REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13266/17

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED.

4/1/2019
Date:

M B MAHALELO

In the matter between:

COMMISSION FOR CONCILIATION, MEDIATION and ARBITRATION	Applicant
and	
MILESTONE PROPERTY GROUP (Pty) Limited	First Respondent
NEDBANK LIMITED	Second Respondent
PLAND PROPERTIES (Pty) Limited	Third Respondent
REDEFINE PROPERTIES (Pty) Limited	Fourth Respondent
ASCENSION PROPERTIES Limited	Fifth Respondent
THE ISMAIL and RAEEZ KASKER Trust	Sixth Respondent

JUDGMENT

MAHALELO, J:

[1] The applicant has brought an application to review and set aside decisions made by it to award a tender to the first respondent pursuant to which it entered into a 10 year lease agreement for the provision of commercial premises, office block, at 1 Heerengracht Street, Cape Town ("*the premises*"). The applicant also seeks an order to have the lease agreement declared void *ab initio* alternatively invalid and set aside coupled with a further order directing the first respondent to pay the costs of this application in the event of opposition of the relief sought.

[2] Only the first respondent resists the substantive relief sought.

[3] For the sake of convenience the parties will be referred to as CCMA and Milestone.

[4] According to the CCMA's founding affidavit, the basis for the application to review and set aside the tender is that each of its decision and awards:

> "*were permeated and invalidated by fundamental errors made by members of its staff when it invited bids from the public for the provision or commercial office space for the applicant in Cape Town in 2012 as also when they evaluated, adjudicated and awarded the tender pursuant thereto to Milestone*".

[5] CCMA also applies for condonation for the late filing of the 2014 review application and the surrent review application, CCMA says that it has brought this application within the 180 days of it becoming aware of the reasons for the decision and the award of the Bid. It argues that the 180 days provided for in the PAJA commences running from when it became aware of the true reasons for its decision and the award of the Bid. It seeks condonation for the late filing of the 2014 review application in the event the court finds that it is wrong in its contention, to the extent that the current review application was brought more than 180 days both after the decisions and the Bid sought to be reviewed and set aside were made, as well as more than 180 days after it became aware of the reasons for the decision and the award of the Bid, it seeks condonation of its failure to bring the current review application within the 180 day period and without unreasonable delay.

[6] Milestone opposes the relief sought on various grounds.

[7] I deal with the application for condonation below and because of the conclusion I have reached this aspect is dispositive of the application. I therefore do not deem it necessary to deal with the points in *limine* which were raised in this matter namely, application to strike out certain paragraphs of the replying affidavit, application by the CCMA to admit a fourth set of affidavit and lack of *locus standi* by Milestone.

FACTUAL BACKGROUND

[8] On 8 June 2012 CCMA published in the Government Tender Bulletin under tender number CCMAH039 a request for interested parties to provide it with lease office accommodation in Cape Town for a period of 10 years. In response to the Bid, proposals for commercial premises to let were received by CCMA from each of the respondents, except the second respondent. Between 8 June 2012 and 7 January 2013 the CCMA evaluated and adjudicated all the Bids and on 7 January 2013 in a letter, the CCMA informed Milestone that its Bid for tender had been successful and accepted for a period of ten years for a total bid price of R88 452,706.54 (inclusive of VAT).

[9] Pursuant to receipt of the letter, Milestone advised the CCMA that the letter incorrectly recorded the amount of R88 452,706.54 as being inclusive of VAT, wherein fact it was exclusive of VAT and the correct amount inclusive of VAT was R100 836,085.45. On 25 January 2013 the CCMA responded to Milestone in an email stating:

> *"Thank you for your email below and we can confirm that your pricing is correct. We are in the process of rectifying the letter of award."*

[10] On 13 February 2013 Milestone received a letter addressed to it by the director of the CCMA advising that the CCMA had now awarded it the Bid in a corrected amount of R100 836,085.45. On 7 June 2013 CCMA entered into a written lease agreement with Milestone ("*the lease*") pursuant to which the CCMA agreed to lease from Milestone a commercial building situated at 1 Heerengracht Square, Adderley Street, Cape Town ("*the building*") for an agreed consideration price of R100 836,085.46. The lease was due to

commence on 1 March 2014 when the CCMA would take occupation of the building.

[11] Milestone commenced refurbishing the building to the CCMA's specifications. There were various meetings, discussions and emails exchanged between the parties regarding the refurbishment of the building.

[12] On 1 August 2014 the second respondent addressed a letter to the CCMA's attorneys confirming that the building would be available for beneficial occupation on 1 September 2014. There seemed to have been disputes between the parties regarding whether Milestone and the second respondent had remedied issues which were identified by the CCMA in the default notices sent to them. The CCMA asserted that Milestone remained in breach of the lease agreement.

[13] On 27 August 2014 the CCMA addressed a letter to Milestone recording that the CCMA was considering not taking occupation of the building and that it was also considering to apply to have the Bid set aside because of the irregularities with regard to the decision to award the tender. The concerns which arose on the part of the CCMA in this regard culminated in its appointment of Integrated Forensic Accounting Solutions ("*IFAS*") which it commissioned to review the adjudication and the award of the Bid to Milestone during June 2014.

[14] The CCMA refused to take occupation of the building. On 3 September 2014 the CCMA launched an application to review and set aside the decision by the CCMA's Bid Evaluation Committee taken on 18 November 2012 and January 2013 respectively to award the Bid to Milestone, the award of the Bid by the director of the CCMA on 7 January 2013, the decision taken by the CCMA's

Supply Chain Manager to change the Bid from a turnkey lease basis to a lease only for office accommodation and parking, the revised award of the tender by the director of the CCMA to Milestone on 13 February 2013, and consequently declaring the lease agreement entered into between Milestone and the CCMA on 7 January 2013 void *ab initio*, and set aside.

[15] It later emerged that Milestone had already sold and transferred the building to a third party pursuant to that sale. In terms of clause 19.1 of the lease agreement Milestone was not precluded to sell the building to a third party. On 2 June 2015 Milestone cancelled the lease agreement. On 4 March 2016 the CCMA withdrew its review application on advice of its legal representative. On 30 August 2016 Milestone issued summons against the CCMA in which it claimed damages. Thereafter, the CCMA launched the present review and condonation applications on 18 April 2017.

[16] The present review application is opposed by Milestone and answering and replying affidavits have been filed.

CONDONATION

[17] In the current review application the CCMA seeks an order condoning its failure to launch the current review application within 180 days of it becoming aware of the invalidity of and irregularities in the decisions to award the tender to Milestone as required by section 7(1)(b) of PAJA and extending the time period provided for in section 9 of PAJA for it to bring the current application until 28 April 2017. The CCMA further seeks to review and set aside as void, alternatively, invalid, the decisions made by it in terms of section 6(2) and specifically subsection (b), (c), (e), (f) and (i) thereof.

[18] In its amended notice of motion the CCMA also seeks, to the extent necessary an order condoning its failure to bring the 2014 review application within 180 days of it making of its first decision and extending the time provided for in section 9 of PAJA to 5 September 2014, alternatively condoning the failure of the CCMA to bring the 2014 review application without unreasonable delay.

[19] Section 7(1) of PAJA states that:

> *"7(1) any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –*
>
> *(a) subject to sub-section 2(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(a) had been concluded; or*
>
> *(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."*

[20] In addition, section 9 of PAJA makes provision for the period of 180 days referred to, to be extended for a fixed period, either by agreement between the parties or failing such agreement by the court on application by the applicant for relief. Section 9(2) of PAJA empowers the court to grant an application in terms, *inter alia*, of section 9(1) (b) where the interest of justice so require.

UNREASONABLE DELAY

[21] An applicant for relief in the form of review and setting aside of the decision contemplated in section 7 of PAJA must launch his/her application within 180 days of the date on which the reasons for the administrative action became

known (or ought reasonably to have become known) to the applicant or without unreasonable delay. See *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC).

[22] The CCMA alleges in its founding affidavit that the 2014 review application was launched well within the 180 day period. It bases its claim to being compliant with the time period prescribed by PAJA with reference to when it gained knowledge of the alleged irregularities in its decisions from the IFAS investigative report dated August and October 2014. This is incorrect as a matter of law. The 180 day period commenced running from when the CCMA was aware of the reasons for the decisions, which occurred when each decision was taken.

[23] From the CCMA's founding affidavit the following appears:

> *23.1 On 18 August 2012, the Bid Evaluation Committee took a decision to recommend that the Bid be awarded to Milestone.*
>
> *23.2 On 3 October 2012 the Bid Evaluation Committee recommended that the tender be awarded to Milestone.*
>
> *23.3 On 29 November 2012 the Bid Adjudication Committee adopted the recommendation of the Bid Evaluation Committee and approved the award of the tender to Milestone.*
>
> *23.4 On 17 January 2013 the Bid Adjudication Committee prepared a revised adjudication report correcting the error with regard to the inclusion of VAT and still recommended the award of the tender to Milestone.*

23.5 On 13 February 2013 a revised letter of award was sent to Milestone.

[24] At the time of taking the decisions referred to above, the CCMA was aware of the reasons of its decisions or ought reasonably to have been aware. The CCMA contend that it was misled by its supply chain manager and that it would not have awarded the Bid to Milestone had it known that the specifications of the Bid had changed; that the points had been incorrectly scored, and that the amount of award did not include VAT and needed to be revised to include VAT.

[25] It further contends that it had no knowledge of the procedural irregularities prior to August 2013.

[26] The CCMA launched its review application in the first place as a review under PAJA (s 6(2)) and in the alternative in terms of the principle of legality.

[27] Legality reviews must still be brought without unreasonable delay (although they are not presumptively unreasonable if brought after 180 days as under PAJA). The court must still determine whether the CCMA's delay should be condoned. Although there is no prescribed time period for instituting review proceedings in terms of legality principle, it is a longstanding rule that a legality review must be instituted without delay. See *Khumalo and Another v MEC Education, KZN* 2014 (5) SA 579 (CC). This is particularly so since there is a higher duty on the state to respect the law, to fulfil procedural requirements and to treat respectfully when dealing with rights. See *Member of the Executive Council for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC).

[28] The CCMA accepts that it did not launch this current review application timeously and therefore seeks condonation. It says that its failure to launch these proceedings timeously must be viewed in the light of it having instituted the 2014 review proceedings timeously. To the extent that the court finds that the 2014 review application was launched out of the 180 day period, the CCMA seeks condonation for its failure to launch the 2014 review application without unreasonable delay.

[29] The CCMA submits that the time period from when it was required to bring its 2014 review application ought to be calculated from when it gained knowledge of the alleged irregularities from the August and October 2014 IFAS report. In *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) the Constitutional Court considered the question, from when is an organ of state required to review its own decision. The Constitutional Court confirmed the Supreme Court of Appeal's decision and held that the time period for bringing a review commences when the decision is taken and the reasons for that decision are made known to the person seeking the review. In that regard an organ of state reviewing its own decisions must be taken as knowing of the decision and the reasons for it when the organ of state takes the decision.

[30] In *Cape Town City v Aurecon supra* the Constitutional Court expressly considered and rejected the submission that the clock should only start ticking once the organ of state knows the grounds upon which the decision should be reviewed and set aside. The court emphasised that "*the decision challenged by the City and the reasons thereof were its own and were always within its*

knowledge". In *ASLA Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (2) All SA 677 (SCA) the court held that:

> "*the contention of the respondent that the time period only commenced running once it became aware of the unlawful administrative action, is untenable.*"

[31] Although *Aurecon* and *Buffalo City supra,* concerned the 180 day period under PAJA, the court's reasoning in those cases is in my view applicable to a review in terms of the principle of legality. The above authorities simply demonstrate that the CCMA's contention that the time period should be calculated from October 2014 (when it received the IFAS report) is incorrect.

[32] The CCMA however concedes that if the date is calculated from when it took its last decision which it seeks to review namely on 13 February 2013 then it did not bring the 2014 review application timeously. As already stated, it then seeks condonation for failure to bring the 2014 review application timeously. The CCMA provides as its reason for failing to institute the 2014 review proceedings timeously to be that it did not have knowledge of the alleged irregularities prior to the IFAS report of August and October 2014. This cannot be correct because in its papers the CCMA stated that it had knowledge that there were irregularities concerning the allocation of points on the 90/10 principle from when it received the integrated audit report at the end of its 2013 financial year.

[33] It seems that the CCMA elected not to act on this knowledge and it has also not advanced any reasons why it did not do so. It has been said earlier in this judgment that CCMA withdrew the 2014 review application on legal advice of

its then legal representatives. This was done despite the fact that the CCMA remained obliged to set aside the award of its tender on the basis of irregularities involved in the tendering process.

[34] In this matter, the CCMA's last decision to award the tender to Milestone was taken on 13 February 2013. As already said, the CCMA received information of irregularities in the award of the tender to Milestone from its internal audit at the end of 2013. It then launched the 2014 review application on 3 September 2014, 715 days after it took its first decision it seeks to set aside and 567 days after its last decision it seeks to set aside.

[35] The CCMA delayed reprehensibly in launching its 2014 review application despite trying to do the right thing, at which point Milestone had already performed in terms of the lease agreement. Although there is no time limit for launching a legality review application, it is a longstanding rule that it must be brought without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings. See *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] ZASCA 78; 2005 (2) SA 302 (SCA), or to overlook the delay. This discretion is however not open-ended and must be informed by constitutional values.

[36] The rule enunciated in *Associated Institutions Pension Fund and Others supra* is said to be twofold. Firstly, the failure to bring the review within a reasonable time may prejudice the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.

[37] As appears from *Gqwetha Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) and numerous other decisions in which they have been followed, the application of the rule requires consideration of two questions:

(a) Was there an unreasonable or undue delay?

(b) Whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application?

[38] The reasonableness or unreasonableness of the delay is entirely dependent on the facts of and circumstances of any particular case. See *Setsokotsane Busdiens (Edms) Bpk v Voorsitter van die Nasionale Vervoerkommissie en 'n Ander* (61/84) [1985] ZASCA 121.

[39] The investigation into the reasonableness of the delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable.

[40] In terms of the first leg of the enquiry, we know that the CCMA received its internal audit report at the 2013 year end and the IFAS report between August and October 2014 but launched the 2014 review application on 3 September 2014. The CCMA made no attempts to account for the delay of the period between the end of the year 2013 and 3 September 2014 despite having learnt of the irregularities from its internal audit, but instead, insisted on Milestone's compliance with the lease agreement. The delay of one year and more or less

six months, if taken from the time of receipt of the internal audit's report, is significant in itself.

[41] Taken into account that the CCMA is responsible for the decision, it was obliged to act expeditiously to fulfil its constitutional obligations (section 217 of the Constitution), and it should have within its control the relevant resources to establish the unlawfulness of the decisions it impugns, the unreasonableness of the unaccounted delay is serious.

[42] With regard to the current review application, it was launched on 18 August 2017, four years and 6 months after the last decision sought to be reviewed was taken. The CCMA concedes that the current review application was launched outside of the 180 days period provided for in section 7 of PAJA. It contends that it is entitled to condonation on the following grounds:

42.1 Section 217 of the Constitution compels it to bring this application.

42.2 It will be prejudiced in the conduct of its defence in the action if its review application is not entertained because of lateness and the principle of legality will be offended.

42.3 The 2014 review application was instituted promptly and without delay as soon as the CCMA became aware of the invalidities and irregularities which plagued the Bid.

42.4 The CCMA acted on advice that the matter was moot before withdrawing the application. The advice was clearly incorrect. Milestone accepts that the advice was incorrect.

[43] The CCMA, in trying to explain the delay in bringing the current review application says the following:

> *"When Milestone served it with the summons in the action on 31 August 2016 it briefed its current attorney, Athol Gordon to defend the action. Gordon obtained copies of the files from the previous attorney in order to prepare to defend the action. On 30 September 2016 the CCMA issued a notice in terms of Rule 30 against Milestone in the action for failure to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2000. Milestone replied on 27 September 2016 and annexed its opposing papers which had been served after the 2014 review application was withdrawn. Gordon liaised with the CCMA in order to establish the status of the 2014 review application. He was advised that it was withdrawn. Gordon advised the CCMA that the 2014 review application should not have been withdrawn and the advice previously given in this regard was incorrect. Gordon explained to the CCMA the consequences of withdrawing the 2014 review in relation to the lease agreement and the Bid. He advised that the review should be instituted afresh. After having carefully considered the advice the director of the CCMA instructed Gordon to prepare the current application. Gordon set about collating all the papers in the three different sets of proceedings either finalised or underway between the parties and prepared the present application. As demonstrated by the volume of the documents in this application, this was an onerous and time consuming exercise."*

[44] Section 217 of the Constitution requires that procurement by organs of state is in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The principle of legality reinforces that organs of state act with expedition when they seek to review and set aside their own decisions.

[45] In *Buffalo City supra*, the SCA held that:

"[14] In deciding that the 'serious breach of section 217 of the Constitution, was dispositive of the application for condonation, the court a quo failed to have regard to what was said in Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd [2013] All SA 639 (SCA) paragraph 36. A submission that the 180 day time bare should be extended because it was a requirement of the rule of law that the exercise of all public power should be lawful and the decision maker had failed to act legally was repeated in the following terms:

'As I see it, however, the argument is misconceived. While it is true that the principle of legality is constitutionally entrenched, the constitutional enjoinder to fair administrative action, as it has been expressed through PAJA, expressly recognises that even unlawful administrative actions may be rendered assailable by delay.'

This erroneous approach resulted in a failure by the court a quo to properly consider whether the respondent had furnished 'a full and reasonable explanation for the delay which covers the entire duration thereof' (Harrison supra paragraph 50). The only explanation provided by the respondent for the delay, namely that it only became aware of the alleged irregularities relating to the award of the Reeston contract, when a forensic report was presented to it on 28 October 2015 was no explanation at all."

[46] The requirements provided for in section 217 of the Constitution and the authority cited above clearly shows that it does not mean that an organ of state can unreasonably delay in instituting review proceedings and then seek to pursue a review application under the guise that it is compelled to do so by section 217. In my view, section 217 of the Constitution must be viewed in the light of section 237 of the Constitution and what was said in *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) that:

"[46] All constitutional obligations must be performed deligently and without delay. Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation itself. The principle is thus a requirement of legality.

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

[48] 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 the decision maker's memories are bound to decline with time. Document and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undetermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired."

[47] It is important to remember that the CCMA withdrew the 2014 review application in the face of section 217 of the Constitution. In my view, section 217 of the Constitution and the principle of legality do not excuse the CCMA's tardiness in bringing the review application before court. Having considered the facts, the only reason advanced by the CCMA as to why it delayed to in bringing the current application after it was advised to do so by its new legal representative is because of the volumes of the records involved in the matter. This reason is inadequate and the CCMA's delay is undue.

SHOULD THE DELAY BE OVERLOOKED?

[48] The CCMA contends that it will suffer prejudice if it is not allowed to bring the review because it cannot review and set aside the decision to award the tender to Milestone. In my view, the prejudice is of its own making. After withdrawing the 2014 review application on 06 March 2016, Milestone issued summons in the action for damages on 30 August 2016. The CCMA delivered the current review application seven months after the summons were issued, it delivered papers which do not more than ventilate the same review grounds as in those relied upon in the 2014 review application. This period of delay alone cannot be accounted for by the CCMA.

[49] In considering the extent of the CCMA's delay and the prejudice to be suffered, the following timeline is relevant:

49.1 On 24 January 2013, the Bid Adjudication Committee adopted the recommendation of the Bid Evaluation committee, and approved the award of the tender to Milestone for the higher amount which included VAT, being R100 836 085.25.

49.2 On 13 February 2013, Milestone received a revised letter of award from the CCMA, which correctly recorded the total VAT-inclusive price as being R100 836 085.25. The conditions per the 07 January 2013 letter remained applicable.

49.3 As a result of being awarded the tender, during the period February to April 2013, Milestone negotiated the terms to finance the acquisition of the property with the second respondent (Nedbank Limited) and commenced the preparation of Auto CAD drawings for the CCM'S office layout plans.

49.4 During the period May 2013 to June 2013, various emails relating to and drafts of the lease agreement were exchanged between the CCMA and Milestone.

49.5 On 7 June 2013, the CCMA entered into a lease agreement with Milestone, pursuant to the aforementioned decisions.

49.6 The CCMA state that it became aware that a mistake had been made with regard to the allocation of points in terms of the 90/10 principle from an independent opinion which it received in the financial year ending 2013. The CCMA notably does not provide a copy of this opinion or take the court into its confidence regarding the content of this opinion, save for the sweeping statement that the opinion identified mistakes regarding the allocation of points.

49.7 Even in reply, the CCMA simply acknowledges that "an independent audit opinion received for the year ending 2013 found that the applicant had incorrectly applied the 90/10 principle in the tender". The CCMA goes on to say that notwithstanding receipt of this opinion pointing out to an error in the points allocation, it "believed that, even upon a correct application of that principle, the first respondent would still have scored the highest points."

49.8 The CCMA then says, in reply to Milestone's allegation that it ought to have instituted review proceedings following this independent report:

> *"no review application was launched earlier [than the 2014 review proceedings] because the applicant simply did not know the reasons why it had made decisions which were incorrect."*

49.9 This is simply not correct. The CCMA knew there was an error in the points allocation from the independent audit report. There is no minimum number of errors that are required for a body exercising a public power pursuant to section 217 of the Constitution to review its decision.

49.10 Despite being aware of the error in 2013, the CCMA took no steps to review its decision to award Milestone the tender, nor did it give any indication to Milestone that there was an error in the point's allocation. Instead, between May 2013 and March 2014, the CCMA engaged with Milestone extensively to get the premises ready for occupation, regarding the refurbishment of the premises.

49.11 There were various delays in the premises being ready for occupation, culminating in the CCMA's attorneys sending a letter of demand on 2 April 2014 to Milestone and the second respondent (Nedbank Limited) recording that Milestone was in breach of the lease agreement. The letter sets out the various respects in which the CCMA alleges that the premises are not fit for occupation, and calls on the second respondent, in terms of clause 15.2 of the lease agreement, to remedy the default of Milestone. The letter of demand required the second respondent to step into the shoes of Milestone to remedy such breach. A subsequent letter from the CCMA's attorneys, dated 30 April 2014, granted an extension to the time period for remedying the alleged breach. As is evident from these letters, the CCMA, in seeking to enforce the breach clause against the second respondent, led another party to believe that the lease agreement was valid and binding.

49.12 On 12 May 2014, the CCMA's attorneys addressed a letter to the second respondent's attorneys recording that the CCMA was of the view that the lease agreement was inadequate and that it needed to be cancelled in order to replace it with a new lease agreement. Self-evidently, there was no suggestion at this stage that the tender should not have been awarded to Milestone.

49.13 Furthermore, the letter concludes with confirmation that the CCMA will be taking occupation of the building from 01 July 2014:

> *"Notwithstanding the above, our client will be granted beneficial occupation of the leased premises with effect from 1 July 2014, without having to pay any rental in respect thereof, so as to enable our client to effect its transition from its current premises to the building"*

49.14 Between 12 May 2014 and 01 August 2014, various correspondence was exchanged between the parties. The correspondence concerns the date of occupation of the premises and outstanding issues needing to be resolved regarding the premises. Thus the CCMA was still insisting on performance from Milestone.

49.15 On 01 August 2014, the second respondent address a letter to the CCMA's attorneys, confirming that the premises will be available for beneficial occupation on 01 September 2014. On 7 August 2014, the CCMA's attorneys addressed a letter disputing that the second respondent and Milestone had remedied the issues identified in the default notices from April 2014. On 08 August 2014, Milestone's and the second respondent's attorneys address a letter to the CCMA's attorneys explaining that the CCMA'S assertion that Milestone remained in breach of the lease agreement was incorrect.

49.16 On 27 August 2014, the CCMA's attorneys addressed an email to Milestone's and the second respondent's attorneys, recording that the CCMA was considering not taking occupation of the building and that the CCMA was considering applying to have the tender set aside.

49.17 Prior to this email there had been no indication by the CCMA that there was any basis to suggest that the tender should have not been awarded to Milestone. Although there were negotiations and a dispute concerning the date of occupation of the premises and whether the lease agreement had been complied with, the award of the tender was never in issue. Milestone had in reliance upon the award, and in fulfilment of its obligations under the lease agreement, incurred expenses to prepare the building for occupation by the CCMA.

49.18 The CCMA then refused to take occupation of the building. Milestone sold the building to a third party, it says at a considerable loss as the CCMA refused to pay rent and it would therefore not be in a position to continue repaying the loan owing to the second respondent in terms of which the acquisition of the building had been financed.

49.19 On 03 September 2014, the CCMA launched an application to review its decisions concerning the award of the tender ("2014 review proceedings").

49.20 The CCMA subsequently withdrew the 2014 review application on 04 March 2016.

49.21 Milestone issued a summons against The CCMA on 25 August 2016, claiming damages arising from the CCMA's repudiation of the lease agreement.

One of the issues in those action proceedings concerns a dispute of fact regarding which party terminated the lease agreement.

49.22 Some 7 months later on 18 August 2017, the CCMA the launched the current review proceedings.

[50] What weighs with me is that Milestone relied on the lease agreement. The failure of the CCMA to seek to set aside the tender timeously has clearly influenced Milestone and the second respondent in the manner in which they carried out Milestone's obligations under the lease agreement. It is relevant in this regard that the CCMA insisted that Milestone should remedy the breach under the lease agreement even after it learnt from its integrated audit report that there were irregularities in the award of the tender to Milestone. Now more that four years and six months after the tender was awarded the CCMA would have it set aside. This would obviously be prejudicial to Milestone.

[51] Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

> *"The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are*

reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

See *Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) at [50] and [51].*

[52] I thus make the following order:

52.1 The application for condonation for the late filing of the 2014 review application and the current review application is refused.

52.2 The applicant to pay the costs of the application.

M B MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

FOR THE APPLICANT: ADV FRANCOIS JOUBERT SC
INSTRUCTED BY: CLYDE & CO

FOR THE FIRST RESPONDENT: ADV DAVID WATSON
ADV CLAIRE AVIDON
INSTRUCTED BY: PADAYACHEE ATTORNEYS

DATE OF HEARING: 14 MARCH 2019
DATE OF JUDGMENT: 04 JULY 2019