IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 11981/2015

In the matter between:

PREMIER ATTRACTION 300 CC t/a
PREMIER SECURITY Applicant

And

THE CITY OF CAPE TOWN Respondent

JUDGMENT: 09 March 2016

DAVIS J

Introduction

[1] Applicant seeks the following substantive relief against the respondent:

1. Payment in the amount of R 16 469 681.94 ('the main claim'), and a further amount of R 2 339 296.27 ('the additional claim'). In the alternative, applicant seeks orders directing that the effect of the publication of various Sectoral Determinations in relation to the remuneration payable to security guards registered with the Private Security Industry Regulation Authority (PSIRA), was to increase the amounts payable by respondent to applicant (Premier), for security services rendered by applicant in terms of the tender awarded to it by the respondent.

2. An order directing respondent to be contractually bound to pay Premier for security services allegedly rendered by it for three specified cites over various periods; and
3. Orders directing respondent within one week of the granting of the order to take the necessary steps to process and correct, if need be applicant's pro forma invoices and to furnish applicant with relevant information to enable it to raise its invoices accordingly. Furthermore, to make payment of all amounts and to invoice applicant within 48 hours of presentation of these invoices.

[2] The main claim relates to whether applicant is entitled to a recalculation of the amounts paid by the respondent to applicant in terms of a contract which forms the subject matter of this application during the period of 1 September 2010 to 30 September 2014. The additional claim relates to invoices issued by applicant in respect of services rendered at certain specific sites in respect of which authorised purchase orders were not issued by the respondent, and, as a consequence of which, the services were rendered in violation of the contract and the relevant regulatory and statutory framework. Applicant foreshadows the dispute in its founding affidavit, where it said the following:

'Applicant and respondent did not agree on the interpretation of R.871:

1. Applicant was of the belief that it was entitled to a 7.25% increase in the contractual amount payable for all categories of guards. Quite apart from anything else, the 7.25% increase was well known in the work force, and the expectation – across all grades – was for such an increase;
2. Respondent interpreted Sectoral Determination R.871 – insofar as same related to the second year (with effect from 1 September 2010) – as being that it was

merely obliged to increase the contractual sum payable per security officer to applicant by the amount of the minimum wage increase.'

The factual background

[3] Applicant's claim concerns to a Tender 138 S Security Services ('the tender'), which was awarded to it during 2008, by the respondent for the supply of security services at various sites. The agreement between applicant and respondent was governed by the conditions of a contract which formed part of the tender document. It commenced on 1 October 2008, and terminated on 30 September 2014. Applicant contends that the dispute relates primarily to the method of establishing the escalation, or adjustment of rates, or prices paid by the respondent for the security services as set out in the price schedule of the tender document. Sub clause 8.1 of the conditions of contract states that the rates payable by the respondent to applicant for security services rendered would have to accord with the rate / prices for security services as set out in the process schedule.

[4] In this connection clause 11.4 is of particular relevance:

11.4 LABOUR (in respect of General Service and Armed Escort/Patrolling):

11.4.1 The prices of this tender shall be deemed to be FIRM (constant) for the contract periods Year 1 Year 2 respectively, as well as for any agreed extension to year two.

11.4.2 The basis of the tender is the three-year wage determination agreement concluded for the Private Security Sector – Government Gazette No 29188, R 874, dated 1 September 2006. It is expected of

Tenderers to use those published salary rates in the Gazette to arrive at the Tender prices for this tender's Year 1 and similarly the rates for this tender's Year 2. Provided that if the prices in fact remain firm for two years then if the Contract period is extended by mutual agreement beyond two years, a possible further adjustment in line with the then current government determination will be considered.

11.4.3 No increase in the labour content of rates quoted in this tender will be entertained by the Council under any circumstances during the contract unless the Minister of Labour for whatsoever reason decides to depart from that agreement. Should such departure occur, an adjustment may be considered which shall be the difference between the rates in the current gazette and the rates in the new gazette for comparable periods, applied to 90% of the Tender prices for Security Officers (tendered prices / rates are expected also to include the cost of fuel, overheads and profits – of which that deemed 10% shall remain FIRM)

11.4.4 In the event of Minister of Labour departing from the current wage determination / agreement, the following shall apply:

11.4.4.1 All applications for price variations must be accompanied by satisfactory documentary evidence.

11.4.4.2 Only the difference in Rand and cents between the old and new published rates shall be used, and applied to 90% of the tendered rates for labour (Security Officers).

11.4.4.3 Contractors who wish to apply for price adjustment must show how the new prices were calculated, and claim a new price per applicable item number (not a general percentage).

11.4.4.4 Notwithstanding anything to the contrary contained in the Tender document, any claim for an increase in the tender prices herein quoted shall be submitted in writing to the City Manager, for the attention of the Director: Supply Chain Management, City of Cape Town, P O Box 655, Cape Town, 8000, in the form of a written letter (not in form if an invoice or a general circular) before the said increase is to become effective. When submitting any such claim, the contractor shall indicate the actual amount claimed for each awarded item. A mere notification of a claim for an increase without stating the new price claimed for each item or a mere claim for an escalation of a percentage shall, for the purpose of this clause, not be regarded as a valid claim.

11.4.4.5 Notwithstanding anything to the contrary contained in this contract, the Council reserves the right to request the Tenderer / Contractor to submit independent auditors' certificates or such other documentary proof as it may require in order to verify a claim for price increases.

Should the Tenderer / Contractor fail to submit such auditors' certificates or other documentary proof to the City Manager within a period of thirty days from the date of the request therefor, it shall be conclusively presumed that the Tenderer /Contractor has abandoned his claim.

[5] Respondent contends that clause 11.4.4 provides for the agreed requisite procedure which had to be followed by applicant when making an application to respondent for price / rate variations consequent upon a departure from the wage determination / agreement applicable at a particular time. In particular, respondent contends that applicant would have to submit a claim for an increase in the tender price to respondent's Director Supply Chain Management before such price increase became effective, and, prior to applicant's claim to such increase, prices being deemed to be valid. Respondent contends further, that this provision in the conditions of contract makes it clear that any price escalation claimed by applicant would be subject to agreement with the respondent, and that an application therefor had to be made and accepted by the respondent prior to agreement having been reached. Respondent argues that applicant's tender bid was evaluated by respondent, based on a predetermined set of criteria as provided for in respondent's tender document. The tender was awarded to applicant and the contract was subsequently concluded between the parties on the basis of the prices / rates which had been tendered by applicant. In calculating these prices it was the applicant's sole responsibility to ensure that it took into account the minimum salary rates as set out in a sectorial determination which were published in terms of the Basic Conditions of Employment Act 75 of 1997.

[6] Applicant submits that it completed the wage rates to be charged for each category and subcategory of security officer for the first two years of the operation of the tender. In its calculation of these rates, a tenderer was required to be "guided by" the rates in the sectoral determination promulgated on 1 September 2006 (R.874 of Government Gazette NO 29188). Applicant argues that it was at all

times aware that the security industry was regulated by sectoral determinations made by the Minister of Labour from time to time, and it would have to take into account these determinations when adjusting wages. Applicant contends that all tenderers are required to be registered with the Private Service Industry Regulatory Authority (PSIRA) and to be in good standing with the latter body. Accordingly, applicant contends that when it calculated the wage rates and the pricing schedule it not only took into account the minimum rates in accordance with the sectoral determination, but also those sums required for compliance with the PSIRA. Accordingly, these wage rates were significantly higher than the minimum sectoral determination wage rates. While applicant contends that the wage rates tendered were required to be in line with the sectoral determination as well as the PSIRA pricing structures, respondent argues that the PSIRA's "illustrative pricing structures" are mere guidelines which carry no legislative force.

[7] According to respondent it was incumbent upon applicant to ensure that the prices at which it tendered enabled it to comply with the labour legislation which was relevant to the employment of security officers and to meet its financial obligations towards the employers. To this end respondent refers to clause 17.1 of the Conditions of Contract.

> The CONTRACTOR undertakes that: -
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> 17.1 It shall comply with all the labour legislation relevant to the employment of Security Officers;
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> 17.2 it shall remain solely responsible for payment of all costs of the Security Officers including but not limited to salaries, bonuses, pension fund

contributions, provident / benevolent fund contributions, medical fund contributions and insurance premiums, where applicable; and

17.3 it shall be responsible for the payment of, *inter alia*, all applicable taxes, charges, duties or fees assessed or levied by the Central Government, Workmen's Compensation Commissioner, Provincial Government, Local Authority or a Metropolitan Council in respect of the security Officers or as a result of the Security Officers being provided by the CONTRACTOR in terms of this Contract and it shall, on request, furnish sufficient documentary proof to the COUNCIL that any of or all of these payments have in fact been made.

[8] Applicant contends that according to the tender document tenderers were obliged to submit invoices on or before the 7th of each month to an official of respondent who would then authorise the amount of the invoice as being correct. Only upon authorisation would the invoice be submitted to respondent for payment. In exercising its right under clause 10 of the tender document, respondent refused to pay applicant any amount other than that which was in conformity with its interpretation of the tender document and the various sectoral determinations. While contending that the respondent's interpretation was incorrect, applicant contends that it had no option but to submit invoices that were in accordance with respondent's interpretation. Had it submitted invoices which were different to this interpretation, respondent would not have authorised them, and applicant would not have received payment. This particular contention was in a response to respondent who argued, having considered an application for an increased price, that it offered price increases during the period 1 September 2013, to 30 September 2014, which prices were accepted by applicant. The price increases offered by respondent were

commensurate with the increase provided for in the relevant sectorial determinations.

[9] Respondent contends that it is not now open to applicant, having accepted such escalation, to now seek an ex post facto adjustment of the escalation.

[10] Before dealing with the significant question of interpretation, of the conditions of contract the respondent raised a number of points in limine, including prescription and statutory noncompliance. These are the questions to which I must first turn.

Prescription

[11] Mr Katz, who appeared together with Ms Adhikari on behalf of respondent, referred to s 12 (3) of the Prescription Act 68 of 1969 which provides: 'a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it to exercising reasonable care.' Accordingly, the section requires knowledge of the material facts from which the debt arises for the period of prescription to commence as opposed to knowledge of the relevant legal considerations. In this connection Mr Katz referred to *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) at para 17 where Cameron and Brand JJA said:

> 'This Court has, in a series of decision, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably.'

[12] On this basis Mr Katz submitted that, on applicant's own version, it was aware of the facts on which it based its main claim on 1 September 2010, at the latest, which was a date on which the Sectoral Determination was promulgated in Government Gazette NO 32524 (R.871). For this reason, he argued that, in the light of the fact that the application was launched on 25 June 2012, the portion of applicant's claim which arose during the period 1 September 2010, to 25 June 2012, had prescribed and had to fail on this basis alone.

[13] In particular, Ms Adhikari who argued most of this component of respondent's case referred to clause 6 of the contract which reads thus:

> 6 **PROCEDURES APPLICABLE TO THIS CONTRACT**
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> 6.1 The City will issue official Purchase Order for services required under this contract. The Council will when the need arises give written notice to a member of the Security Service Panel to provide Security Services at a Site(s) and/or for Area Patrols. This written notice will take the form of a formal Council Purchase Order – supported by "Site Orders" where applicable, including among other information the duration of time for which the Contractor will render the Security Services at a particular Site(s) and/or Area (Patrol(s), where necessary. The relevant Purchase Order number must be shown on every Invoice.
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> 6.2 In the case of an emergency the Council may give verbal notice to a member of the Security Service Panel to the services envisaged in terms of this Tender. In such circumstances the Council will confirm the instructions in writing by official Council Purchase Order.

In addition this clause must be read together with clause 10 which, to the extent that it is relevant, reads as follows:

10 **SETTLEMENT OF ACCOUNTS**

10.1 The CONTRACTOR shall, on or before the 7th of each month submit to the COUNCIL an invoice for the previous month to be duly authorised by a Council Official as correct, specifying the services rendered during that previous month and detailing the amount due and payable to the CONTRACTOR. Value-Added Tax shall be shown separately on each invoice. Invoices must be submitted per site and the order number must appear on invoice. Payment shall not be effected unless credit notes in respect of short postings are submitted with the invoices.

10.2 All original invoices shall and credit notes must be forwarded to the following address:

10.3 In addition to the requirements of the Value-Added Tax Act, a valid Invoice for this contract shall contain at least the following details:

10.3.1 - The relevant official Purchase Order number that was issued by Council;

10.3.2 - Exact date/s of service rendered;

10.3.3 - The Name of the Council Branch for whom the service was rendered;

10.3.4 - Address of the Site / Area where the service was rendered;

10.3.5 - The name and telephone number of the Council representative who ordered the service;

10.3.6 - Nature of service (in terms of the Price Schedule item number/s and description);

10.3.7 - Number of Security Officer (how many persons?);

10.3.8 - Grade of each Security Officer who rendered the service;

10.3.8 - Registered Name and number of Dog, if applicable.

[14] As the applicant was paid on the invoices submitted, it was contended by Ms Adhikari that the cause of action, insofar as the period 1 September 2010, to 25 June 2012, was concerned, had prescribed. Once the procedures and settlement of accounts pursuant to clauses 6 and 10 of the contract had been completed, a cause of action arose which was only pursued by applicant more than three years later.

[15] Mr Kirk-Cohen, who appeared together with Ms Small on behalf of the applicant, referred to a principle set out initially in Wessels, The Law of Contract in South Africa 2 ed (1951) Volume 2 at para 2306 – 13 which is to the effect that a payment made by a debtor to a creditor should, in the absence of express appropriation by either party, be appropriated to the debt which is most onerous to the debtor or, expressed differently, to the debt which would be most in the interest of the debtor to pay. This principle has been confirmed both in *Ebrahim (Pty) Ltd v Mahomed and others* 1962 (1) SA 90 at 97 G – H and *Miloc Financial Solutions v Logistic Technologies (Pty) Ltd and others* 2008 (4) SA 325 (SCA) at para 46.

[16] Mr Kirk-Cohen also referred to the decision in *City of Cape Town v Real People Housing (Pty) Ltd* 2010 (5) SA 196 (SCA) where reference is made at para

3 to a credit control and debt collection policy of respondent which contains the following provision: 'Payment of any undisputed debt … will first be allocated to the oldest debt … progressing to the latest debt.' As Nugent JA said, 'read together with the policy it is plain that the City is authorised to allocate payment made by a debtor to the oldest undisputed, and its computerised accounting system has been **designed to** produce that effect.' (para 3) In the present case, it was not a question of respondent being the recipient of payment, but rather as the body which is obliged to pay amounts to the applicant. Further, in **Real People Housing**, supra the court was dealing with a policy which expressly contained this provision as opposed to an argument concerning the general applicability of a common law provision.

[17] It follows therefore that the cases cited by Mr Kirk-Cohen are not directly relevant to the question of prescription. It is trite law that extinctive prescription commences to run as soon as the debt is due. As Van Heerden JA said in *Truter v Deysel* 2006 (4) SA 168 (SCA) para 16:

> 'A term 'debt is due' means a debt including a delictual debt, which is owing and payable. A debt is due in a sense when the creditor acquires a complete cause of action for the recovery of a debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place, or, in other words, when everything has happened which would entitled the creditor to institute action and to pursue his or her claim.'

Accordingly, if applicant was 'of the belief that it was entitled to a 7.25% increase in the contractual amount payable for all categories of guards' between the period September 2010 until 25 June 2012, then the cause of action had arisen during that period and the debt was accordingly due. In any event, it should be recalled that the case

brought by the applicant was for under payment rather than for unpaid invoices which it had submitted pursuant to clauses 6 and 10 of the contract to which I have made reference.

[18] For these reasons I find that the portion of applicant's claim which arose during the period of 1 September 2010, to 25 June 2012, has prescribed and that this portion of the claim must thus fail.

Statutory non compliance

[19] On 24 June 2015, applicant purported to send a notice to respondent in terms of the Institution of Legal Proceedings against Certain Organs of the State Act 40 of 2002 ('the Institution of Proceedings Act'). One day after the notice had been sent to respondent this application was launched. Mr Katz submitted that the notice did not comply with the following pre-emptory provisions of the Institution of Proceedings Act, namely s 3 (1) which provides that no legal proceedings may be instituted against an Organ of State for the recovery of a debt unless the creditor has first given the Organ of State written notice of its intention to institute the legal proceedings, alternatively unless the Organ of State has consented in writing to the institution of legal proceedings without notice, or despite a defective notice. In addition, s 3 (2) (a) requires that the notice must be served on the relevant Organ of State within six months from the date on which the debt became due. Notwithstanding the provisions of the Institution of Proceedings Act, according to Mr Katz, applicant chose not to apply for condonation for its failure to give due notice to the respondent in its founding affidavit, nor was condonation sought in its replying affidavit. Section 3 (4) of the Institution of Proceedings Act grants the court a

discretion to condone noncompliance with the Act's provisions subject to three requirements:

(a) the debt has not been extinguished by prescription;

(b) good cause exists for the creditor's failure ;in this case applicant's failure to serve the notice in accordance with s (3) (2) (a) of the Institution of Proceedings Act; and

(c) the organ of State was not unreasonably prejudiced by the failure.

These requirements are conjunctive, and the applicant bears the onus to establish each of these. For a justification of these provisions see *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at para 30.

[20] It follows from my finding that part of claim has not prescribed. But the second and third requirements remain to be examined. In *Rance* ,the court dealt with the question of the "good cause" requirement in terms of s 3 (4) (b) (ii) at paras 36 – 37:

> '[36] 'Good cause' within the meaning contained in s 3(4) (b) (ii) has not been defined, but may include a number of factors which will vary from case to case on differing facts. Schreiner JA in dealing with the meaning of 'good cause' in relation to an application for rescission, described it thus in *Silber v Ozen Wholesalers (Pty) Ltd*:
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> > 'The meaning of "good cause" in the present sub-rule, like that of the practically synonymous expression "sufficient cause" which was considered by this Court in *Cairn's Executors v Gaarn*, 1912 A.D. 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar

expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.'

[37] The prospect of success of the intended claim play a significant role – 'strong merits may mitigate fault; no merits may render mitigation pointless'. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the clause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of an intended action, e g where an expert report central to the applicant's envisaged claim is omitted from the condonation papers.'

[21] Mr Katz contended that applicant understood the implications of the Institution Proceedings Act because on 24 June 2015, its attorneys generated a letter to respondent which concluded as follows:

'Our client accordingly gives notice under s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 that it intends to institute proceedings for the above relief. Our client is obliged – pursuant to s 3 of the Act - to set forth briefly the facts giving rise to debt. These facts have been previously set forth, and we refer to our prior correspondence, attached for ease of reference. For the sake of avoidance of doubt, however, we record that:

1. Our clients were in a contractual relationship under tender number 138S throughout the period 1 October 2008 to 30 September 2014. Although the

contract was initially for a two year period, it was duly renewed through this period;

2. During the contract, there were Sectoral Determinations which came into effect. These Sectoral Determinations varied the minimum wage payable, and were the trigger for our client becoming entitled to increases in the contractual amounts payable;
3. The parties are not in agreement as to the proper interpretations of the contract, as read with Sectoral Determinations in question, as read with the provisions of PSIRA. In the result, their interpretations differ;
4. Their differences in interpretation give rise to the claim.
5. In addition to this, we respectfully refer you to paragraphs 10 and 11 above as regards the issuance of order numbers.'

[22] Finally, after a debate in Court on 16 November 2015, applicant brought an application for condonation. I should add that prior thereto, on 06 November 2015, applicant was specifically "invited" by respondent in its answering affidavit to make application for condonation .However in its replying affidavit filed by applicant on 11 November 2015, it merely stated: 'To the extent necessary (applicant) requests the above Honourable Court to condone the noncompliance.'

[23] In the application for condonation Mr Sayed, who deposed to an affidavit on behalf of the applicant, says that the letter of 24 June 2015, was the culmination of 'the fourteen drafts of the founding papers'. The letter relating to Institution of Legal Proceedings Act was sent on the same day applicant finalised its application as to the amount which it was owed. Consequently, 'there was no time prior to the letter of 24 June 2015, when the letter could have been sent and at the same time include

the claim amount'. Mr Sayed also contends that respondent, if condonation is to be granted, will suffer no prejudice. It has committed itself to a version of events as at 18 February 2015, and it had never suggested that it needed more time to investigate applicant's case. Furthermore, he contended that respondent's first reliance upon noncompliance with the Institution of Legal Proceedings Act occurred but five court days before the hearing. Accordingly, applicant by virtue of the agreement and the consensus reached with regard to the regulation of proceedings in terms of an order in June 2015, was under the impression that compliance with this legislation would not feature in the litigations.

[24] By contrast **Mr Verwant**, a legal advisor of respondent provided the following version in a further affidavit to which he deposed.

> 'The City has been unreasonably prejudiced by Premier's failure to timeously serve a notice in terms of the Institution of Proceedings Act in that –
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> 1. Premier on its version was aware that it disagreed with the City as to the amounts due to it in terms of the contract which forms the subject matter of this dispute during or about October 2010.
> 2. However at no point prior to 9 December 2014 did Premier raise its concerns in this regard with the City.
> 3. Premier issued 3764 invoices to the City during the contract period. At no point during this entire period did Premier raise a dispute with the City as it was entitled to do in terms of the conditions of contract, nor did it seek to have such dispute arbitrated.
> 4. By Premier submitting invoices over a period of more than four years without
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> (i) engaging the dispute resolution mechanisms in the contract,
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> (ii) issuing a notice to the City in regard to the dispute, or

(iii) instituting legal proceedings against the City,

the City could reasonably and did rely on Premier's acquiescence as to the manner and rate of payment in terms of the contract.

5. Indeed, after the expiry of the tender at issue in this matter, viz during September 2014, the City issued a new tender based on precisely the same principles in regard to payment terms as the 2008 tender.

   If the City had been aware of issues which Premier now raises it would have issued the new tender on different conditions. Specifically, the City would have expressly excluded the applicability of the PSIRA rate to the contract price.

6. The City assumes, as it was reasonably entitled to, that Premier – and for that matter all other parties in the position of Premier – accepted the City's calculations in respect of the Minister of Labour's departures from the sectoral determinations.

7. Further, the City emphasises that it has not made provision in its budget for the increased amounts which Premier, now some seven years after the commencement of the contract, five years after the difference of opinion concerning the calculations of the contract price and eight months after the expiration of the contract, claims.

8. The above issues are patently unfair to the City. They can hardly be described as anything other than unreasonable prejudice.'

[25] On the strength of this affidavit and the finding in *CJ Ranch, supra*, Mr Katz submitted that an application for condonation in terms of s 3 (4) of the Institution of Proceedings Act was required to set out fully the explanation for the delay, which explanation must cover the entire period of delay and must be considered to be reasonable. Furthermore, application for condonation must be made as soon as the party realises that it is required to do so.

[26] Mr Katz also referred to applicant's own version, namely, that it required a period of seven months in which to formulate its claim against the respondent. It had consulted its attorneys in November 2014. It then met with officials of the respondent on 09 December 2014. It wrote a letter of demand to respondent on 14 January 2015. Respondent then replied with a detailed letter of 18 February 2015. Two weeks later, on 04 March 2015, applicant briefed counsel and a week later it consulted with counsel again; that is on 12 March 2015. On 08 April 2015, it briefed counsel with further information regarding the calculations upon which its claim was based after which its legal team began to draft the founding affidavit in May 2015. This work took a further month to finalise and founding papers were issued on 25 June 2015. There is, in Mr Katz's view, no explanation as to why at any stage during this process the applicant did not direct a notice to the City in terms of s 3 of the Institution of Proceedings Act.

[27] With regard to prejudice, Mr Katz pointed out that applicant had issued in excess of 3000 invoices to the respondent during the contract period without engaging the dispute resolution mechanism contained in terms of clause 38.1. By submitting invoices during the contract period without raising any dispute, the respondent could reasonably, and in fact did rely on applicant's acquiescence as to the manner and rate of payment in terms of the contract. After the expiry of the tender it issued during September 2014, respondent issued a new tender based on precisely the same principles with regard to payment terms as were contained in the 2008 tender. According to Mr Katz, had respondent been aware of issues which applicant now seeks to raise, it would have issued a new tender on different

conditions. Furthermore, he contended that the respondent had not made provision in its budget for the increased amount which applicant now at a very late stage seeks to claim. This was patently unfair and was clearly prejudicial to the respondent.

[28] Mr Katz emphasised to the court that the applicant bore the onus of establishing that the respondent was not unreasonably prejudiced by its failure to give timeous notice. It was not for the respondent to show that it was prejudiced by the delay. To hold that the respondent bore such an onus would amount to a material misdirection in that it would entail a reversal of the onus as set out in *CJ Ranch* at paras 51-52.

[29] Mr Kirk-Cohen contended that on 18 February 2015, the applicant's had received an 81 page letter which included a passage, 'it should be noted at the outset that the parties have had, and by all accounts still have, a good working relationship. It however appears that there were a few clauses in the Tender that led to interpretational differences and this has led to the current impasse.' This letter concluded thus:

> 'Having regard to the above and the supporting documents attached thereto it is clear that the City of Cape Town is not liable for any amounts allegedly due to your client. Any action instituted by your client will be vigorously defended in any Forum of its choosing. It should be noted that your client tendered and was one of the successful service providers and replacement tender… which is awarded on the same basis… We hope this satisfies your queries raised to date in your meetings and correspondence with the City.'

[30] According to Mr Kirk-Cohen, it required some significant amount of time to examine the contents of this letter and its annexures before generating relevant

spread sheets to calculate whether there was a claim to be brought by applicant. It was only after the 81 page letter had been produced that the possibility of a claim "really emerged."

[31] It appears to me that, regrettably, applicant was not prudently advised in this regard. Thus it opened itself up to the argument that it never demonstrated any cause, let alone good cause ,for its non-compliance with the relevant legislation until the proverbial thirteenth hour, and then only, after the insistence of the Court. However, as an order was granted in 2015, which seems to have generated the incorrect impression on the part of applicant that compliance with the Institution of Proceedings Act would not feature in this litigation and that, further, were I to deny condonation, this would ensure that applicant could not vindicate any rights which it enjoys under s 34 of the Republic of South Africa Constitution Act 108 of 1996, the spirit, purport and objects of which should figure in any such application, I am prepared to grant the necessary condonation.

The merits

[32] The applicant has contended that it had no option but to submit invoices based on what it referred to as "the City's interpretation" of the conditions of contract and, in particular, clause 11.4.3 in order to receive any payment. Its argument therefore, is that if it had submitted invoices for what it considered were the price escalations to which it was entitled by virtue of the wage adjustments brought about by the new sectorial determinations, respondent would otherwise not have had any payment thereof. Significantly, the applicant never made any attempt

to exercise its rights contained in the conditions of contract as provided for in clause 42 thereof:

> 42 **ARBITRATION**
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> 42.1 Should any dispute arise between the parties in connection with:
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> 42.1.1 the rights and obligations of any party in terms of arising out of this Contract or out of its termination; or
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> 42.1.2 the implementation or interpretation of this Contract, or
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> 42.1.3 the rectification, termination or cancellation of this Contract, or
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> 42.1.4 any matter affecting the interest of the parties in terms of the Contract
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> that dispute may, unless resolved between the parties, be referred to, and be determined by arbitration in terms of this clause.

[33] On its own version, the first time that the applicant sought to raise any issues with regard to the conditions of contract with respondent, was during a meeting held on 09 December 2014. It issued no less than 3764 invoices to respondent for payment and, accordingly, apart from not attempting to vindicate the rights which it might have had under the conditions of contract in terms of clause 42, respondent avers that applicant waived its right to claim a shortfall in respect of the services rendered in its invoices. In short, by accepting payment from the respondent of the amounts invoiced by applicant, the latter had signalled its acceptance of an amended price escalation. At no point did it issue a notice of breach to the respondent in terms of clause 38.1 of the Conditions of Contract, nor did it declare a dispute to seek to have such dispute arbitrated in terms of clause 42 thereof.

[34] In *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) Nienaber JA held that the test to determine the intention to waive is an objective one. Thus, the question of waiver must be judged by its outward manifestations. Mental reservations which are not then communicated have no legal consequences and an outward manifestation of intention must be judged from a perspective of the other party concerned; that is to say 'from the perspective the latter's notional alter ego, the reasonable person standing in his shoes.' (para 16) In developing the content and test for this 'outward manifestation', Nienaber JA said:

> 'The outstanding manifestations can consist of words; or some other form of conduct from which the intention to waive is inferred; or even of inaction of silence the duty to act or speak exist. A complication may arise where a person's outward manifestations of intention are intrinsically contradictory as for instance where one telefax indicates an intention to waive and another, perhaps as a result of a typographical error does not.' (para 18)

[35] Mr Katz referred to applicant's founding affidavit to the effect that it was required to reduce the amount for which it invoiced the respondent 'in line with the City's interpretation of the contract before payment would be forthcoming'. This however was never communicated to respondent at the relevant time. Furthermore, there were no reservation of rights by applicant whereby it sought at some later stage to dispute the correctness of the amounts for which it had invoiced the respondent. It submitted invoices and it was paid on those invoices. It never disputed the correct amount of the payments, nor did it ever invoke the dispute resolution mechanism maintained in the conditions of contract.

[36] By contrast Mr Kirk-Cohen contended on the strength of *Greathead v SA Commercial Catering and Allied Workers Union* 2001 (3) SA 464 (SCA) at para 17:

> 'There is nothing to show that the appellant either expressly or by conduct waived or agreed to abandoned the law point. Moreover, senior counsel for the appellant informed the Court that the point did not occur to counsel who argued the matter for the appellant in the court below, the appellant could not have considered to abandoning these rights if he (and his legal revisers) had not appreciated it.'

[37] However, this is not the factual matrix which confronts this court. As indicated earlier, in his founding affidavit **Mr Meyers**, on behalf of the applicant, sets out a difference of interpretation of Sectorial Determination R.871. It is clear from paragraph 36 of the founding affidavit that, on this version, the applicant and the respondent had not agreed on the interpretation of R.871 from an early stage. In the founding affidavit Mr Meyers continues by conceding:

> 'Applicant has now been advised that both parties erred in their interpretation. However, what must be emphasised is the practical effect of what occurred 37.1. Firstly, exercising its right under clause 10 of the contract … Respondent refused to pay any amounts other than those which were in conformity with its own interpretation. As a result, in order to receive payment at all applicant was obliged to submit invoices based upon respondent's interpretation with <u>which it disagreed</u>. Respondent was paid only these amounts not – as it avers – the amounts which were due and lawfully payable under the contract. Secondly, applicant – consonant with it interpretation as to what respondent was obliged to pay – increased its wages to its security officers by amounts which significantly exceeded the amounts by which respondent increased the amounts payable. The effect of this – over time (because the dispute went on for several years) was that the business which applicant received from respondents seems to be profitable.'

[38] This is an entirely different factual matrix from the proposition urged by Mr Kirk-Cohen, namely that applicant did not appreciate the right which it enjoyed. The founding affidavit makes it clear that applicant generated invoices based upon amounts which, in its view, were incorrect and it did so for a considerable period without demure and certainly without any attempt to invoke rights which it might have enjoyed in terms of the condition of contract; in particular clause 42, being the arbitration clause. On the basis of this finding, it appears that there is no point in engaging further with whether applicant was entitled as of right to claim payment of a shortfall on the basis of what was agreed between the parties because it had waived unequivocally whatever rights it might have enjoyed thereunder.

The additional claim

[39] The applicant has also made a claim for R 2 339 296.27, which is based upon an averment that when respondent's second tender was awarded to applicant resulting in a commencement of a new contract with effect from 1 October 2014, applicant was requested to take over additional sites; that is to provide additional security for these sites.

[40] The background to this component of the case is set out in the founding affidavit as follows:

> 'At approximately 15h00 on 25 December 2010 there was a break in at sub-council 4 C Jordaan. As a result of this break in Mr Sayed was called by respondent's co-ordinator for the area, Mr Derick Dankers.
>
> 1. During this call, on 25 December 2010, Mr Dankers requested that applicant provide two Grade D security officers to the site.

2. Mr Sayed was at home when he received this call and, shortly thereafter, went to the site to establish how many guards would be required.

   2.1 When Mr Sayed arrived at the site, law enforcement officers were present and showed Mr Sayed where the break in took place. Mr Sayed was told to ensure that his guards watch over the entire building and pay particular attention to one area of the premises.

   2.2 Within 5 minutes of Mr Sayed's arrival at the site applicant's guards arrived.

   2.3 Applicant provided two Grade D guards for the day shift and two Grade D guards for the night shift, as requested.

3. From 25 December 2010 to the end of February 2013, applicant provided two Grade D security officers to the Jordaan site.'

[41] Mr Meyers then continues in his affidavit by referring to a meeting with Mr Sayed of the applicant and Mr Andre Strydom, the head of Safety and Security of respondent which took place during May 2012 regarding issues of payment. Respondent's coordinator Mr Dankers was also present at this meeting. According to Mr Meyers no dispute was raised regarding money owed to the applicant. During February 2013, Mr Sayed had a further conversation with Mr Strydom who promised that the Sports and Recreation Department had undertaken to revert directly to Mr Sayed that afternoon with regard to payment for the provision of security for the site. Failure to do so would permit Mr Sayed to remove the guards forthwith, which is exactly what happened.

[42] In November 2014, Mr Meyers provides a further basis for this claim:

'The Northdene Hall site (a community hall in Kraaifontein) experienced a break-in.

1. Mr Dankers called Mr Sayed at his home during the night regarding the break-in and requested applicant provide security to the site;
2. Pursuant to this request, Mr Sayed provided two Grade D guards for the site;
   2.1 Two Grade D security officers were provided to work Monday to Friday night shifts (from 4pm to 7pm).
   2.2 One guard was provided to work during the day on weekends and on public holidays.
3. During 2013 and 2014, Mr Dankers conveyed to Sayed that an official within the respondent (Mr Combrink) had queried whether – as a fact - respondent was providing this service and/or whether the correct number of guards were on duty. As a result, and for its part, applicant carried out inspections on a daily basis to ensure that the correct number of guards was being supplied.
4. Feedback was provided to Mr Dankers:
   4.1 He was advised that the inspections had shown that applicant had satisfied itself that it was providing guards as contracted;
   4.2 Applicant keeps a comprehensive record of its guards on various sites in what is known as an occurrence book or "OB". Mr Sayed gave these occurrence books to Mr Dankers to provide to Mr Combrink. The purpose was to demonstrate which guards had been on site during which periods;
5. Mr Sayed subsequently made contact with Mr Dankers again to discuss the on-going non-payment;'

A further component of this claim was generated by a 'break in' during October 2013, in the Parow Valley area. Mr Meyers continues with his explanation as follows:

'1. Shortly after the break in Mr Sayed was called by Mr Dankers and they agreed to the following:

1.1 Mr Sayed would meet with Mr Dankers on the Saturday morning; and

1.2 Mr Sayed would arrange for two Grade D security officers to be sent to the site that (Friday) evening.

2. On the Saturday morning Mr Sayed went to evaluate the extent of the damage at the site and discussed the security officer requirement with Mr Dankers.

2.1 Mr Dankers suggested that the security officers worked from inside the building in an office.

2.2 Mr Sayed was not happy with this suggestion and it was agreed that the guards would remain outside the building and that they should be supplied with an outside shelter and a toilet.

3. Since that date, two Grade D security officers were provided by applicant to this site. As at the end of the contract on 30 September 2014, they were still so provided.'

It is these three sets of events upon which applicant seeks an order that respondent is contractually bound to pay applicant for these services rendered in the amount of R 2 399 296.27.

[43] In his answering affidavit on behalf of respondent, Mr Jackson, the Head: Facilities Management, Safety and Security in the Corporate Services and Compliance Directorate of respondent, admitted the factual basis of these claims as set out in the founding affidavit. The defence raised by respondent is that the additional claims did not comply with the necessary statutory framework as set out inter alia in clause 16 of the General Conditions of Contract.

[44] Mr Katz submitted that applicant rendered services in a manner which had not accorded with these contractual arrangements, and accordingly, was not entitled to receive payment for these services. The tender and applicant's

acceptance thereof was subject to the terms of the FCM policy which the City had adopted and implemented as required in terms of s 111 of the Municipal Finance Management Act 56 of 2003 ("the MFMA"). In terms of s 110 (1) (a), of the MFMA there is a procedure which deals with supply chain management and the procurement by a municipality of goods and services. In terms of s 111 of the MFMA, which applies to each municipality, a municipal entity is required to implement a supply chain management policy which gives effect to provisions of the legislation. In terms of s 112 of the MFMA a supply chain management policy of a municipality must be fair equitable, transparent, competitive and cost effective and comply with the prescribed regulatory framework for municipal supply chain management.

[45] Mr Katz referred to the adoption by the respondent of a Supply Chain Management Policy (SCM) on 31 July 2013. Section 329 of this policy provides that, in respect of goods and services with the exception of professional services where there are other mechanisms in place for excepting a bid, no work shall commence, or goods be delivered before an official order has been placed for the vendor. Section 330 of the policy provides that respondent shall not be liable for payment for any goods delivered or services rendered in contravention of s 329.

[46] Mr Katz therefore submitted that it was not open to applicant to deliver the services to the respondent in the absence of duly issued purchase orders irrespective of whether this was done at the instance of respondent's employee.

[47] Much of the debate between counsel turned on the interpretation of a judgment in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008

(3) SA 1 (SCA) where respondent had been added to the list of appellant's approved suppliers for the supply and delivery of coal to certain of its power stations. Respondent then caused a summons to be issued for an outstanding amount which alleged was the appellant's total indebtedness to it for coal supplied and delivered during a specified period. One of the defences raised by the appellant was that it had not varied the supply contract in terms of the procedures set out in s 38 (1) Gauteng Rationalisation of the Local Government Affairs Act 10 of 1998, nor had it complied with the formalities prescribed in terms of s 38 (3) of that Act. Ponnan JA, in dealing with this defence, drew an important distinction as follows:

> 'It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different 'categories' of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the other hand, and the irregular or informal exercise of power granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estoppel may depend upon it. (See TE Dönges & L de van Winsen *Municipal Law* 2 ed (1953) 38 -41)
>
> In the second category, persons contracting in good faith with a statutory body or its agents are bound , in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with (see for example *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A)). Such persons may then rely on estoppel if

> the defence raised is that the relevant internal arrangements or formalities were not complied with.
>
> As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires.' (paras 11 – 13)

[48] In *RPM Bricks*, the court went on to hold that, even though the respondent had been misled into believing that the appellant's employees were duly authorised to vary an agreement that had been lawfully concluded with it, this could not deprive the appellant of a power which had been bestowed upon it by the legislature for 'to do so would be deprive the ultra vires doctrine of any meaningful effect'. (para 18)

[49] The question for determination in this case is, whether the defence put up by respondent concerns internal arrangements, or a statutory framework. Significantly, in the answering affidavit, little if any specificity is provided with regard to this defence. All that Mr Jackson says insofar as respondent's defence is concerned is that 'Premier chose to render services in a manner which do not accord with the express terms of the contract and as such is not entitled to payment for such services'. Accordingly, he states that respondent denies that Premier was entitled to raise invoices which in total amount to R 2 339 296.27 for the three sites referred to in these paragraphs <u>for the reasons set out above</u>.' (my emphasis)

[50] Significantly neither clause 8.4 of the Special Conditions of Contract nor clause 16 relied upon by Mr Katz deal at all with the procedures required to provide services for the additional sites as pleaded by the applicant. To the extent that s

329 of the SCM Policy provides that no work shall commence before an official order has been placed with the vendor', no such denial is pleaded in Mr Jackson's affidavit. To the contrary, it would appear that a successful tenderer such as applicant is allocated 'a coordinator' in each area where there are sites which it services and the coordinator serves as a point of contact for tenderers and their dealing with respondent. There was no denial, for example, that Mr Derek Dankers was such a coordinator nor that a certain request arose from coordinators such as Mr Dankers regarding emergencies such as burglaries or cancelled contracts with existing service providers. This is stated in the founding affidavit and admitted by Mr Jackson in his answering affidavit.

[51] For these reasons, it would appear that the distinction drawn in the *RPM Bricks* case*, supra* can be applied in this case and that applicant's case for the additional claim falls to be examined within the second category to which Ponnan JA referred in *RPM Bricks, supra*. The evidence put up by respondent did not gainsay this conclusion. Accordingly, at best for respondent, the claim was based on an irregular exercise of a competent power.

Conclusion

[52] Given the finding with regard to prescription and waiver the main claim for the payment of R 16 469 681.94 together with interest thereon must be dismissed. The alternative claim however for the reasons which are set out above must succeed.

[53] Given that I found that the applicant has been successful only in part and taking account of where the emphasis of the pleadings and argument were placed ,

I propose that a costs order be made whereby the respondent should be liable for thirty percent of the costs which were incurred by the applicant pursuant of this litigation.

[54] For these reasons therefore:

1. The application for the payment of the sum of R 16 469 681.94 is dismissed.
2. The application for the payment of the sum of R 2 339 296.27 together with interest at the prescribed rate *a tempore mora* is upheld subject to the following qualifications:

2.1 It is directed that respondent was contractually bound to pay applicant in regard to services rendered:

2.1.1 On the site known as the Law enforcement Office (Site PRE324) during the period October 2013 to September 2014;

2.1.2 On the site known as the Northdene Hall (Site PRE326) during the period November 2012 to June 2014;

2.1.3 On the site known as Subcouncil 4 C Jordaan (PRE228) during the period December 2010 to February 2013;

2.2 It is directed that respondent – within one week of the grant of the order herein –take such steps as are necessary to process (and, if necessary, to correct) applicant's pro forma invoices which are set out in annexure V to the affidavit of Ismael Meyers and to furnish such information to applicant to enable it to raise invoices accordingly;

3. Respondent is directed – within one week of the presentment of invoices as contemplated above – to make payment of the sums due to applicant.
4. Respondent is ordered to pay thirty per cent of applicant's costs which were incurred in the application in respect of the main and additional claim, these costs to include thirty per cent of the costs of two counsel.

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DAVIS J