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

06 June 2024

DATE **SIGNATURE**

CASE NO: 33425/16

In the matter between:

BOSCH MUNITECH (PTY) LTD Plaintiff

And

GOVAN MBEKI MUNICIPALITY Defendant

This judgment is issued by the Judge whose name is 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 Judge or her Secretary. The date of this judgment is deemed to be 06 June 2024.

JUDGMENT

COLLIS J

INTRODUCTION

1] In the present action the plaintiff claims payment in the amount of R 16 969 144-69 together with interest.[1] The plaintiff alleges that on 1 October 2013, it accepted an offer from the defendant to conclude a contract to execute civil engineering works for the refurbishment of the eMbalenhle Water Works.[2] This was done pursuant to a competitive bidding process.

2] The Plaintiff initially instituted an application in this Court under case number 88360/2014 on 11 December 2014,[3] seeking the very same relief it now seeks in this action. That application was finalised and the judgment

[1] Caselines - Pleadings Bundle, Part 1: 007-29.
[2] Caselines - Pleadings Bundle, Part 1: 007-13, Para 3.17 of Particulars of Claim.
[3] Caselines - 011-40a: Trial Bundle: Notice of Motion.

of the Court is set out in Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality.[4]

3] In order to succeed with its present claim, the plaintiff bears the *onus* of proof on a balance of probabilities.

4] The defendant denies that it concluded a valid and lawful contract with the plaintiff.[5] It asserts that any agreement concluded with the plaintiff is indisputably and clearly inconsistent with section 217 of the Constitution and the statutory prescripts that give effect thereto.[6]

5] The defendant is a municipality and an organ of state in the local sphere of government.[7] The defendant attacks the validity and legality of the procurement contract concluded between it and the plaintiff.

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[4] 2015 JDR 2066 (GP).

[5] Caselines - Pleadings Bundle, Part 4: 007-230, Para 8.4 and Para 10.2 of Amended Plea and Counterclaim.

[6] Chapter 11 of the "*Local Government: Municipal Finance Management Act, Act 56 of 2003"* ("the MFMA"), read together with the and *"Municipal Supply Chain Management Regulations"*, promulgated under section 168(1) of the MFMA, and published in General Notice No 868 in Government Gazette GG 27636 of 30 May 2005. ("the SCM Regulations"). See further the Defendant's "*Supply Chain Management Policy"* ("the SCM Policy") adopted in compliance with section 111 of the MFMA; as well as the Treasury Guidelines on supply chain management issued by the National Treasury in terms of section 168 of the MFMA.

[7] Section 40 (1), read with Chapter 7, and more specifically section 151(1), as well as section 239 of the Constitution.

6] The defendant has in addition to its plea, mounted a counterclaim. It is the plaintiff's contention that the defendant has unreasonably delayed its counterclaim and that any contract concluded with it must be declared invalid. The defendant in turn requests this Court to determine a just and equitable relief as per section 172(1)(b) of the Constitution.

7] In response to the counterclaim of the defendant, the plaintiff raised a special plea of prescription.[8] The defendant asserts that the special plea is without merit. Section 172(1)(b) of the Constitution affords the court wide powers to grant any just and equitable order, and as such the provisions of the Prescription Act[9] cannot restrict the constitutional powers granted to courts per section 172(1)(b).

8] The defendant resists the claim on the basis that the plaintiff was aware of the illegality or should reasonably have known. For this reason, the defendant contends that the evidence objectively confirms that the plaintiff was not an unsuspecting party that unwittingly entered into an unlawful contract with the municipality.

[8] Caselines - Pleadings Bundle: 007-257 to 259.
[9] Notably, section 12 of the *Prescription 68 of 1969*.

9] It is common cause that the plaintiff never provided any service. The plaintiff's claim is for expenses relating to site establishment and standing time, not construction. It is further not in dispute that the defendant received no definite or tangible benefit or advantage.

LOCAL GOVERNMENT STATUTORY PROCUREMENT FRAMEWORK

10] In order to determine the dispute between the parties, it will be apposite to have regard to the statutory regulatory framework applicable to contracts concluded at local government level. The Constitution recognises the right of municipalities to "govern", of its own initiative the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.[10]

11] One of the constitutional objects of local government is the provision of services to communities in a sustainable manner.[11] The Constitution instructs municipalities to structure and manage their administration to

[10] S151(4) Constitution of the Republic of South Africa, 1996. See also S4(1)(a) Local Government: Municipal Systems Act, 32 of 2000.
[11] Section 152(1)(b).

prioritise the basic needs of the community and to promote the social and economic development of the community.[12]

12] The mismanagement of municipal funds impacts a municipalities' ability to provide services in a sustainable manner. The irresponsible, inefficient, or negligent use of funds undermines the prospect of the defendant achieving its constitutional objectives. Government procurement has huge economic and political significance. The importance of government procurement is illustrated by the fact that it is afforded constitutional status.

(a) Constitutional Status of Government Procurement

13] Section 217 of the Constitution places an obligation on the defendant when contracting for goods and services to do so following a system that is fair, transparent, competitive and cost-effective.

14] Section 217 is not the only provision of the Constitution that impacts government procurement. By way of example, section 33 provides for the right to 'just administrative action' and sections 215, 216, 218 and 219

[12] S153(A) Constitution as further reflected in section 50(2) and 51(c) of the Municipal Systems Act, 32 of 2000.

require National Treasury to introduce uniform norms and standards to ensure transparency and expenditure control measures.

(b) Statutory Regulation of Municipal Procurement

15] The legislature has adopted various statutory instruments to give effect to the constitutional status of government procurement. At local government level, the most important are:

15.1 Municipal Systems Act 32 of 2000 (the "Systems Act");

15.2 Municipal Finance Management Act 56 of 2003 (the "MMFA");

15.3 Municipal Supply Chain Management Regulations ("the SCM Regulations")[13];

15.3 Preferential Procurement Policy Framework Act 5 of 2000

(the "PPPFA") and the Preferential Procurement Regulations, 2011 ("the PPR").[14]

15.4 The Municipalities Supply Chain Management Policy ("the SCM

Policy").

[13] Adopted per section 168(1) of the MFMA. Published in General Notice No 868 in Government Gazette GG 27636 of 30 May 2005.

[14] Promulgated under section 5 of the PPPFA and published in General Notice No R502 in Government Gazette 34350 of 8 June 2011

(c) The Defendant's SCM Policy

16] Section 111 of the MFMA places an obligation on every Municipality to implement a SCM Policy. The SCM Regulations establish the framework for a municipalities' SCM Policy. The policy must reflect the constitutional principles of section 217(1).[15] Once adopted, a municipalities SCM Policy applies to the procurement of goods and services by a municipality from non-state contractors.[16]

17] It is the responsibility of the Defendant's Municipal Manager to take all reasonable steps to ensure that the Defendant's SCM Policy is implemented.[17] The Defendant's municipal council must delegate such additional powers and duties to the Municipal Manager to enable him to discharge the supply chain management responsibilities in terms of the MFMA, SCM Regulations and SCM Policy. The Defendant's SCM Policy is a public document to which parties wishing to participate in the tender process have right of access.

[15] Section 112(2) MFMA.
[16] Section 110(1)(a) MFMA.
[17] Regulation 4(1)(a) of SCM Regulations.

(d) Relevant National Treasury Guidelines

18] In terms of Section 168 of the MFMA, the Minister of Finance may make regulations or guidelines on supply chain management issued by the National Treasury.

19] The SCM Guide is part of the constitutional and legislative framework. The SCM Guide forms part of the provisions that empower and/or limit the power of public bodies in the procurement of goods and services. It is not merely an internal prescript that may be ignored or disregarded by organs of state procuring goods and services.[18]

20] In the matter of Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others,[19] the Constitutional Court held that:

> "The accounting officer or accounting authority must ensure that the documentation and general conditions of contract are in accordance with the instructions of the National Treasury and that the bid documentation includes evaluation and adjudication criteria, including criteria prescribed by the

[18] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others, 2014 (1) SA 604 (CC) at para 40.
[19] 2014 (1) SA 604 (CC).

Procurement Act and the Board-Based Black Economic Empowerment Act (Empowerment Act)."[20]

21] Validity of Bids an extract of the SCM Guide is quoted hereunder for ease of reference:

"Bidders should be required to submit bids valid for a period specified in the bidding documents. This period should be sufficient to enable the institution to complete the comparison and evaluation of bids, review the recommendation and award the contract.

An extension of bid validity, if justified in exceptional circumstances, should be requested in writing from all bidders before the expiration date. The extension should be for the minimum period required to complete the evaluation, obtain the necessary approvals and award the contract. In the case of fixed price contracts, requests for second and subsequent extensions should be permissible only if the request for extension provides for an appropriate adjustment mechanism of the quoted price to reflect changes of inputs for the contract over the period of extension. Bidders should have the right to refuse to grant such an extension without forfeiting their bid security, but those who are willing to extend the validity of their

[20] Para 37 at Pg 618.

bid should be required to provide a suitable extension of bid security, if applicable."[21]

22] The above-mentioned statutory instruments do not prescribe fixed times for tender validity periods. Rather, guidance is provided on how the period should be determined. Provision is further made for the extension of the tender validity period by agreement before the initial period lapses.

Tender Invitation and Bid Submission

23] To the matter at hand and at or during April 2013 the defendant published an advertisement calling for tenders for *"UPGRADING OF eMBALENHLE WASTE WATER TREATMENT WORK: CIVIL, MECHANICAL AND ELECTRICAL ENGINEERING WORKS"* (Employer Tender Number: 8/1-66/2012) (the "Tender").[22] The tender invitation stipulated that a compulsory clarification meeting would be held on 5 April 2013. The closing date for the submission of bids was Friday, 26 April 2013.[23]

[21] Supply Chain Management, A Guide for Accounting Officers/Authorities as published by National Treasury, Pg 39.
[22] Caselines - Trial Bundle: 011-6, Tender Advertisement.
[23] Bosch Munitech judgment, para 3

24] The tender validity period was 120-days, calculated from the closing date. Therefore, the Defendant's Municipal Manager had to formally award the tender to the successful bidder no later than 26 August 2013.

25] The Defendant's Agent, WorelyParsons, extended the closing date from 26 April 2013 to 3 May 2013. The Defendant denies WorelyParsons' authority to extend the closing date to 3 May 2013. In this regard the Plaintiff explicitly pleads that the tender validity period lapsed (the tender was not awarded within the 120-days) and further that the Plaintiff's tender was no longer capable of acceptance.[24] It is further not in dispute that the Plaintiff submitted its bid to the Defendant on 3 May 2013.

Tender Specifications

26] The Tender is comprised of six volumes.[25] The "Conditions of Contract for Construction for Building and Engineering Works Designed by the

[24] Caselines - Pleadings Bundle, Part 1: 007-12, Para 3.14 of the Particulars of Claim.
[25] Caselines - Trial Bundle: 011-7, Tender Data.

Employer (hereinafter referred to as the "Construction Contract" or "FIDIC")[26] also formed part of the Tender Documents and contract.[27]

27] The 'Standard Conditions of Tender' [28] must be read together with the 'Tender Data'.[29] The Tender Data lists amendments to clauses in the Standard Conditions of Tender. The Tender Data further has precedence if there is any ambiguity or inconsistency. Clause 2.16 of the Standard Conditions of Tender addressed the "Tender Validity Period".[30] It reads as follows:

> "2.16 Tender Offer Validity
>
> 2.16.1 Hold the tender offer(s) valid for acceptance by the Employer at any time during the validity period stated in the tender data after the closing times stated in the tender data.
>
> 2.16.2 If requested by the Employer, consider extending the validity period stated in the tender data for an agreed additional period."

[26] FIDC, 1st Edition, 1999 of the Construction Contract.
[27] A copy of the Conditions of Contract is attached to the Plaintiff's summary judgment application. Caselines: Summary Judgment Application – 013-84 to 213.
[28] Caselines - Trial Bundle: 011-39, "T1.3: Standard Conditions of Tender".
[29] Caselines - Trial Bundle: 011-7, "T1.2: Tender Data".
[30] Caselines - Trial Bundle: 011-44.

28] The Tender Data further added to clause 2.16.1 by providing:

> "F.2.16.1 Add the following clause:
>
> 'If the tender validity expires on a Saturday, Sunday or Public Holiday, the tender shall remain valid and open for acceptance until the closure of business on the following working day.'
>
> F.2.16.3 Add the following new clause:
>
> 'Except that should the Tenderer unilaterally withdraw his tender during this period, the Employer shall, without prejudice to any other rights he may have, be entitled to accept any less favourable tender for the Works from those received, or to call for fresh tenders, or to otherwise arrange for execution of the Works and the Tenderer shall pay on demand any additional expense incurred by the Employer on account of the adoption of the said causes, as well as either a difference in costs between the tender withdrawn (as corrected) in terms of clause 3.9 of the Conditions of Tender, and any less favourable tender accepted by the Employer, will difference between the tender withdrawn (as corrected) and the costs of the execution of the Works by the Employer as well as any other amounts the Employer may have to pay to have the Works completed."[31]

[31] Caselines - Trial Bundle: 011-10 to 11.

29] The tender documents further included the "C1.1 Form of Offer and Acceptance (the "Form of Offer").[32] The Form of Offer confirms that the employer (the Defendant) has solicited offers to enter into a contract for the procurement of the refurbishment works, consisting of civil, mechanical and electrical engineering works. The Form of Offer confirms that by submitting the offer, the tenderer (the Plaintiff) has accepted the conditions of Tender.

30] In *casu* the plaintiff's offer was signed by Mr. McCarley, the Plaintiff's Managing Director, on 26 April 2013, before submitting the tender on 3 May 2013.[33] Mr McCarley did not testify during the trial.

31] Under the offer price in the Form of Offer signed by Mr McCarley, the following is recorded:

> "This offer may be accepted by the employer by signing the acceptance part of this form of offer and acceptance and returning one copy of this document to the Tenderer before the end the period of validity stated in the tender data, whereupon the Tenderer becomes the party named as the

[32] Caselines - Trial Bundle: 011-17: "C1.1: Form of Offer and Acceptance".
[33] Caselines - Trial Bundle: 011-18.

contractor in terms of the conditions of contract identified in the contract data."[34]

32] Under the heading "Acceptance" the Form of Offer stipulates that by signing the Form the employer (the Defendant) accepts the tenderer's (the Plaintiff) offer. It further states:

> "Acceptance of the Tenderer's Offer shall form an agreement between the Employer and the Tenderer upon the terms and conditions contained in this agreement and in the contract that is the subject of this agreement."[35]

33] The Form of Offer requires that any deviations must be recorded in the schedule of deviations attached to the Form, failing which they shall not be valid. It is common cause that the schedule of deviations contained in the Form of Offer was never completed. More specifically, the following was not recorded in the schedule of deviations:

33.1 the 120-day tender validity was extended beyond 31 August 2013;

33.2 that the scope of the tender had been restricted to the civil works, and the price accordingly adjusted; or

[34] Caselines - Trial Bundle: 011-18.
[35] Ibid.

33.3 amendments to the requirements for the acceptance of the offer and any additional terms not envisaged in the Tender Documents.

34] WorleyParsons was appointed as the Defendant's Agent for the Tender,[36] and acted as such during the tender validity period. Only once the contract was signed could WorleyParsons act as the Engineer.

35] During the tender process, meant to culminate in the award of the Tender, WorleyParsons assumed the mantle of Agent. Its authority and powers were limited to those specified in the Tender Documents, specifically the Standard Conditions of Tender and the Tender Data.

36] Clause 1.4 of the Standard Conditions of Tender describes the Agent's role in the tender adjudication process as follows:

"Each communication between the employer and a tenderer shall be to or from the employer's agent only, and in a form that can be read, copies and recorded. Writing shall be in the English language. The employer shall not take any responsibility for non-receipt of communications from or by a

[36] Caselines - 011-7: Trial Bundle: T1.2: Tender Data, Clause F1.4.

tenderer. The name and contact details of the employer's agent are stated in the tender data."[37]

37] As mentioned above, the "Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Construction Contract of FIDIC)[38] formed part of the Tender. The successful bidder was required to sign the Construction Contract once the tender was awarded. In this regard, the following clauses from the Construction Contract are relevant and not in dispute:

> "1.1.1.1 *"Contract"* means the Contract Agreement, the Letter of Acceptance, the Letter of Tender, these Conditions, the Specification, the Drawings, the Schedules, and the further documents (if any) which are listed in the Contract Agreement or the Letter of Acceptance.
>
> 1.1.1.3 *"Letter of Acceptance"* means the letter of formal acceptance, signed by the Employer, of the Letter of Tender, including any annexed memoranda comprising agreements between and signed by both Parties. If there is no such letter of acceptance, the expression "Letter of Acceptance" means the Contract Agreement and the date of issuing or receiving the Letter of Acceptance means the date of signing the Contract Agreement.

[37] Caselines - Trial Bundle: 011-41, clause 1.4 of Standard Conditions of Tender.
[38] FIDC, 1st Edition, 1999 of the Construction Contract.

1.1.2.4 *"Engineer"* means the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in the Appendix to Tender, or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 [Replacement of the Engineer].

38] The Construction Contract (FIDIC) further includes various annexures and forms that the Plaintiff and the Defendant must complete and sign, *inter alia*, the "Letter of Tender", "Appendix to Tender", "Contract Agreement", and Dispute Adjudication Agreement.

39] In this regard the following definitions is noteworthy:

"Engineer" *supra*, the Construction Contract requires that the Engineer be named in the "Appendix to Tender", which is attached to the Construction Contract. Concerning the authority granted to the "Engineer", clause 3.1 of the Construction Contract provides:

"The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract. The Engineer's staff shall include suitably qualified engineers and other professionals who are competent to carry out these duties.

The Engineer shall have no authority to amend the Contract.

The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. The Employer undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Contractor."

COMMON CAUSE FACTS

40] The following appears to be the common cause facts between the parties:

40.1 Neither the plaintiff, nor the defendant, signed the Construction Contract/FIDIC. In this regard, the plaintiff did not present any evidence that the Construction Contract was signed;

40.2 The written contract was not attached to the Plaintiff's amended Particulars of Claim. The only copy of the contract before this Court is the unsigned version attached to the Defendant's opposing affidavit in the summary judgment application, as Annexure "MM5".[39]

40.3 The Plaintiff did not plead any of the terms and conditions of the Construction Contract/FIDIC in its Particulars of Claim;

[39] Caselines - Summary Judgment Application: 013 to 213.

40.4 Once the tender validity period expired, WorleyParsons appointment as Agent came to end per the tender documents;

40.5 Even if it is accepted that WorleyParsons was entitled to make a new offer on behalf of the defendant, as pleaded by the plaintiff, WorleyParsons could only obtain the powers and obligations afforded to the Engineer once the Construction Contract/FIDIC was duly completed and signed by both parties.

41] The Defendant purposefully refers to WorelyParsons as its "Agent" in its Plea and Counterclaim. At no stage does the Defendant refer to WorelyParsons as the "Engineer". Furthermore, the Defendant admitted that WorelyParsons had been appointed as its Agent and that WorleyParsons had been appointed to represent the Defendant in the conclusion of the Tender, as advertised.

42] The Defendant explicitly pleaded that WorelyParsons was not appointed, nor did it have any authority, to conclude any contract that constituted a deviation from the Defendant's SCM Policy. The plaintiff's failure to appreciate the distinction between the role of the "Agent" juxtaposed to the "Engineer" is apparent from its Particulars of Claim.

43] It is on this basis that the defendant had argued that WorleyParsons could not approve payment certificates in terms of the Construction Contract/FIDIC, absent a duly executed and signed Construction Contract.

APPOINTMENT OF THE PLAINTIFF AS CONTRACTOR

44] On Friday, 30 August 2013 the Defendant's Bid Adjudication Committee (the "BAC") resolved to recommend to the Defendant's Municipal Manager:

44.1 That the Plaintiff be appointed as the contractor for civil works at the value of R40 24 107.47, incl 5 % escalation, 10 % contingency and 14 % VAT;

44.2 That Piet Bok Konstruksie BK be appointed for electrical and mechanical works at the value of R22 281 298.79, incl 5 % escalation, 10 % contingency and 14 % VAT.[40]

45] On 31 August 2013, the Municipal Manager signed a letter addressed to the technical director of WorleyParsons.[41] The letter confirmed the appointment of the Plaintiff and further instructed WorleyParsons as follows:

[40] Caselines - Trial Bundle: 011-120.
[41] Caselines - Trial Bundle: 011-121.

"We request you to issue the letter of award to the successful bidders on our behalf. We further request you to facilitate the site handover of the site to both contractors upon acceptance of our offer of award and submission of all the necessary documentation in accordance to the conditions of contribution for building and engineering works designed by the employer published by FIDIC FIRST EDITION 1999 of the construction contract (Redbook)."

46] The Defendant's right to divide the work between the two service providers is not in dispute. The aforesaid was also confirmed by the Plaintiff's sole witness, Mr du Toit.

47] It is further important to be mindful of the fact that that the Municipal Manager's letter is titled "BID NO 8/3/1-66/2012 REFURBISHMENT OF eMBALENHLE WASTE WATER TREATMENT WORKS – APPOINTMENT OF CONTRACTOR(S)." The letter of appointment does not refer to the lapsed tender validity period or a "new offer". The letter is also silent on the extension of the tender validity period beyond 120-days.

48] The appointment letter was subsequently dispatched to the Defendant's agent on 6 September 2013.[42]

49] In reply to receipt to the letter, WorleyParsons on 20 September 2013, sent a letter to the Plaintiff titled "CONTRACT NO: 8/3/1-66/2012: REFURBISHMENT OF eMBALENHLE WASTE WATER TREATMENT WORKS.[43] The letter confirms the Plaintiff's appointment for the civil works under contract 8/3/1-66/2012 and attaches the Municipal Manager's letter in confirmation. The letter requests the Plaintiff to:

"6. Please indicate in writing your acceptance of this offer although the validity of the tender has already expired."
ACCEPTANCE OF APPOINTMENT AS CONTRACTOR

50] On 1 October 2013 the Plaintiff forwarded a letter titled "CONTRACT NO 8/3/1-66/2012 REFURBISHMENT OF eMBALENHLE WASTE WATER TREATMENT WORKS: CIVIL, MECHANICAL AND ENGINEERING WORKS, Letter of Acceptance" to WorleyParsons' technical director. The letter confirmed that:

"Your letter of appointment dated 20 September 2013 refers.

[42] Caselines - Trial Bundle: 011-123, para 6(a), attachment to 20 September 2013 letter.
[43] Caselines - Trial Bundle: 011-122 to 123.

As per point 6 of your letter I hereby confirm acceptance of the offer as per your updated letter despite the expiration of the tender validity." [44]

51] On 3 October 2013 the Plaintiff's board of directors resolved as follows:

"That Anton du Toit in his capacity as director is hereby authorised to sign the Govan Mbeki Municipality: Contract 8/3/1-66/201: REFURBISHMENT OF THE eMBALENHLE WASTE WATER TREATMENT WORKS – CIVIL, MECHANICAL AND ELECTRICAL ENGINEERING on behalf of the company."[45]

52] On 4 October 2013, a site meeting was held. The meeting was attended by representatives of WorelyParsons, the Plaintiff and Piet Bok Konstruksie.[46] The minutes of the meeting further clearly record the commencement date of the contract as 8 October 2013. No representative of the Defendant attended the meeting.

53] On 7 November 2013, the Defendant's Municipal Manager signed a "C1.1 Form of Offer and Acceptance". The offer part of the Form was completed by specifying the amount mentioned in the WorleyParsons letter

[44] Caselines - Trial Bundle: 011-124.
[45] Caselines - Trial Bundle: 011-128.
[46] Caselines - Trial Bundle: 011-129, Minutes of Meeting held on 4 October 2013.

of appointment, dated 20 September 2013. The Plaintiff's Managing Director signed the offer in the required space on 21 November 2013.

54] The offer signature block was signed and completed by Mr McCarley, beneath the lesser price of R 40 246 107,47 written in manuscript, on 21 November 2013. The signature block for the acceptor was left blank but witnessed by Mr Mtshali on 7 November 2013, and the schedule of deviations, although including no agreed deviations, was signed by the Municipal Manager, Mr Mahlangu and also dated 7 November 2013.

PLEADED CASE OF THE PLAINTIFF

55] It is common cause that the tender validity period had lapsed. However, the Plaintiff claims that a 'new offer' was made by the Defendant, which it accepted. Consequently, the Plaintiff's case is that a new contract was entered into and concluded with the Defendant. [47] The admission is summarised as follows in paragraph 3.14 of the Particulars of Claim:

"When the Engineer, acting on behalf of the Defendant, addressed Annexure "E" hereto to the Plaintiff, the aforementioned 120 day validity period pertaining to the Plaintiff's tender had expired and the Plaintiff's

[47] Caselines - 007-12: Pleadings Bundle: Para 3.14 and 3.15 of Particulars of Claim.

tender, which constituted an offer by the Plaintiff to the Defendant, was no longer capable of acceptance by the Defendant in the terms of, or on the basis of, the original Invitation to Tender issued by the Defendant or the Offer made by the Plaintiff in terms thereof." [48]

56] The Plaintiff further pleads that the alleged new 'offer' incorporates all the terms and conditions contained in the tender documents. The distinction between the Tender and this new offer is the exclusion of certain unfavourable terms and the inclusion of favourable terms and conditions.

57] A reading of the common cause facts above confirms that the evidence does not support the Plaintiff's claim of a new contract or offer.

58] During the trial, the Plaintiff's witness believed that it had accepted the award of the Tender, albeit on a reduced scope.

59] The Plaintiff's case has always been that the material terms and conditions of the Tender were no longer applicable to the Plaintiff's

[48] Caselines - 007-12: Pleadings Bundle: Para 3.14 of Particulars of Claim.

acceptance of the Defendant's alleged offer. In its Particulars of Claim, the Plaintiff pleaded as follows:

"3.18. The material terms and/or conditions of the Plaintiff's tender, which were no longer applicable to the Plaintiff's acceptance of the Defendant's new offer set out in Annexure "E" hereto, consisted of, inter alia, the following:

3.18.1. …

3.18.2. …

3.18.3. The manner in which the contract would be concluded between the Plaintiff and the Defendant would no longer be as described in the Invitation to Tender and/or the Plaintiff's tender but would be by the written acceptance by the Plaintiff of the Defendant's offer as set out in Annexure "E" hereto.

3.18.4. The provision by the Defendant to the Plaintiff of a fully completed Form of Offer and Acceptance, (i.e. all the pages thereof), signed by the Plaintiff and the Defendant, would not be a jurisdictional pre-requisite for the creation of a vinculum juris between the parties and the appending of signatures by or on behalf of the Plaintiff and the Defendant to the Form of Offer and Acceptance would serve merely as

facilitation of proof that a vinculum juris had already been established between the parties.

3.18.5. None of the terms and/or conditions of the Plaintiff's original tender and/or the Defendant's Notice of and Invitation to submit a tender would apply which, by their very nature, given the lapsing of the tender validity period and the Defendant's new offer to conclude a contract with the Plaintiff in respect of a limited portion of the Plaintiff's original tender, would apply."

EVIDENCE PRESENTED ON BEHALF OF THE PLAINTIFF

60] As mentioned, the Plaintiff in order to succeed carried the *onus* on a balance of probability. In this regard, it called a single witness, namely Mr Du Toit. In essence Mr. Du Toit could not testify that the Construction Contract/FIDIC was duly signed and completed by the respective parties albeit that the demand for payment by the Plaintiff was made in terms of the FIDIC contract.

61] In fact, the majority of his evidence dealt with the disputed signed "Form of Offer and Acceptance".

62] In this regard his evidence on point was the following: The Plaintiff's counsel referred Mr du Toit to the unsigned copy of the Construction/FIDC

contract attached to the Defendant's Opposing Affidavit in the Summary Judgment earlier proceedings. In this regard he testified to the terms and conditions of the contract.

63] Mr Du Toit, was specifically referred to the incomplete contract, attached to the summary judgment application (Annexure "MM5") and not a signed Construction Contract/FIDIC. On point his testimony was as follows:

> "Mr Potgieter: This deals with the obligations of the tender to pay the contractor, and it says that the employer should pay to the contractor the amount specified in the interim payment certificate within 36 days after the engineer received the statement and supporting documents.
> Now, this FIDIC document has been amended, and that period is now 35 days not so?
>
> Mr du Toit: Yes."

64] Based on this evidence, it is evident that Mr du Toit accepted that all payments subsequent to the Plaintiff's alleged appointment were regulated by the Construction/FIDIC Contract that formed part of the Tender documents.

65] Mr du Toit however was unclear on the actual contract that was concluded or what the terms and conditions of said contract were. During cross-examination, he responded as follows:

> "Mr Botes: Yes. Now that's what the municipality want to achieve because we are, we want to be responsible, we want to do the right thing, and in the end of the day, if monies are due while then, it must be paid. If monies are not due, will obviously can't be paid. Now against that backdrop, the first agreement upon which the Plaintiff rely in this application you will recall was an agreement that was allegedly entered into and concluded during November 2013. Do you remember that?
>
> Mr du Toit: Yes. I remember the offer was extended, yes, by Mr Nico Wiid."

66] Mr du Toit was further specifically asked during cross-examination if he could identify the contract upon which the Plaintiff relied for its claim. In this regard, he testified:

> "Mr Botes: Yes, the agreement the contract that came into existence in November 2013.
>
> Mr du Toit: I am sure of November, when was the .... when did the ... did Nico Wiid, on behalf of the employer, issued the offer to Bosch

Munitech was the 20th of September, I recall so, and then in my reply which I think was the 30th October we accepted, I would think the 30th October the agreement came into place between the parties and that form the contract. So that is a contract as you refer to. But then again, I am a layman I am not an attorney. So that is what is being referred to so.

Mr Botes: I am not asking you for your opinion, I am just establishing two things. One the Plaintiff's case and two, listen carefully the true facts; that's all I am interested in. Are we on the same page?

Mr du Toit: Yes, I can testify to the facts that I am aware of."

67] When questioned further on the conclusion date for the contract, Mr du Toit's testified as follows:

"Mr du Toit: Again, the date is for the court to decide where a contract came into existence but based on my understanding, that would be the formal offer of acceptance that was signed on the 21st alternatively November alternatively the day that we accepted your client's offer the 30th of October when I wrote the letter saying I accept your offer based on these terms then the contract came into

existence. That is my understanding of the contract, Sir, and that is where you can find it.

Mr Botes: My answer, my question, is actually very straightforward and easy. I just want you to assist Her Ladyship and direct Her Ladyship's attention to the written agreement that the Plaintiff relies upon where in paragraph 4 of Mr McCarley's affidavit. It's all I want.

Mr du Toit: That would be the entire tender document that has been signed after the formal offer. That would be, not all of it is in here, but the formal offer will be the basis of it, and that is in these documents. Would you like me to find the page?"

68] Significant to Mr du Toit testimony further is that he unequivocally testified that to his knowledge, there had been no general extensions issued to all the tenderers:

"Mr du Toit: My Lady, whatever the recording says, I was clear in my mind, and I will clarify if that make matter easier. Like, I told Mr Botes, no, there was not a general extension issued to all tenderers. There was an offer made to me based on a Bid Adjudication Committee that was that made their findings within the 120 days; the offer was made to me for me to accept or reject. It is my understanding

that I am well within my rights to accept that offer which I did.

So that is my statement, and yes, as you clearly stated no there was no extension of the closing date for all bidders. I was made an offer based on a municipal adjudication that was made within the 120 days. What that legally means is beyond me."

69] Based on what has been stated aforesaid, it is clear that Mr du Toit was under the impression that he was accepting an offer originating from the Bid Adjudication Committee's recommendation during the tender validity period.

70] From the above the conclusion to be drawn is that Mr du Toit believed that an offer was made to the Plaintiff in terms of the Tender.

71] Differently put, Mr du Toit accepted and understood that the Plaintiff was concluding a contract in terms of the Tender and not a contract based on a "new offer".

72] As to the limited scale of the tender award, Mr du Toit confirmed during his evidence in chief and again during cross-examination, that the Defendant was entitled to split the Tender as it did per the tender documents and specifications. There was therefore, nothing untoward regarding the Defendant's decision to divide the scope of work.

73] Mr du Toit during his testimony further confirmed that the amounts claimed were only for standing time and site establishment costs. The payment certificates that were approved by WorleyParsons were not for construction works performed by the Plaintiff. It is therefore be common cause that the Defendant never received any benefit.

74] Mr Du Toit's evidence also differs to the pleaded case of the plaintiff. The following extract of his testimony is indicative thereof. When questioned on the allegations made in the Particulars of Claim by the Defendant's counsel, he stated:

> "Mr du Toit: My Lady, I have said I don't agree with it. I said if we look at this practically again, I am not an attorney. What I understand from these things again, I did not write this. I am called as a witness on facts to which I testify here today.

My understanding of that, if you understand the contract in all of those volumes obviously 2, 3, 4, 5 whatever as it pertains to the technical data and drawings, those will obviously be applicable in the original contract or commercial section of a tender there would be very few pages applicable to the execution thereof, which is normally the contract data and the special conditions of contract which refer to FIDIC which refers to the execution of a contract and in there, there would have been the duration for us to complete this contract, for example, would be 2 years. By that would refer to a complete award. Mechanical, civil and electrical.

So for me, what I read from this is that, yes, those all need to be revisited because we were only awarded the civil portion. By that so yes, the contract still exists within the FIDIC Redbook. That didn't go away.

We are not now doing another form of contract. I think that would be silly to say that. So yes, that still pertains there are sections. I mean, we can page through the whole thing, and I can tell you what I think exactly should be applicable and what I understood on this and what was executed was ok you doing civils gives us your program.

So the requirement must be I must give program of works within a certain amount of days. So they the original program, which was civil, mechanical, electrical, for example, My Lady, that no longer applies, because it was not awarded that.

So again, my understanding of this is, its take all of that away. We don't throw the document away. The pertinent facts that spoke to a full scope of work need to be revisited. In line with partial award made, in line with what was allowed in the tender, in line that would talk to the days for completion, the new program, integration with etc. So mean I can run through it. So, so that is my response to that.

No, we don't throw the whole thing away. We threw away the pertinent items within the contract data that spoke to the entire contract and apply that to the portion of the contract that was awarded. That is my understanding. So that is what I am saying I disagree with you. We don't know longer do it under FIDIC/Redbook. It's still a Redbook. It's just the terms of that need to be agreed based on the award."

75] Albeit that Mr Du Toit was extensively cross-examined by counsel for the Defendant, Mr Du toit was never given an indication that his factual evidence will be refuted by any witnesses to be called by the Defendant.

76] The lack of any indication by the Defendant's counsel in cross-examination to Mr. Du Toit that any of his factual evidence would be impeached has consequences. They are well recognized and the following quote is of relevance:

> "[*61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.*
>
> *[62] The rule in Browne v Dunn is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.*

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and explain contradictions on which reliance is to be placed." [49]

77] The above approach to be adopted was not followed during the cross-examination of the Plaintiff's witness.

DEFENDANTS' PLEADED CASE

78] The Defendant's pleaded case in a nutshell, is the following:

78.1 The Defendant's Agent did certain things that he was not empowered to do and nor could they be delegated to the Defendant's agent. They were thus null and void.

78.2 Procurement legislation and/or the Defendant's own procurement policy was not followed and thus no valid contract could have been concluded between the parties.

78.3 In the premises:

[49] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC), p. 36, par. [61] – [63]. This decision is, colloquially, known as simply the SARFU, decision.

78.3.1 No certificates could or should have been issued by the Defendant's Agent.

78.3.2 Any certificates that had been issued were invalid and of no legal effect.

78.3.3 Payments of certificates that had occurred had been made in error.

78.4 The specific details underlying the aforementioned defences raised by the Defendant can best be summarized as follows:

78.5 The Defendant is a Municipality, a Local Government and an Organ of State. [50]

78.6 In the premises, when procuring goods and services pertaining to the tender in question in this case, the Defendant was obliged to comply with various legislation consisting of Acts and Regulations as well as the Defendant's Supply Chain Management Policy. [51]

78.7 Whilst admitting that Worley Parsons was indeed appointed as the Defendant's Agent the Agent was not authorized to extend the closing date for the submission of Bids in reaction to the Defendant's tender invitation. [52]

78.8 The Plaintiff failed to submit a tender before 12h00 on Friday 26 April 2013. [53]

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[50] P. 7-222, par. 2.2.
[51] P. 7-223, par. 3.2.
[52] P. 7-225, par. 4.1.2 and p. 7-226, par. 4.2.
[53] P. 7-225, par. 4.1.1 read with par. 5.1 at p. 7-226 and par. 5.3 as well as par. 6 at p. 7-228.

78.9 The tender validity period was stipulated to be 120 days which had to have been calculated from the closing date in the tender invitation *viz* 26 April 2013. [54]

78.10 The Defendant had been obliged to award the tender within a period of 120 days *viz* by 24 August 2013, [55] but, even if it is found that the extension of the closing date to 3 May 2013 is valid, no award of the tender to the Plaintiff occurred within 120 days calculated from 3 May 2013. [56]

78.11 A valid award of a tender could only be made within the 120 days by the Defendant signing the Form of Offer and Acceptance before the expiry of the 120 days and same never occurred. Consequently, no valid contract could ensue. [57] In this regard the Defendant relies specifically, on the provisions of C1.1 of the Form of Offer and Acceptance and even quoted same. [58]

78.12 In particular the Defendant pleaded that as soon as the 120 day period had expired without the Defendant awarding a tender the tender process had been completed and the Defendant was no longer free to negotiate with the Plaintiff as the process would no longer be transparent, equitable or competitive. [59]

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[54] P. 7-225, par. 4.1.3.
[55] P. 7-226, par. 5.3.
[56] P. 7-227, par. 5.4.
[57] P. 7-227, par. 5.5.
[58] P. 7-227, par. 5.4.2.
[59] P. 7-228, par. 7.2.

78.13 Any negotiations with the Plaintiff "to extend the validity period" was not equitable or competitive. [60] This was because it would be unfair to other tenderers if the tender was not awarded within the 120 day period. [61]

78.14 When the Defendant's Bid Adjudication Committee resolved to award a portion of the tender to the Plaintiff and when the Defendant's Municipal Manager wrote the letter instructing the Defendant's Agent to make an offer to the Plaintiff the said Committee and Municipal Manager had not been aware that the 120 day period had already expired. [62]

78.15 When the Plaintiff had accepted the offer made by the Defendant, as set out in the Defendant's Agent's letter, the Plaintiff had been aware that acceptance of same would result in an illegal, invalid and null and void, *ab initio,* contract which would bestow no rights and the Plaintiff had acted *mala fide* and unlawfully. [63]

79] It is on this basis that the Defendant had raised among others a legality challenge to the Plaintiff's claim.

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[60] P. 7-228, par. 7.3.
[61] *Ibid*.
[62] P. 7-229, par. 8.1.
[63] P. 7-231, par. 9.8 read with p. 7-230, par. 9.2 and p. 7-232, par. 9.9. The last sentence of par. 15.3 at p. 7-235 is particularly apposite when it comes to the Defendant's contention that the Plaintiff had done something wrong.

THE PLAINTIFF'S REPLY TO THE DEFENDANT'S PLEA:

80] In its reply the Plaintiff placed all of the alleged non-compliances and/or lack of authority of the Defendant's Agent, in dispute but also pleaded that any breaches of same which were proven did not justify a conclusion that no valid contract was concluded. [64] The Plaintiff also specifically pleaded that the conclusion of the contract was preceded by a valid competitive bidding process. [65]

81] The Plaintiff furthermore referred the Defendant to specific clauses of the Defendant's own Standard Conditions of Tender which militate against the Defendant's defences. [66] The Plaintiff averred that the Defendant's interpretation of the validity period of 120 days was incorrect and pleaded the correct interpretation of same.[67] Pertaining to the Defendant's reliance upon an alleged jurisdictional pre-requisite for the conclusion of a valid contract, (i.e. the signing of certain papers within a certain period of time), the Plaintiff pleaded that the Defendant's interpretation of same was incorrect and same merely regulated the formalization of a contractual

[64] P. 7-245, par. 2.2.
[65] P. 7-246, par. 2.3.
[66] P. 7-248, par. 5.2.
[67] P. 7-249, par. 5.2.4.

document once a tenderer's tender had resulted in the conclusion of a contract. [68]

82] Pertaining to the Defendant's attempt to rely upon the lack of authority of the Defendant's Agent the Plaintiff repeated the Plaintiff's alternative basis for its claim against the Defendant as raised in the Plaintiff's final particulars of claim. [69]

83] The Plaintiff also referred to the Plaintiff's reliance on ostensible authority. [70]

THE DEFENDANT'S COUNTERCLAIM

84] In addition to its plea the Defendant had also filed a counterclaim. The Defendant's counterclaim is for repayment of those monies paid by the Defendant to the Plaintiff in accordance with the first five certificates issued

[68] P. 7-250, par. 5.2.5.
[69] Vide e.g. p. 7-246, par. 3.2; p. 7-248, par. 5.2; p. 7-251, par. 7.2; p. 7-253, par. 10.2 and p. 7-254, par. 11.2.
[70] P. 7-254, par. 11.2.

by the Defendant's Agent certifying that the Defendant had been liable to pay the said amounts to the Plaintiff.[71]

85] The Defendant's counterclaim raises no new issues that were not raised by virtue of the Defendant's plea to the Plaintiff's final particulars of claim. The basis of the counterclaim remains the alleged illegality of the contract between the parties for want of compliance with procurement legislation, regulations and policies. It is contended by the Defendant that it is just and equitable within the meaning of section 172(1)(b) of the Constitution that the Plaintiff be ordered to repay those monies paid by the Defendant to the Plaintiff. [72]

86] The purported sense of wrongfulness of the Plaintiff pertaining to the conclusion of the contract is once again raised. [73]

87] Of particular importance is the averment by the defendant that "*The contravention of the statutes as set out in the Defendant's plea are not*

[71] P. 7-241, par. 19.3.1 and prayer 2 at p. 7-242.
[72] *Ibid*.
[73] P. 7-240, par. 19.2 and p. 7-241, par. 19.3.2.

merely of a technical nature. The irregular and invalid nature of the award and contract constitutes against the public good". [74]

THE PLAINTIFF'S PLEA TO THE DEFENDANT'S COUNTERCLAIM

88] In the first instance the Plaintiff pleaded that any claim for repayment of the monies paid by the Defendant to the Plaintiff has prescribed. [75] This plea relies upon dates about which there can be no debate as they appear *ex facie* the pleadings.

89] As far as the merits of the Defendant's counterclaim is concerned the Plaintiff raised no new issues than those raised in the Plaintiff's final particulars of claim and reply to the Defendant's plea to the Plaintiff's final particulars of claim. As a matter of fact, the Plaintiff referred to many portions of the final particulars of claim. [76]

90] The Plaintiff did, however, raise the following specific issues in the Plaintiff's plea to the counterclaim:

[74] P. 7-241, par. 19.5.
[75] P. 7-257, par. B1.
[76] *Vide* e.g. p. 7-261, par. 3.2; p. 7-262, par. 3.3.6 and p. 7-266, par. 4.1.

90.1 The Defendant had ratified the conduct of the Defendant's agent in respect of those aspects which the Defendant contended that the said Agent had not been authorized. [77]

90.2 The professed ignorance of the Defendant's Bid Adjudication Committee and Municipal Manager about the lapsing of the 120 day period constituted unilateral errors which the Defendant could not rely upon when it came to the conclusion of the contract. [78]

90.3 The Defendant's counterclaim constituted nothing more than an attempt to "*self-review*" the Defendant's actions [79] and because the Defendant had been guilty of inordinate delay in seeking such relief it is not just and equitable to grant the Defendant such relief especially bearing in mind the particular facts *in casu*. [80]

90.4 Any lament by the Defendant about the Plaintiff not having built anything was due to the Defendant's fault. [81]

90.5 The equitable relief contemplated in section 172(1)(b) of the Constitution was not intended to assist an Organ of State guilty of culpable conduct such as the defendant is guilty of *in casu*. [82]

90.6 It would not be in the interests of public policy but would amount to a grave injustice to deprive the Plaintiff of the amounts claimed in the Plaintiff's particulars of claim. [83] The Plaintiff averred that depriving

[77] P. 7-261, par. 3.3.
[78] P. 7-266, par. 4.1.
[79] P. 7-268, par. 8.2.1.
[80] P. 7-268, par. 8.2.2.
[81] P. 7-269, par. 9.2.2.
[82] P. 7-269, par. 10.2.
[83] P. 7-270, par. 11.2.

the Plaintiff of the amounts claimed would simply encourage Organs of State to continue to act culpably and wrongfully and in a lackadaisical manner to the detriment of third parties and the public because such conduct would be seen to have no consequences. [84]

THE DEFENDANT'S REPLY TO THE PLAINTIFF'S PLEA TO THE COUNTERCLAIM:

91] The Defendant elected to respond to the Plaintiff's plea to the counterclaim as follows:

91.1 "The counterclaim is not one in terms of any common law enrichment action. [85]

91.2 Because the relief claimed in the counterclaim is dependent upon the Court first declaring the contract between the Plaintiff and the Defendant invalid, (and, by necessary implication, it is averred that same has not yet occurred), the jurisdictional pre-requisite for requesting repayment of the monies paid by the Defendant to the Plaintiff first has to be met and only then will the Defendant's cause of action for equitable relief, arise. Consequently, prescription could not yet commence running. [86]

[84] P. 7-271, par. 11.3.
[85] P. 7-275, par. 3.2.
[86] P. 7-275, par. 3.2.

91.3 The Prescription Act cannot restrict the wide powers which a Court has to grant equitable relief. [87]

91.4 The principles of estoppel, ostensible authority and/or quasi-mutual assent find no application because they are aimed at making lawful that which is unlawful. [88]

91.5 The question of delay is irrelevant and the Court is obliged to declare the contract unlawful. [89]

91.6 The alleged unlawful conduct of the Plaintiff is reiterated [90] and consequently it is just and equitable to grant the relief claimed in the counterclaim."

92] In determining the issues in dispute, it is important to note that the Defendant presented no evidence before this Court. In support of its case it mainly relied on the evidence presented by the Plaintiff's witness and its pleaded case.

93] A litigant however is not only required to merely plead its case but would also be required to present evidence either viva voce or through documents to prove its case.

[87] P. 7-275, par. 3.3.
[88] P. 7-277, par. 6.
[89] P. 7-279, paras. 9.1 and 9.2.
[90] *Vide* e.g. p. 7-277, par. 5.4 and p. 7-280, par. 10.2.

THE FOLLOWING FACTS WERE PROVEN DURING THE TRIAL

94] In the present matter, the following facts were proven during the trial:

94.1 Du Toit put the Plaintiff's tender together and submitted the Plaintiff's tender timeously on 3 May 2013.

94.2 The tenders were opened after the extended closing time and this occurred in accordance with the Defendant's standard conditions of tender by reading out the tenders.

94.3 The Defendant did not reject any tenders on the basis that they were late, as required to be done by the Defendant's Standard Conditions of Tender.[91]

94.4 There were only two tenderers who qualified bearing in mind the values at which the tenders came in and the requirement that the tenderers should qualify according to their CIDB grading. [92]

94.5 The Tender Invitation informed all tenderers that the components of the tender, (i.e. Civil, Mechanical and Electrical), could be split, (i.e. awarded to different tenderers).

94.6 The tender validity period of 120 days was extended by the Defendant's designated Agent [93] informing all tenderers by means of

[91] And, as shall be illustrated when the Defendant's submissions are made, as required by the Defendant's Supply Chain Management Policy.
[92] This appears at p. 11-6 in the Defendant's Tender Invitation.
[93] P. 11-7 clause F.1.4.

e-mail communications commencing on 10 April 2013 that the tender closing date had been extended to 3 May 2013 at 12h00. [94]

94.7 The only means of communicating with the Defendant was via the Defendant's aforementioned Agent. [95]

94.8 The Defendant made an offer to the Plaintiff to conclude a contract on *mutatis mutandis* the terms contained in the original tender by issuing an offer letter to the Defendant. [96]

94.9 The Plaintiff accepted the offer contained in the last mentioned letter by means of a letter dated 1 October 2013. [97]

94.10 At no time until litigation commenced did the Defendant ever disavow anything done by the Defendant's Agent or contend that there was no valid contract due to any lack of authority of the Defendant's Agent.

94.11 At a site meeting the Form of Offer and Acceptance reflecting the reduced scope of the works in respect of which the Plaintiff and the Defendant had contracted was finalized by the Plaintiff signing same after the Defendant's representatives had previously signed same.[98]

94.12 The Plaintiff was given possession of the site where the works had to be constructed and there was even a "*soil-turning*" ceremony reported in the press. [99]

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[94] Which is borne out by the e-mails at p. 11-928 a.f. and p. 11-104 to 11-111.
[95] This is borne out by p. 11-41 clause 1.4.
[96] To be found at p. 11-122, (which is also Annexure "E" to the POC at p. 7-116).
[97] To be found at p. 11-124, (which is also annexure "F" to the POC at p. 7-118).
[98] The document is to be found at p. 11-158 to 11-161.
[99] The press report appears at p. 11-134.

94.13 Ever since the Plaintiff sent the letter of acceptance of the Defendant's offer to conclude a contract in respect of a reduced scope of works various steps were taken by the parties with a view to execute the contract that they had concluded. These consisted of *inter alia*:

94.13.1 The signing of the said Form of Offer and Acceptance.

94.13.2 The obtaining, at great cost, by the Plaintiff of the necessary guarantees and the provision of same to the Defendant.

94.13.3 The incurring of costs by the Plaintiff pertaining to *inter alia* security and housing.

94.13.4 The conclusion by the Plaintiff of contracts with sub-contractors who would perform certain of the obligations which the Plaintiff had to perform.

94.13.5 The Plaintiff moving onto site.

94.13.6 The Defendant's Agent certifying claims for payments made by the Plaintiff.

94.13.7 The payment by the Defendant of the first five payment certificates.

94.13.8 Meetings aimed at attempting to alleviate the Defendant's professed financial difficulties pertaining to the financing of the project forming the subject matter of the contract.

94.13.9 A request by the Technical Manager of the Defendant to the Plaintiff not to cancel the contract despite the Defendant's breach of contract.

94.13.10 At no stage did the Defendant ever contend that:

The Defendant had no intention to conclude a contract with the Plaintiff, (i.e. had no *animus contrahendi*), as averred by the Defendant in the Defendant's opposition to the application launched by the Plaintiff against the Defendant which was adjudicated upon Murphy, J. In this earlier application, Murphy J had found that the contract was invalid for want of compliance with procurement Legislation, Regulations or Policies.

95] It is common practice that tender validity periods at times get extended.

95.1 The purpose of tender validity periods is to bind tenderers to hold their offer open for a period of 120 days during which period they cannot withdraw their offers and during which period the Defendant

can enforce a contract by simply accepting the tenders within the 120 days.

95.2 When the 120 tender validity period had expired the Plaintiff had the right to elect to accept any offer made outside that period to the Plaintiff or to reject same.

95.3 The Plaintiff elected to accept the Defendant's tender contained in the letter by the Defendant's Agent dated 20 September 2013 and did so by addressing the letter of acceptance of the Defendant's offer dated 1 October 2013 to the Plaintiff.

95.4 A contract was concluded upon the Plaintiff having notified the Defendant, as aforementioned, that the Defendant's offer had been accepted by the Plaintiff.

95.5 When addressing the letter dated 20 September 2013 to the Plaintiff the Defendant's Agent had not made an offer to conclude a contract himself but had rather simply conveyed the Defendant's offer to the Plaintiff and consequently there had been no transgression of any prohibition against the delegation of powers from municipal officials to a third party such as the Defendant's Agent.

95.6 The Defendant had not issued a general extension of the tender validity period.

95.7 The Defendant did not accept any offer made by the Plaintiff but rather made an offer to the Plaintiff.

95.8 Du Toit did not agree that the Defendant had been obliged to recommence the tender process simply because the Defendant had

elected to split the components of the work to be done between the Plaintiff and Piet Bok Konstruksie. The Defendant had been entitled to split the award and same was contemplated in the Tender Invitation issued to all tenderers.

95.9 The charging for standing time was in accordance with the terms of the contract between the parties and it had been agreed as a line item in the Bill of Quantities of which extracts were attached to each claim for payment. No further breakdown was given because nobody called for it and the Defendant's Agent certified the Plaintiff's entitlement to same and thereby the reasonableness of same.

95.10 The Defendant's Agent remained throughout, from the tender process to the execution of the contract, the representative of the Defendant.

95.11 Du Toit did not agree that the defendant had simply extended an offer pertaining to the 120 day period and pointed out that the scope of works which the Defendant wanted the Plaintiff to do, had also changed.

95.12 There had been no collusion between the Plaintiff and other tenderers as suggested by the Defendant. The e-mails referred to in cross-examination pertaining to enquiring from other entities involved in the same industries whether they were interested in undertaking a joint venture with or becoming partners of the Plaintiff and nothing more. This practice is common and there is nothing wrong with same. The Tender Invitation permits for joint ventures.

95.13 The split of certain components referred to in the Tender Invitation between the Plaintiff and Piet Bok Konstruksie resulted in a savings for the Defendant in excess of R5 million when the total of the amounts of the two offers contained in the letter at p. 11-120 are added up and compared to the Plaintiff's total amount of the Plaintiff's tender. [100]

95.14 At no stage, prior to the commencement of litigation between the parties, did the Defendant or anyone else contend that because the Defendant's Municipal Manager had signed at the wrong place on the Form of Offer and Acceptance at the wrong place, there was no contract between the Plaintiff and the Defendant.

95.15 The signature by the Defendant's Municipal Manager on the page of the Form of Offer and Acceptance dealing with deviations is inexplicable where there had been no deviations. There had been no other reason for the Defendant's Officials, consisting of the Technical Manager and the Municipal Manager, to sign the Form of Offer and Acceptance except to record, formally, the conclusion of the contract between the parties.

95.16 The Form of Offer and Acceptance was signed at the site hand-over as envisaged by the Defendant. [101]

95.17 What the contract documents consisted of is set out in the Tender Invitation. [102]

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[100] An amount of R62 527 406.26 versus the amount of R67 861 297.95.
[101] P. 11-123, par. 4.
[102] P. 11-422.

ANALYSIS

96] In determining the issues in dispute, the first point of departure is the legality challenge made by the Defendant against the validity of the contract.

97] If the Defendant is unsuccessful with the legally challenge this will be the end of the matter. This is so because all the issues raised by the Defendant in its plea and counterclaim are raised in support of the legality challenge. By way of example, the following issues fall away if it is found that the legality challenge should not be entertained:

97.1 The alleged lack of authority of the Defendant's Agent in extending the closing date for the submission of tenders.

97.2 Any other alleged lack of authority of the Defendant's Agent.

97.3 The failure by the Defendant to notify the Plaintiff of its decision to award a portion of the scope of works to the Plaintiff within 120 days from whatever date of closing for the submission of tenders, is found to be applicable.

97.4 The non-compliance with any Legislation, Regulations or Procurement Policies.

97.5 The alleged unfairness to other tenderers resulting from the conclusion of the contract with the Plaintiff.

97.6 Any equitable relief.

98] In a legality review an Organ of State requests a Court to declare its own actions of no legal consequence and validity. Where such actions have resulted in a contract such as the present matter, the Organ of State requests that the contract be declared invalid and of no legal force and effect.

99] In its plea and counterclaim, the Defendant pleaded its legally challenge.[103]

100] In the Buffalo-decision, the Constitutional Court held as follows:

"*Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings …*" [104]

[103] The Defendant's final plea and the Defendant's counterclaim both saw the light of day only as recently as 14 October 2021. Vide p. 7-243 where service of the said pleadings is recorded.

[104] Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd 2019 (4) SA 331 (CC), par. [53].

101] In *casu* there has been undue delay by the Defendant in initiating proceedings constituting a legality review/challenge. Herein, it is common cause between the parties that the contract between them were concluded, during October 2013, precisely seven years before the legality challenge was initiated.

102] In determining the date from which it must be decided whether or not there has been undue delay in initiating legality challenges "… *the proverbial clock starts running from the date that the Applicant became aware or reasonably ought to have become aware of the action taken*". [105]

103] Undoubtedly, the Defendant has always been aware of "*the action taken*" in concluding the contract with the Plaintiff.

104] As previously mentioned, the Plaintiff initially issued an application for payment on certificates before Murphy J during 2014. Having done so, it follows that at the earliest it is this date that the Defendant became aware

[105] ASLA, *supra*, p. 345, par. [49].

of any legality challenge it wishes to have mounted in respect of the contract and it is noteworthy that throughout the Defendant had been legally represented by its current set of attorneys.

105] As such, it must therefore follow, that the Defendants' clock so to speak started to run at the earliest from 2014, which is approximately seven years before the legality challenge was first launched.

106] The Defendant before Court has proffered no explanation as to the reason why it took so long to launch the legality challenge and in the absence of any explanation whatsoever by the Defendant pertaining to the obvious undue delay the Court is entitled to assume that there is no reason at all or that the Defendant is not able to be honest as to the real reasons for the delay.

107] In a similar previous matter, (albeit that the delay was in that case merely 20 months), the Constitutional Court remarked as follows:

"*The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can*

only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons." [106]

108] When it comes to an Organ of State, Courts require more from them than from a private litigant. The following remarks illustrate this:

"*Had the matter been brought by a private litigant, this aspect of the test* [107] *might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations, and that she should have within her control the relevant resources to establish the unlawfulness of the decision she impugns, the unreasonableness of the unexplained delay is serious*." [108]

109] Herein, the Defendant had, albeit from only the time when an attorney and counsel were first consulted with a view to oppose the Plaintiff's application that served before Murphy, J, within the Defendants' control the relevant resources to establish the unlawfulness of the decision the Defendant seeks to impugn.

[106] Khumalo and Another v MEC for Education, KwaZulu-Natal 2014 (5) SA 579 (CC), p. 595, par. [51].
[107] i.e. undue delay.
[108] Khumalo *supra*, p. 595D – E.

110] In the absence of any explanation being placed before this Court to explain in full the delay, the inescapable conclusion to be drawn is that either no reasons exist to explain the delay or that the Defendant was not honest to explain the real delay. On either proposition this Court cannot come to the assistance of the Defendant.

111] On its delay it is significant to note that the Defendant had pleaded as follows in its reply to the Plaintiff's plea to its Counterclaim:

111.1"…*the Honourable Court is obligated to declare it unlawful/invalid. This, notwithstanding, an unreasonable delay in seeking the relief sought in the Counterclaim*". [109]

111.2"*Even if no explanation for the delay exists the Honourable Court is still compelled to declare any agreement entered into between the Plaintiff and the Defendant unlawful, where the unlawfulness is not in dispute*". [110]

[109] P. 7-279, par. 9.1 of the Defendant's reply to the Plaintiff's plea to the Defendant's counterclaim.

[110] P. 7-279, par. 9.2 of the Defendant's reply to the Plaintiff's plea to the Defendant's counterclaim.

112] This Court having concluded that the legality review was unduly delayed, is however, not the end of the matter.

113] A Court further however has a discretion to overlook delay.[111] There must, however be a basis for a Court to exercise its discretion to overlook the delay.[112]

114] The basis for a Court to exercise its discretion to overlook delay "…*must be gleaned from the facts made available or objectively available factors*". [113]

115] One of the considerations a Court will consider is the potential prejudice to affected parties and the possible consequences of setting aside the impugned decision [114]

[111] ASLA, *supra* p. 346, par. [53].
[112] ASLA, *ibid*.
[113] ASLA, *supra ibid*.
[114] ASLA, *supra,* p. 346, par. [54].

116] Thus "…*the nature of the impugned decision*" has to be considered,[115] and so too "…*the extent and nature of the deviation from constitutional prescripts*…" [116] will play a vital role when it comes to whether or not a Court should condone undue delay. [117]

117] In this regard it is the Plaintiff's stance that there had not been a deviation from constitutional prescripts whereas the Defendant contends otherwise. The mere submission that there had been a deviation from Constitutional prescripts however, does not suffice. More would be required and no argument can merely be made without any evidence to support same.

118] Absent such evidence, it follows that this Court cannot exercise its discretion to come to the assistance of the Defendant to condone the undue and unreasonable delay in launching the legality review/challenge.

[115] ASLA, *supra*, p. 347, par. [55] and p. 348, par. [56] – par. [58].
[116] ASLA, *supra*, p. 348C.
[117] This is why it was submitted in par. 26 *supra* that not every failure to tick every single box of procurement legislation, Regulations and procurement policies justifies entertaining a legality review/challenge.

119] A further consideration however to consider when deciding to overlook delay is the conduct of an Applicant.[118] This is particularly true for State Litigants seeking to review their own decisions for the simple reason that often they are best placed to explain delay.[119]

120] In the present matter the Plaintiff had argued that the conduct of the Defendant in casu is reprehensible. The Defendant deliberately roped the Plaintiff into a contract which it must, of necessity have known the Defendant could not fulfil. After all the Defendant can be presumed to have known what monies the Defendant had and would have had available to pay for the performance of the Plaintiff's obligations in terms of the contract.[120]

121] Absent any explanation counsel had further argued, it is manifestly reprehensible to rope a third party into a contract knowing full well that that third party would incur costs and obligations vis-à-vis subcontractors whilst knowing full well that one would not be able to pay the third party. This conduct will universally be condemned not only as reprehensible but

[118] ASLA, *supra,* p. 349, par. [59].
[119] *Ibid*.
[120] There is a long existing and well-established presumption and rule of law that a person is taken to have known what it was his duty to have known. *Vide* Cape Town Municipality v Paine 1923 AD 207, p. 232.

as also despicable. As if this was not enough, the Defendant thereafter, once again presumably knowing what the Defendant's budgetary constraints were, did not play open cards with the Plaintiff and did not cancel the contract due to an inability to perform due to a lack of funds, but strung the Plaintiff along for months knowing full well that the Plaintiff would reserve and allocate resources to perform in terms of the contract.

122] Counsel had further argued, to add salt to injury, the Defendant thereafter sought to defeat the Plaintiff's claims by lying to Court. In its affidavit opposing the application which served before Murphy J, the Defendant contended under oath that there had never been an intention on the Defendant's behalf to conclude a contract with the Plaintiff, (i.e. there had never been *animus contrahendi*).[121]

123] It is on this basis that counsel had argued that it hardly behoves any submissions, that the whole sequence of events up to the cancellation of the contract by the Plaintiff, is reconcilable only with a conclusion that the Defendant indeed intended to conclude a contract and thus had the necessary *animus contrahendi*. The fact that due to Counsel's ingenuity interesting legal arguments have been advanced as to why there had never

[121] P. 11-590, the last three lines of paragraph 8.1, par. 8.2.

been a valid binding contract can never detract from what the intention of the Defendant had always been.

124] In the present matter as already stated earlier, the Defendant only belatedly, after many years, mounted a legality challenge in which it sought to justify the relief claimed by the Defendant by impugning the character of the Plaintiff in the pleadings only to jettison such impugning when the Defendant's counsel placed it on record, whilst cross-examining Mr Du Toit, that the Defendant was not contending that the Plaintiff had done anything wrong in concluding the contract with the Defendant. What however remains glaringly absent in these proceedings is any evidence presented by the Defendant to explain its undue delay.

125] The Defendant before Court had argued that mounting a legality challenge should be condoned, if it has been determined that a Court's hands are bound, if it is common cause that the contract is unlawful due to a failure to comply with constitutional prescripts. [122]

[122] ASLA, *supra*, p. 360, par. [101].

126] It is this principle which the Defendant relies upon for its stance taken that it matters not that the delay was undue and it matters not that no explanation is given for the said delay. [123] To the matter at hand however, it is not common course that the contract is unlawful.

127] On the defence raised of a legality review, this Court therefore concludes that this Court has a discretion not to entertain a legality review subject to the considerations recorded in that decision.

128] Furthermore, in casu, all of the facts militate against the Court exercising its discretion to condone the undue delay by the Defendant and in the absence of condonation being granted, it follows that the Defendants defence has not been proven.

129] Based on this Court's refusal to condone the undue and unreasonable delay in launching the legality review, I hold the view it is dispositive of the defences raised to the Plaintiff's claim. It must therefore follow that the Defendant cannot also succeed with the Counterclaim it has instituted.

[123] P. 7-279, paras. 9.1 and 9.2.

130] In addition, given that the Court has accepted the Plaintiff's version which is not refuted by objective evidence on the merits, the defence on the merits must also fail. Consequently, the Defendants' Counterclaim is dismissed with costs.

ORDER

131] In the result the following order is made:

131.1 The Plaintiff's claim is granted with costs inclusive of the costs of Senior Counsel.

131.2 The Defendant is to pay the Plaintiff payment of the amount of R 16 969 144.69 as certified in payment certificates numbers 6-13 and retention certificate number 14.

131.3 Payment of the amount of R 8 785 710.86 as loss of profit.

131.4 Payment of interest on the amount of R 16 969 144.69 calculated *a tempore morae* at 3% above the rate of interest SARB charges commercial banks from time to time.

131.5 Payment of interest at the prescribe rate of interest *a tempore morae* on the amount of R 8 785 710.86.

131.6 The Defendant's legality challenge to the validity of the contract is dismissed with costs.

131.7 The Defendant's counterclaim is dismissed with costs inclusive of the costs of Senior Counsel.

C.J COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES:

Counsel for Plaintiff : Adv. T.A.L.L. Potgieter SC

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Counsel for Defendant: Adv. FW Botes SC and Adv. E Van As

Instructed by: Cronje De Waal – Skosana Inc Attorneys

Date of Hearing: 15 September 2022

Date of Judgment: 06 June 2024