IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 61801/2019

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

9 November 2021
DATE

SIGNATURE

Heard on: 10 August 2021
Delivered on: 9 November 2021

In the matter between:

TAVRIDA ELECTRIC AFRICA (PTY)LTD	**Applicant**
and	
ESKOM HOLDINGS SOC (LTD)	**First Respondent**
ADC ENERGY CC	**Second Respondent**
RWW ENGINEERING (PTY) LTD	**Third Respondent**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] On 20 August 2019 Tavrida Electric Africa (Pty) Ltd (hereinafter "the applicant") launched a Rule 53 application seeking for the review and setting aside of the decision taken by the first respondent, namely Eskom Holdings Soc (Ltd) (hereinafter "Eskom") to award a tender to ADC Energy CC and RWW Engineering (Pty) Ltd respectively, (hereinafter "the second and third respondent").

[2] The order sought by the applicant is couched in the following terms:

"*1. That the award of the tender CORP4077 by the First Respondent to the Second and Third Respondents be reviewed and set aside;*

2. The matter is remitted to the First Respondent for re-adjudication of the eligible bids submitted by the Applicant, Second Respondent and Third Respondent on such terms and subject to such directions as the above honourable Court may deem meet;

3. In the alternative to paragraph 2, the First Respondent is ordered, within thirty days of date hereof, to commence a full new tender process commencing with an RFQ to be started and completed;

4. In consequence of an order in terms of paragraph 1 above, any contract/s between the First Respondent and the Second and/or Third Respondents is/are

set aside, save that the setting aside is suspended until the tender is re-awarded pursuant to paragraph 2 or the award of a new tender pursuant to paragraph 3 above, or on the lapse of a period of six months, whichever is earlier;

5. That the First Respondent be ordered to pay the costs of this application, jointly and severally with any other opposing party the one paying the other/s to be absolved, such costs to include those consequent upon the employment of two counsel;

6. Further and /or alternative relief."

[3] Eskom opposed the application whereas the second and third respondent elected to abide by this court's decision.

[4] Further to the above, Eskom raised a point *in limine* in terms of which it argued that the applicant has not brought its application within the 180-days time period provided for in section 7(1)(b) of PAJA. The court then requested the parties to file their supplementary heads of argument that deal exclusively with this issue. The parties obliged and the court is indebted.

[5] Of importance is that despite Eskom's counsel making submissions for the point *in limine* to be heard before the merits, arguing that once the point in *limine* is decided in favour of Eskom it would be dispositive of the entire application, I for expediency's sake

decided to hear submissions on both the point *in limine* and the merits of the application simultaneously. This of course accorded with the applicant's counsel's argument.

COMMON CAUSE FACTS RELEVANT TO THE POINT *IN LIMINE* RAISED

[6] 1. On or about 03 March 2017 Eskom issued an invitation to tender ("the invitation").

2. The tender related to the provision of auto reclosers for use by Eskom throughout South Africa.

3. The applicant is a supplier of reclosers or autoclosers.

4. The tender data identified Mr Louie Blom ("Mr Blom") as Eskom's representative.

5. The valuation process and criteria were described as follows:

5.1 basic compliance;

5.2 mandatory tender returnables;

5.3 functionality;

5.4 price and preference scoring;

5.5. financial analysis;

5.6 objective criteria.

[7] A tender briefing session which was also attended by some of the applicant's representatives was held on 23 March 2017.

[8] Annexure "B" to the application is an extract from that presentation. The relevant portion reads:

"*Eskom may also include more than just the highest ranked supplier in its list of contracted suppliers"*.

[9] The applicant submitted a bid in response to the invitation to tender.

[10] On 17 August 2018 Eskom, represented by Mr Blom, sent an email to the applicant advising that the applicant had passed the initial evaluation criteria and that Eskom was ready to negotiate certain issues in preparation of a possible contract award. Eskom explained that the negotiation it refers to was in regard to price negotiation by Eskom and that the applicant should come prepared "*knowing how far your mandate to negotiate is (price wise)"*.

[11] Fast forward, the applicant's "*re-negotiated price*" which was emailed to Eskom on 4 September 2018 was lower than Eskom's "*aspiration"* price recorded in the minute of the meeting held on 29 August 2018. The difference was some R36.07 excluding VAT.

[12] On or about 10 September 2018 Mr Blom enquired from the applicant whether it would be able to maintain that price if the tender was to be split between several tenderers.

[13] On 12 September 2018 Mr Blom sent an email enquiring what the applicant had decided regarding *inter alia* splitting of the contract. The applicant responded on 13 September 2018, stating that:

13.1 its offer of 4 September 2018 would stand if it received 50% of the tender quantity;

13.2 if the tender was going to be divided equally between three bidders, then the applicant would have to increase its price by 4%.

[14] The applicant heard nothing more about this issue from Eskom.

[15] On 21 January 2019 the applicant enquired about the outcome of the tender to which Mr Blom responded on 22 January 2019 by advising that the results were loaded on the Treasury website. The Treasury website page displayed that the second respondent scored 96 points whereas the third respondent scored 97 points which would later be changed to 94.2 in April 2019.

[16] On 24 January 2019 the applicant requested the results of the tender stipulating prices, points achieved and the tender assessment criteria applied.

[17] On 28 January 2019 Mr Blom replied stating the following:

17.1. Eskom always wanted multiple suppliers;

17.2 The factory visits and negotiations were aimed at three suppliers and breaking it into specific regions;

17.3 When Eskom requested all suppliers to confirm that their prices were valid if contracts were awarded to two or three suppliers, the applicant "*negotiated themselves out of Eskom mandate parameters by insisting if split is 3 ways then they want 4% increase on the negotiated price. This new price (+4 %) was outside Eskom mandate and could not be accepted"*.

[18] On 4 February 2019 the applicant requested an '*official*' written letter regarding the tender outcome (my addition).

[19] On 6 February 2019 Mr Blom sent the applicant a rejection (erroneously dated 2016).

[20] On 15 February 2019 the applicant requested detailed information regarding the assessment of the tender, asking Eskom to advise the facts, the grounds and the reasons for the tender having been unsuccessful.

[21] The applicant attended a meeting with Eskom on 4 March 2019 at which meeting Eskom reportedly stated that the problem with the applicant's bidding was price and price only.

[22] Towards the end of March, that is on or about 27 March 2019, the applicant received a letter from Eskom in which the latter stated that the applicant was not awarded a portion of the contract, as its final price after negotiations was not competitive.

[23] On 18 April 2019 the applicant replied to Eskom explaining how and why it should have been awarded the tender or part thereof. Eskom did not respond to this letter.

[24] On 12 June 2019 the applicant's attorneys wrote to Eskom pointing out that:

24.1 the applicant had sought reasons on 15 February 2019 and that there had not been **an adequate response** (my emphasis);

24.2 a meeting scheduled for 24 April 2019 was cancelled by Eskom;

24.3 the letter dated 6 March 2019 fails to adequately address the applicant's concerns and not provide **detailed reasons** as sought for the rejection of its tender (my emphasis);

24.4 the applicant requested **proper reasons** (my emphasis) why it was not awarded the tender by 24 June 2019; and

24.5 it (the applicant) identified its obligation to exhaust any available internal remedy. It thus requested Eskom to identify any such available internal remedy or appeal that is available.

[25] On 24 June 2019 Eskom responded and stated that it had provided reasons in its letter dated 6 March 2019.

SUBMISSIONS ON BEHALF OF ESKOM BY MR MOKUTU *IN RE* THE POINT *IN LIMINE*

[26] Eskom raised a point in *limine* on the delay by the applicant in its launching of its review application outside the prescribed time period and its concomitant refusal to bring the condonation application to remedy the delay.

[27] Mr Mokutu submitted that notwithstanding Eskom's invitation to the applicant to bring the condonation application for the late institution of its review application, the latter simply refused to do so. In reply to the applicant's argument that it only knew of the "reasons" for the rejection of its bid around 27 March 2019, Eskom contended the following:

27.1 the fact that the applicant was unsuccessful was made known to it on 22 January 2019;

27.2 on 24 January 2019 the applicant requested the results of the tender stipulating prices, points achieved and the tender assessment criteria;

27.3 on 28 January 2019 the applicant was informed of the reasons why its bid was unsuccessful. The said email informing the applicant of the reasons states as follows:

"*….when we requested all suppliers to confirm that their prices were valid if contract were awarded to two or three suppliers, Travida negotiated themselves out of Eskom mandate parameters by insisting if split is three ways then they want a 4% increase on the negotiated price. This new price (4% increase) was outside Eskom mandate and could not be accepted….*".

[28] Mr Mokutu submitted that even on a more generous interpretation of section 7(1)(b) of PAJA, and as was held in ***Buffalo City Metropolitan v ASLA Construction (Pty) Ltd 2019 (4) SA 331 CC***, the date of knowledge of the reasons may in certain circumstances give rise to the date 180-days period commences to run, arguing that the same approach needs to hold true *in casu.* He argued that from the genesis outlined above, it cannot be gainsaid that the applicant knew of the reasons on 28 January 2019 and that the applicant should therefore have instituted its review application within 180-days calculated either from 22 January 2019 (being the date the administrative action was made known to it), alternatively within 180-days from 28 January 2019 (being the date the reasons were made known to the applicant).

[29] Eskom refuted the applicant's interpretation of section 7(1)(b) of PAJA to the effect that it was only upon receipt of the "*detailed information regarding the assessment of the tender"* that the 180-day period started to run, stating that that interpretation was rejected

by the Court in ***Pringle, Dodds Beaumont*** *(*below herein) and that this court should similarly reject it.

[30] Mr Mokutu argued that from the ***Aurecon*** (below herein)'s interpretation of section 7(1)(b) of PAJA, knowledge of reasons (in *casu* 28 January 2019) and irregularities (in *casu* 27 March 2019) are two distinct concepts.

[31] Mr Mokutu argued in conclusion that the applicant's review application stands to be dismissed with costs, such costs to include costs occasioned by the employment of two counsel.

SUBMISSIONS BY MR LEECH ON BEHALF OF THE APPLICANT

[32] Mr Leech for the applicant contended that the time period commenced to run on 27 March 2019 when Eskom formally provided written reasons explaining why the applicant was not selected (and not so much about the irregularities). In its reply to Eskom's contentions, the applicant stated that the 180-days period commenced to run on 27 March 2019 when Eskom provide the applicant with "***a detailed information*** *regarding the* ***assessment of the tender***" *(*my emphasis).

[33] It is common cause that the applicant served its review application papers on Eskom on 23 August 2019 whereas Eskom argues that same should have been served on either 22 or 28 July 2019. The applicant argued that it failed to understand Eskom's about-turn

regarding what it (Eskom) had always maintained that it formally provided the reasons for its decisions on 27 March 2019.

[34] Mr Leech argued that Eskom's argument is untenable in light of Mr Blom stating in his email of 28 January that he was not providing reasons as sought by the applicant. He further argued that the reading and interpretation to be accorded to section 7(1)(b) of PAJA must be purposive as it gives effect to section 33 of the Constitution of the Republic. He argued that in terms of the principles as set out in the Constitutional Court ("CC")'s decision in ***Cool Ideas1186 CC v Hubbard and Another (CCT 99/13 [2014] ZACC 16)***, it was held, *inter alia*, that '*A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity…..'*. Mr Leech further argued that section 7(1)(b) of PAJA stipulates that the time period of 180-days commences to run when the requester was informed of the administrative action, became aware of the action and the reasons for it (his emphasis) or might reasonably have been expected to have become aware of the action and the reasons.

[35] He further argued that ***JH v Health Professions Council of South Africa*** below gives a plain and an unambiguous wording to the statute, which interpretation accords with his narrow interpretation of section 7(1)(b). Eskom's interpretation of the commencement of the 180-days period could lead to review applications being instituted recklessly and without any knowledge of the reasons for the decision and that to require a tenderer to challenge administrative action without knowledge of the reasons does not give best effect to 'that' constitutional right, Mr Leech submitted.

[36] In regard to the delay rule, Mr Leech argued that Eskom was at pains to articulate any prejudice it would suffer. He conceded that although it is in the public interest to bring finality to administrative decisions since setting aside same could inconvenience the public, this however finds no application *in casu*.

[37] He concluded by submitting that Eskom has failed to make a case in regard to its point *in limine* and that same should accordingly be dismissed with costs, including costs consequent on employment of two counsel.

LEGAL PRINCIPLES IN RESPECT OF THE POINTS *IN LIMINE*

[38] Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that:

> "*Any proceedings for a judicial review in terms of s6(1) must be instituted without unreasonable delay and not later than 180 days after the date:*
>
> *(a) subject to subsection 2(c), on which any proceedings in terms of internal remedies as contemplated in subsection 2(a) have 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*."

[39] Section 9(1) of PAJA allows for the granting of condonation in appropriate circumstances where proceedings were instituted outside the 180-days period. In an

instance where an application for condonation is brought under section 9(1) of PAJA and a justified explanation for the delay is put forward, the delay will be condoned.

[40] In ***City of Cape Town v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para 41 to 42,** the court held that:

> "*[41] On a textual level, the City's contention confuses two discrete concepts: reasons and irregularities: Section 7(1) of PAJA does not provide that an application must be brought within 180-days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for administrative action became known (or ought reasonably to have become known) to the applicant.*
>
> *[42] On a purposive level the City's interpretation would give rise to undesirable outcomes. As the SCA pointed, the City's interpretation would – "automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to (Aurecon) and the public interest in the finality of administrative decisions and the exercise of administrative functions.*"

[41] The delay point was highlighted by referencing what Nugent J held in ***Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 SCA paras 22 to 23** that:

> "*Firstly, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed. Underlying this desirability for finality is the potential for prejudice both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain.*"

[42] In ***Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 at para 73**, Cameron J held that:

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

[43] In ***JH v Health Professions Council of South Africa 2016 [2] SA 93 (WCC)***, Rogers J held that:

> *" [8] The 180-days period starts to run from the date on which the aggrieved party becomes aware of the administrative action and the reasons for it or might reasonably have been expected to have become of the action and the reasons for it. As will appear from the next part of this judgment, the applicant requested reasons but these were not forthcoming and he launched the review application without them. Had reasons been furnished, the 180-days period would have been reckoned from the date they were furnished and this application would thus almost certainly not have been out of time.*"

[44] In ***Pringle, Dodds Beaumont v Southern Palace Investments 22 (Pty) Ltd (Unreported Case number 08420/2010, South Gauteng High Court, (JHB) at paras 30 to 36)***, His Lordship Mr Justice Coppin said the following in regard to the interpretation of section 7(1)(b) of PAJA:

> "*In terms of section 7(1)(b) the 180 days start to run [where there are no internal remedies] after the date on which the person concerned "was informed of the administrative action, became aware of that action and the reasons for it…." (*my emphasis). Coppin further held that the clock starts to run "*after the date on which the person concerned 'was informed of the administrative action, became aware of that action and the reasons for it or might reasonably have been expected to have become aware of that action and the reasons.*" Coppin J further held that "*the earliest*

date of the date the person is informed of the decision is the date on which the 180 day clock has started to tick."

[45] In ***Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd [2019] ZACC 15*** *at para. 73*, the Constitutional Court held that the clock started to run on the date (4 September 2014) when the decision to award the contract to the successful bidder was made.

[46] Regarding the question whether the review court can still entertain the merits of the review application without having ruled on the delay point, the Supreme Court of Appeal ("SCA") in a majority judgment delivered by Brand AJ (as he then was) in ***Beweging vir Christelik Volkseie Onderwys and Others v Minister of Education and Others*** **[2012] 2 All SA 462 9SCA) para 44**, held that there is no need to hear the merits of the review application since the issue of delay is dispositive of the review application and convenient to deal with first.

[47] In ***Opposition to Urban Tolling Alliance v The South Africa National Roads Agency Limited*** **[2013] 4 All SA 639 [SCA]**, Brand AJ (as he then was) held that when dealing with the delay rule and upon dismissing the application on the basis that the reviewing applicant has delayed, the reviewing Court is not deciding on the merits but is merely withholding a remedy that is sought by the applicant. Therefore, there is no need for the reviewing Court to decide the merits of the review application.

[48] In ***Passenger Rail Agency of South Africa v Siyangena Technologies (Pty) Ltd and Others*** ***(*****2016/7839) [2017] ZAGPPHC 138 (3 May 2-17) at paras. 2 to 8 of the judgment [unreported]**, the Court enquired on whether the delay point raised in terms of section 7(1)(b) of PAJA should be disposed of before the merits of the matter could be entertained. Regarding the question whether it had jurisdiction to entertain the review application in the face of the delay point raised by the respondent in the review application, the Court held that it did not have the authority to entertain the review application on account of ***PRASA*** supra having failed to institute a condonation application in circumstances where the review application was launched outside the prescribed 180 days.

[49] In ***Buffalo City Metropolitan Municipality*** above, the Constitutional Court analyzed the various principles underpinning the adjudication on the delay point and it, *inter alia*, held that:

49.1 there are instances where delay alone *per se* may not necessarily preclude the reviewing Court from dealing with the merits of the review where the reviewing applicant has delayed;

49.2 the approach in overlooking a delay in a legality review (as opposed to a PAJA review) is flexible (para 54 of the judgment);

49.3 within the context of PAJA the extent and nature of the deviation from constitutional prescripts directly impacts upon an application for condonation in terms of section 7 of PAJA (para. 56 of the judgment);

49.4 according to the principle in ***State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2)SA 23 (CC at para. 112 ("Gijima")*** matter***,*** where the unlawfulness of the impugned decision is clear and not disputed, then the Court must declare it as unlawful, notwithstanding an unreasonable delay in bringing the application for review for which there is no basis for overlooking;

49.5. it was held in para.71 of ***Buffalo City Metropolitan Municipality*** that the above principle ("***Gijima***") must be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined.

49.6 the procedural requirement to bring review applications without undue delay serves a substantive purpose and it is based on sound judicial policy and in the public interest that there be finality and certainty in matters (para. 69 of ***Buffalo City Metropolitan Municipality*** judgment);

49.7 In ***Department of Transport and Others v Tasima (Pty) Ltd at parav163-164 ("Tasima")***, the Constitutional Court reaffirmed the principle that a Court should be slow to allow procedural obstacles to prevent scrutiny of a challenge to the exercise of public power, but undue delay should not be tolerated.

ANALYSIS

[50] In determining the question as to when the 180-days time period commenced to run *in casu* and when one considers the facts and the arguments by both parties, including the legal principles both rely on, I find that the applicant was furnished with the reasons on 28

January 2019. Another pertinent issue to consider is whether this court finds that the 28th January, under the circumstances, can be deemed as the date from which the 180-days period for purposes of compliance with section 7(1) (b) of PAJA ought to have commenced to run. When one considers ***Pringle, Dodds Beaumont*** *supra,* Coppin J held that "*the earliest date of the date the person is informed of the decision is the date on which the 180 day clock has started to tick*."

[51] Mr Leech argued that as per ***Pringle, Dodds Beaumont*** and ***PRASA*** *supra,* the 180-days period ought to start to run only upon "*detailed information regarding the assessment of the tender"* being furnished to the requester, which date was the 27 March 2019 when the applicant received what it terms 'detailed information'. In reply, Mr Mokutu argued that this court should follow the approach adopted in ***Aurecon*** *supra* in terms of which that court drew a distinction between the date on which a requester became aware of the reasons (28 January 2019 *in casu*) and the latter being the date on which a requester became aware of irregularities (27 March 2019 *in casu*), arguing that these two concepts are distinct from each other.

[52] In my view, the date from which the 180-days period ought to start to run is the earliest date on which a requester was informed or furnished with reasons regarding the impugned administrative act, to the extent that such reasons, considered objectively, constitute 'sufficient reasons'. What would then constitute 'sufficient reasons' is not and should not become a mechanical exercise. Simply put, sufficient reasons would embody an explanation as to the primary reason(s) or facts which gave rise or led to a particular decision or act being made or taken by the administrator. This therefore borders on the

generality of the reasons for the administrative act under scrutiny. For this reason, I am of the firm view that the 28 January reasons had sufficient detail to satisfy section 7(1)(b). It is for this reason that I am satisfied that as early as on 28 January 2019, the applicant had been provided with reasons to enable the applicant to could have instituted its judicial proceedings review without delay.

[53] Apposite to the above, in my view, what constitutes "reasons' can only be determined on a case-to-case basis. In *casu*, Eskom speaks of "*reasons*" whereas the applicant speaks of "*detailed information regarding the assessment of the tender*". What needs to be considered is the plain language of section 7(1)(b) which speaks purely and clearly about "reasons for the decision". Nowhere is mention made of the detailed information as argued for by the applicant. As a matter of course this court accepts that the issue regarding the scope of "reasons" cannot be considered in vacuum and that a holistic approach therefore needs to be employed to consider same. The 'detailed information' as sought by the applicant would thus, in my respectful view, border on the extras to the reasons.

[54] In regard to the applicant's argument that even Eskom's senior legal adviser admitted that it 'formally' provided the reasons for its decision on 27 March 2019, in my view, this admission does not in any way advance the applicant's case nor lend credence to its interpretation of section 7(1)(b). Coupled to the above, the fact that Mr Blom for Eskom stated in his 28 January 2019 email that the reasons he was providing were not reasons as sought by the applicant does not in itself make the said reasons any lesser than what section 7(1)(b) envisages, given that at least their scope was such that the core reason why the impugned administrative act was made is clearly articulated therein. And yes,

maybe not the detailed information as was specifically sought by the applicant, by they remain to be reasons in any event. In my further view, the test here is not so much defined by Mr Blom's characterization of the 28 January 2019 reasons nor Eskom's senior legal adviser's, but by the content of the very reasons *per se*. On perusal of the 28 January reasons as they appear in paragraph 17 above, and as I have already stated, I find those reasons to have sufficiency enough to satisfy the institution of judicial proceedings review without any undue delay.

[55] Noteworthy is how the applicant had been characterizing the reasons each time it requested same from Eskom:

1. On 15 February 2019 the applicant requested for an "*adequate response*";
2. On 6 March 2019 the applicant requested "*detailed reasons*"; and
3. On 24 June 2019 it requested for "*proper reasons*", even after being provided with what it now terms the "detailed information" it received on 27 March 2019.

[56] From the applicant's above characterization of its requests to Eskom and as gleaned primarily from its 15 February request, in my view, it can therefore be concluded that the applicant did deem the 28 January reasons as 'reasons', except that it needed '*an adequate response'*.

[57] The applicant's argument that but the 28 January reasons were lacking in finer detail does not accord with the authorities cited above, for example, ***Aurecon***, to mention but

one, which states that the 180-days period begins to run from the earliest date on which a requester came to know of the reasons for the impugned administrative action or decision.

[58] Regard being had to what the court held in ***Aurecon*** above, it is my respectful view that were the applicant's narrow interpretation of section 7(1)(b) to be followed, it would undoubtedly lead *to an unfettered and a blanket right to a requester to only institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be.* As the court held in ***Aurecon*** supra, this, in my view will only lead to anomaly which by its very nature is untenable. Despite the applicant's denials that the 27 March 2019 '*detailed information'* was never about having to first identify the irregularities, in my view, that is exactly what appears to have been the reason behind the unreasonable and undue delay.

[59] In my further view, the 'detailed information' expectation by the applicant unreasonably defeats the intention for which the statutory peremptory 180-days period was set, namely, to bring finality administrative actions and the consequences visiting thereto, as was held in ***Buffalo City Metropolitan Municipality*** *supra*.

[60] It is trite that the court's duty is to ensure that procedural requirements are fulfilled. This oversight in itself safeguards the avoidance to a large extent of the unreasonable protraction of matters lingering on *ad infinitum*. Against this backdrop, I find that the arguments and submissions made by the applicant in its interpretation of the 180-days period are not sustainable, considering the legal principles the applicant relies on. I am

satisfied that the applicant has failed to show good cause as to why section 7(1)(b) was not complied with.

[61] As was held in ***PRASA*** *supra,* it is trite that in an instance where a litigant has failed to comply with a statutory provision, such litigant must institute a condonation application to accompany the main application. It is further trite that condonation may be granted where no prejudice has been proven. It is common cause that the applicant did not bring any such condonation application despite attempts by Eskom in trying to get it to. In my view, this court cannot use its discretion in favour of the applicant.

[62] Furthermore, in ***Buffalo City Metropolitan Municipality*** *supra*, the Constitutional Court held that within the context of PAJA, the extent and nature of the deviation from constitutional prescripts directly impacts upon an application for condonation in terms of section 7 of PAJA (para. 56 of the judgment). That notwithstanding, the fact that for reasons not explained to this court the applicant did not even apply for condonation for non-compliance with the statutory time periods does it no favours. Even if this court was perhaps inclined to, it however is not in a position to can 'condone' the non-compliance with section 7(1)(b) of PAJA. In the result, Eskom's point *in limine* stands to succeed and to be upheld with costs.

[63] Regarding the question whether this court can consider the merits of the application despite the upholding of Eskom's point *in limine*, as was held in ***OUTA*** and ***PRASA*** above, I am of the view that what binds this court is the trite approach that the merits of the

application should simply not be considered under circumstances of this nature. In my further view, there is nothing 'exceptional' regarding the reasons for non-compliance which would perhaps have engendered this court to use its discretion otherwise. In my final respectful view, none of the authorities to which the applicant makes reference to support his arguments regarding the interpretation to be accorded to them in respect of section 7(1)(b).

[64] In the result I am satisfied that on the basis of Eskom's the point *in limine* being upheld with costs, including costs consequent upon appointing two counsel, the main application stands to be dismissed with costs.

[65] In the premises I make the following Order:

ORDER

1. The First Respondent's point *in limine* is upheld with costs, including costs consequent upon the employment of two counsel.

2. The Applicant's application is dismissed with costs, including costs consequent upon the employment of two counsel.

Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

Head on: 10 August 2021
Judgment delivered: 09 November 2021

Appearances

For Applicant: Adv. Leech (SC)
Assisted by Adv. Boulle
Instructed by: Nicole Ross Attorney

For 1st Respondent: Adv. Mokutu E. (SC)
Assisted by: Adv. Stemela X.
Instructed by: Ngeno & Mteto Inc.

For 2nd Respondent:
No appearance

For 3rd Respondent:
No appearance