



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

Case No: 18681/2020

In the matter between:

BIGEN AFRICA SERVICES (PTY) LTD

First Applicant

ZUTARI (PTY) LTD

Second Applicant

INGEROP SOUTH AFRICA (PTY) LTD

Third Applicant

WATER & WASTEWATER ENGINEERING (PTY) LTD

Fourth Applicant

PROJECT ASSIGNMENTS (SA) (PTY) LTD

Fifth Applicant

and

THE CITY OF CAPE TOWN

First Respondent

**THE SPEAKER OF THE MUNICIPAL COUNCIL
OF THE CITY OF CAPE TOWN**

Second Respondent

THE MUNICIPAL MANAGER OF THE CITY OF CAPE TOWN

Third

Respondent

KNIGHT-PIESOLD (PTY) LTD

Fourth Respondent

AECOM SOUTH AFRICA (PTY) LTD

Fifth Respondent

JG AFRIKA (PTY) LTD

Sixth Respondent

GIBB (PTY) LTD

Seventh Respondent

IX ENGINEERS (PTY) LTD

Eight Respondent

ROYAL HASKONING DHV (PTY) LTD

Ninth Respondent

Coram: Justice J Cloete

Heard: 11 May 2021

Delivered electronically: 1 June 2021

JUDGMENT

CLOETE J:

Introduction

- [1] This matter has evolved into an opposed legality review between the applicants and the first to third respondents (“the City”). The applicants, along with the fourth to ninth respondents, were all successful bidders for a certain tender 293C for the provision of multidisciplinary professional services to the City’s Water and Sanitation Department (“Department”). The fourth to ninth respondents have not participated in these proceedings.
- [2] In their notice of motion the applicants sought, amongst other relief, the review and setting aside of the decisions of the City’s Council on 29 October 2020 to cancel tender 293C and not to approve the conclusion of long term contracts with any of the applicants pursuant thereto.
- [3] It is now common cause that the City’s “decision” to “cancel” tender 293C conveyed to the applicants (and fourth to ninth respondents) in a letter dated

6 November 2020 was, as subsequently conceded by the City in its counter-application, an error, and that in truth what the City's Council resolved in its meeting on 29 October 2020 was to accept a recommendation not to conclude contracts with them (as well as the fourth to ninth respondents).

- [4] The applicants and the City ("the parties") now agree that no structure within, nor official employed by, the City has cancelled tender 293C and it therefore stands until set aside, although the City submits that the practical effect of the Council's resolution of 29 October 2020 was to cancel the tender, since that resolution resulted in the tender process not being finalised.
- [5] The reason for the resolution taken is the inclusion by the City in tender 293C of what it believes to be a responsiveness (or pre-qualification) criterion that tenderers have, and indicate in their tenders, a local office in the Cape Town municipal area or within 60 kilometres of the Department's Head Office in Bellville ("local office criterion").
- [6] In argument the applicants contended that this criterion did not have to be met at the time of tendering, although this is not supported by their own case in the main founding affidavit where the deponent stated, with reference to a later tender which I deal with hereunder, that:

'It appears to me as if the only material difference between the original version of the local office requirement [i.e. in tender 293C] and the amended

version is that bidders are no longer required to have a local office as defined at the time of tender.'¹ [my emphasis]

- [7] By the date when the resolution was taken the City considered the local office criterion to be a material irregularity inconsistent with s 217(1) of the Constitution (and various pieces of empowering legislation and subsidiary instruments). Section 217(1) provides as follows:

'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective...'

- [8] The main application, launched on 11 December 2020, prompted the City to bring a counter-application on 15 March 2021 for self-review to set aside 3 decisions, namely (a) the approval by its Bid Specification Committee ("BSC") on 1 February 2019 of the tender documents for tender 293C; (b) the advertising of this tender and tender documents on 8 March 2019; and (c) the decision by its Bid Adjudication Committee ("BAC") on 17 February 2020 to award the tender to the applicants and fourth to ninth respondents.

- [9] The City accepts that if the applicants are correct that tender 293C is not tainted by the "material irregularity" relied upon, then it must be implemented (and the process finalised to implementation). The parties also agree that the counter-application, if successful, will render the applicants' relief moot. It is for this reason that the matter evolved into a legality review as opposed to a

¹ Main founding affidavit para 63.

PAJA review.² However they differ on the implications thereof for purposes of determining this matter.

[10] The last-mentioned requires explanation. The applicants accept that the relief sought in the City's counter-application pertains to decisions which pre-date the Council resolution which they seek to impugn. It is settled law that acts performed on the assumption of validity of a prior act (or decision) are rendered invalid when that prior act (or decision) is set aside: *Seale*³, and that this would have the "domino effect" that the impugned resolution will also be set aside.

[11] However the applicants' stance is that this should be disregarded in considering the issue of whether the City is guilty of unreasonable delay in launching the counter-application for self-review, whereas the City's stance is that the whole debate about whether there has been an unreasonable delay is a pointless exercise, given that the core issue – i.e. whether the inclusion of the local office criterion in tender 293C amounts to a material irregularity – is raised in both the main and counter-applications, and is indeed now the only real issue for decision in each of them.

[12] It is common cause that on the same day the applicants were notified of the Council's resolution, i.e. 6 November 2020, the City advertised a new tender for the same services ("194C") which dealt differently with the local office

² See *Asla* referred to hereunder at para [45].

³ *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at paras [12] to [14].

criterion (there are some other differences but they are not relevant for present purposes).

[13] The tender process for tender 194C is at an advanced stage and the City previously gave an undertaking not to award it before 17 May 2021 (6 days after this matter was heard), although once awarded it will nevertheless be subject to the same internal appeal process under s 62 of the Systems Act⁴ (which may be lodged within 21 days of date of notification of the BAC's decision) and the processes prescribed in s 33 of the Local Government: Municipal Finance Management Act ("MFMA") which the City estimates should take a further 60 days thereafter, concluding in about August 2021.⁵

[14] I deal further with this below, but in their notice of motion the applicants also sought an interdict against the City to prevent it from awarding tender 194C, evidently directed also at the duration of any subsequent appeal process following this Court's decision. As the deponent to the main founding affidavit put it:⁶

'...that no award be made pursuant to tender 194C unless and until the Council's cancellation of tender 293C has been upheld by this honourable court or by a higher court of competent jurisdiction on appeal.'

[15] To all of this must be added that, given the situation in which it presently finds itself, the City is continuing with limited "stop gap" contracts with successful

⁴ Local Government: Municipal Systems Act 32 of 2000.

⁵ Section 33 applies because the contracts extend beyond the City's 3-year budgetary period.

⁶ First applicant's founding affidavit para 80, p58.

bidders of tender 35C previously awarded on 20 March 2017, on a month-to-month basis expiring on 30 September 2021, since tender 293C was intended as the replacement for tender 35C (as is now tender 194C).

Issues for determination

- [16] In the main founding affidavit the applicants raised six grounds of review under s 6 of PAJA.⁷ In addition to five ancillary ones, their main ground was that the local office criterion is not a responsiveness (or pre-qualification) requirement, but may rather be complied with by a successful bidder upon commencement of contract (i.e. as part of the functionality assessment); is therefore not a material irregularity; and hence the resolution of 29 October 2020 is vitiated by a material mistake of law.
- [17] Given the City's concession that tender 293C has not been cancelled, the applicants only persist with their main ground plus a related one, namely that even if the local office criterion is responsive, its inclusion in the tender document is not unconstitutional and unlawful, since the City may condone non-compliance, provided that the bidder gives an undertaking to have a local office in place if awarded the tender.
- [18] During the hearing on 11 May 2021 there was some debate about the duration of the interdict sought by the applicants. This resulted in the City providing the following revised undertaking:

⁷ Promotion of Access to Justice Act 3 of 2000.

'On the basis that:

- (1) the applicants are no longer seeking any interim relief pending the judgment of this Court and pending the final determination of any appeals against this Court's judgment; and*
- (2) the applicants are seeking a final interdict in terms of paragraph 5 of the notice of motion, with everything after the date of 6 November 2020 being deleted;*
- (a) in due course the BAC will take an unconditional decision regarding the award of Tender 194C; and*
- (b) the successful (and unsuccessful) tenderers will be informed, in the letters from the City notifying them of the BAC's decision, that, in addition to the BAC's award being subject to the outcome of the Systems Act section 62 process and the MFMA section 33 process, the final outcome of the present proceedings, in which the applicants are seeking an order restraining the City "from making any award pursuant to, and from taking any steps in furtherance of, its invitation to tender no 194C/2020/2021 dated 6 November 2020", may impact on the award of the tender to the successful tenderers.'*

[19] On 25 May 2021 the applicants responded as follows:

'In light of the undertaking given by the City in the email from its legal representatives on 11 May 2021 (attached) that it will notify the bidders for Tender 194C that the outcome of that bid may be impacted upon by the court proceedings – which includes an interdictory element – the relief that the applicants seek in prayer 5 of the Notice of Motion is amended to read as follows –

"5 An order restraining the first, second and third respondents from making any award pursuant to, and from taking any other steps in furtherance of, its invitation to tender no 194C/2020/2021 dated 6 November 2020."

[20] Accordingly the issues for determination are the following:

20.1 Whether the local office criterion in tender 293C is a responsiveness requirement which had to be complied with by bidders at the time of tendering in order for their tenders to be declared responsive;

20.2 If so, whether its inclusion rendered tender 293C unconstitutional and unlawful (to which the issue of the City being entitled to grant condonation is linked); and

20.3 The revised interdictory relief, which will only require consideration should the City be unsuccessful (or the applicants successful) in the main relief.

[21] Before dealing with the relevant facts, which are largely common cause, it is convenient to set out the established approach to reviews of this nature in circumstances where, as the applicants maintain, the City has unreasonably delayed in bringing its counter-application.

Approach to delay in legality self-review

[22] I will refer to the relatively recent decision of the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*⁸ (“Asla”) where the approach was set out. It is a three stage enquiry.

[23] First, it must be determined whether the delay was unreasonable, which is a factual enquiry involving a value judgment.⁹ Second, if the delay was unreasonable, whether the City has provided a satisfactory explanation for the delay (which must cover the entire period of the delay).¹⁰ Third, if the delay was unreasonable and no satisfactory explanation has been provided, whether the delay should be overlooked, which is a flexible approach.¹¹ This involves a legal evaluation taking the following factors into account:

23.1 The potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision;¹²

23.2 The nature of the impugned decision, which involves a consideration of the merits of the legal challenge against that decision, and in this regard the nature and extent of the illegality may be a crucial factor;¹³ and

23.3 The conduct of the applicant concerned (in this case the City), particularly for State litigants because they are often best placed to

⁸ 2019 (4) SA 331 (CC).

⁹ *Asla* para [48].

¹⁰ *Asla* para [52].

¹¹ *Asla* paras [53] to [54].

¹² *Asla* para [54].

¹³ *Asla* para [55] to [58].

explain the delay and are subject to a higher duty to respect the law and rectify unlawful decisions.¹⁴ However even if a functionary has not acted as a “model litigant” or “constitutional citizen” there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance.¹⁵

[24] There is a further “catch-all” consideration, namely that even where there is no other basis to overlook the unreasonable delay, if the conduct is unlawful the court is constitutionally bound to declare it to be so, since s 172(1)(a) of the Constitution enjoins it to declare invalid any law or conduct that it finds to be inconsistent therewith (the ‘*Gijima principle*’).¹⁶

Factual background

[25] The Department makes extensive use of contracted professional services to support and implement its projects, through framework contracts in terms of which service providers are called upon to provide professional services as and when required. These professional services are linked to, and support, the Department’s planning, design and implementation of construction contracts which are essential to the fulfilment of the City’s developmental objectives.

¹⁴ Referring to *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) at para [61].

¹⁵ *Asla* paras [59] to [62] referring to good faith or intention to ensure clean governance in *Department of Transport and Others v Tasima (Pty) Ltd; Tasima (Pty) Ltd and Others v Road Traffic Management Corporation and Others* 2017 (2) SA 622 (CC) at para [168].

¹⁶ *Asla* [63] referring to *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at paras [40] to [41].

- [26] It is the Department which drives the process of formulating tender specifications for approval by the City's BSC, evaluating tender bids and making recommendations regarding their award to the City's BEC and, through the BEC, to the City's BAC. In doing so, the Department in turn receives advice from the City's Supply Chain Management department ("SCM") and makes use of templates which the SCM updates from time to time.
- [27] During 2016 the Department wished to contract for the provision of specialised, professional multidisciplinary services to it across four branches: Bulk Water, Engineering and Asset Management, Reticulation, and Wastewater Treatment.
- [28] This tender was number 35C. Its specifications were formulated based on two SCM templates, namely SCM 515: CIDB (Construction Industry Development Board) Professional Services Tender, and SCM 518: Term Tender for Civil WTA Type Framework. The SCM 515 template for professional services included a local office requirement, namely that *'tenderers must have an office in the Cape Town Municipal area'*.
- [29] The Department supported the inclusion of a local office requirement into the tender documents for tender 35C. Because it was not necessary for the office to be within the Cape Metropole, provided it was within an easy travelling distance, the local office requirement permitted bidders to specify a local office within a 60 kilometre radius of the Cape Town Civic Centre, which

would accommodate prospective bidders in areas outside the Cape Metropole such as Paarl and Stellenbosch.

[30] In addition, clause F.2.1.1.3 of the tender document for tender 35C included a provision that *'Key personnel will be expected to operate out of the local office, as the exigencies of this project require'*.

[31] The Department's reasons for including these provisions were the following. First, having contractors' key professional staff available at a local office makes them easily accessible to the City and other service providers and facilitates regular interaction and stakeholders meetings. Prior to the Covid-19 pandemic almost all meetings about the Department's projects took place in person and often included representatives of contractors appointed under the construction contracts linked to the tender 35C contracts.

[32] Second, a local office in or close to the City shortens response times and permits urgent meetings in the case of incidents such as pipe bursts or water treatment process problems. Third, a local office requirement of this sort means consultants' senior representatives, and not only key professional staff, will be available to the City for face-to-face meetings in the vicinity of the City's offices. Fourth, secondment of City staff to consultants' local offices for training is a part of the motivation for contracting with professional service providers and supports valuable skills transfer. Finally, the professional services tendered for require an ongoing local presence in order to implement the linked construction contracts.

- [33] The applicants go further and assert that it is also desirable for the City to contract with a local consultant(s) with a permanent local presence, because they are familiar with local conditions, rules and regulations. While the City accepts that local consultants probably need not acclimatise to local conditions etc, it disagrees that this is sufficient reason to favour local consultants to the exclusion of prospective bidders from elsewhere since, where local conditions, rules and regulations pose a particular challenge, this will be reflected in the tender specifications and can be achieved in various ways as set out in the City's papers.
- [34] On 12 August 2016 tender 35C was advertised and following the usual evaluation and adjudication processes was awarded on 20 March 2017. Consequent upon the award of tender 35C the City concluded eight framework contracts, one for a primary service provider and one for a standby service provider for each of the four branches. The professional services rendered in terms of tender 35C contracts have been, and remain, of utmost importance to the Department.
- [35] The tender 35C contracts commenced during the period 24 April 2017 to 7 July 2017, and were initially to run until 30 June 2019. Due to the issues which have arisen about tender 293C, the 35C contracts have had to be extended several times and, as previously stated, are currently operating on a month-to-month basis until 30 September 2021.

- [36] Also as previously stated, tender 293C was to be the replacement for tender 35C. It was to be wider in scope, amongst other things because it included framework contracts for professional services to a fifth branch in the Department, the Catchment Stormwater and River Management Branch. Moreover it was determined from the outset to run for a period exceeding three years, rather than being extended on an *ad hoc* basis, which is important for good governance of the City's contracts.
- [37] The specifications for tender 293C were considered and approved by the BSC on 1 February 2019. By that time the SCM 515 template had been updated, and the local office criterion (which in the template itself restricted potential bidders to the Cape Metropole only) had been removed.
- [38] Despite the removal of the local office criterion from the template, the BSC nevertheless decided to include it (as amplified) in the specifications for tender 293C in the same terms as those in tender 35C. The reason for this was because, based on its experience in tender 35C, the Department was, and remains, of the view that having a local office is a practical necessity for the effective implementation of the professional services to be provided.
- [39] The local office requirement in tender 293C is contained in clause F.2.1.4.5 and reads as follows:

'F.2.1.4.5 Local office

In order to be considered for an appointment in terms of this tender, tenderers must have an office in the Cape Town Municipal area or within a radius of 60 km from the Water and Sanitation Head Office, Bellville. All communication with the employer will flow through the local office where the majority of work in terms of this tender will be carried out. The address of the local office must be indicated on Schedule 1, Part T2.2: Returnable Schedules, and which will be regarded as the domicilium citandi et executandi for the purposes of any contract arising from this tender submission.'

- [40] Other salient elements of tender 293C included the following. First, in respect of each branch, one successful bidder would be appointed as "Winner", and a further two successful bidders would be appointed as "Standby Service Provider No.1" and "Standby Service Provider No.2". Second, services would be rendered "as and when required" and the City would thus have available to it a competitive choice of panellists for the provision of such services at favourable rates.
- [41] Third, the contract period was to be 60 months. This means that the award of the tender was subject to the additional requirements imposed by s 33 of the MFMA as is stated at the beginning of the tender document on page 2 under '*General Tender Information*'. Fourth, in addition to the local office criterion, key personnel as identified in the tender document would be required to '*operate out of the local office, as the exigencies of this project require*'.
- [42] Tender 293C was advertised on 8 March 2019 and closed on 18 April 2019. Thirty-four bids were received by the closing date. The BEC included officials from across the Department's various branches as well as the required SCM representative. The BEC evaluated bids against the criteria in clause F.2.1.4

which commences with '*Only those tenderers that satisfy the following criteria will be declared responsive*'. Two tenderers submitted bids without providing details of a local office, but were declared non-responsive for other reasons and according to the City this criterion (which as is apparent from the clause number in the tender document falls under F.2.1.4) was not an issue in their evaluation at all.

[43] Tender 293C elicited an unusually large number of bids. To ensure continuity of service delivery while the evaluation and adjudication processes were underway, on 18 June 2019 the BAC extended the tender 35C contracts by about six months each, to 30 December 2019. While the Department continued with evaluation of tender 293C, in the latter half of 2019 the Auditor-General of South Africa ("AGSA") commenced with its annual audit of the City which is required under the MFMA. The AGSA conducts a range of audits, including financial audits and those for regulatory and legal compliance. The AGSA's findings are compiled into a management report which is tabled in the City's Council. Every year the AGSA's audit report spans hundreds of matters, across all the City's departments.

[44] Typically, the AGSA's investigation into a particular matter commences with a written Request for Information ("RFI"), in which it raises the audit team's preliminary concerns in the form of a "communication of audit findings" ("COMAF"). A RFI is directed to a particular directorate or department within the City, which is asked to respond to the preliminary findings within seven days. In the audit for the 2018/2019 audit cycle (for the year ending 30 June

2019) a total of 42 COMAFs were raised in the City's SCM and contract management environment. One of these was COMAF 29.

- [45] On 28 October 2019 the AGSA's audit team addressed a RFI to the SCM to advise of a potential adverse audit finding in respect of a particular tender, namely 072Q, for *'The Construction of the New Retreat Low Lift Sewer Pump Station and Refurbishment of Existing Outfall Gravity Sewer with Associated Civil and Demolition Works Cape Town'*. The AGSA's concern was that the inclusion in the tender document of a local office requirement in the form of a responsiveness criterion resulted in the tender being biased in favour of bidders in the local area, and thus anti-competitive because it excluded potential bidders from outside it. The AGSA's preliminary conclusion was that:

'The restrictive requirement (fully functional office within 150km from the site) for non-responsiveness limited the participation in the tender as more bidders could have considered submitting offers if the responsiveness criteria did not indicate that bidders will be assessed as non-responsive if a bidder holds office further than 150km from the site...

The criteria to disqualify a bidder in terms of a "local office" is limiting the market and as such considered unfair tender practice in terms of the requirements of section 112 of the MFMA and consequently results in non-compliance.'

- [46] After obtaining input from the responsible official, who provided the rationale for the inclusion of the local office requirement in tender 072Q, the SCM responded to the AGSA on 4 November 2019. It set out the rationale and sought to persuade the AGSA to change its preliminary finding, advising that

tender 072Q ‘...was therefore structured in such a way to prevent non-compliance with environmental legislation and to provide for a fully functioning local office for the execution of the contract’.

[47] The audit team did not accept the SCM's response. On 26 November 2019 it furnished the City Manager with its draft management report. In relation to COMAF 29, the audit team did not dispute the explanation put up by the City justifying the need for a local office, but distinguished between the local office being used as a responsiveness criterion and its forming part of a functionality assessment of the bid. The AGSA found that the latter would be acceptable, but not the former. In reaching this conclusion the AGSA relied on s 217(1) of the Constitution, s 112(1) of the MFMA and regulation 27(2) of the SCM regulations.¹⁷ The AGSA thus further found that all expenditure incurred by the City pursuant to tender 072Q would be regarded as irregular and had to be disclosed accordingly.

[48] On 6 December 2019 the Director: SCM, Mr Basil Chinasamy, and the Director: Treasury, Mr David Valentine, met with the audit team to discuss, among other SCM matters, the audit finding in COMAF 29. Following a debate, both accepted the finding and committed the City to implementing corrective measures in relation to *‘biased tender specifications which contravened the SCM Regulations’*.

¹⁷ Municipal Supply Chain Management Regulations, 2005 made under the MFMA (contained in GN 868 of GG 27636 dated 30 May 2005, as amended).

- [49] Unaware of the engagement between the SCM, City Treasury and the AGSA, the BEC had continued with its evaluation of tender 293C. On 2 December 2019 it finalised a report to the BAC wherein it recommended ten preferred bidders, namely the applicants and fourth to ninth respondents, for further negotiations on rates and percentages that had been identified as not market-related. The report did not discuss the local office requirement because none of the preferred bidders had been disqualified on this basis (in other words, all had a local office).
- [50] On 9 December 2019 the BAC met to consider the report, which formed the sole basis for its decision (i.e. the BAC was not furnished with any source or other documents relating to tender 293C). The BAC's chairperson was Mr Arno Vorster. After considering the report, the BAC resolved to authorise each of the five branches to negotiate with the identified preferred bidders on price as recommended. On the same day the BAC further extended the tender 35C contracts to 30 September 2020, since it was anticipated as the date by which the s 33 process required for the tender 293C contracts would be completed. On 29 December 2019 the applicants and fourth to ninth respondents were notified of the BAC's decision under the hand of Chinasamy.
- [51] The applicants complain that since the notification emanated from Chinasamy who had been part of the meeting on 6 December 2019, he should have realised that tender 293C had a local office criterion like the one at issue in COMAF 29. However Chinasamy has explained that it is because of his

position as Director: SCM that notifications of this nature go out under his name. He is not personally involved in the evaluation of tenders, and had no personal knowledge of the inclusion of the local office criterion in the tender document for tender 293C at the time that the preferred bidders were selected and notified accordingly (on 29 December 2019).

[52] On 25 January 2020 the City's Chief Financial Officer (Mr Kevin Jacoby), Chinasamy and other representatives of the City met with those of National Treasury. The purpose was to discuss, generally, the AGSA's findings on SCM matters in the 2018/19 audit and the practical application of relevant parts of the MFMA and SCM regulations in the medium and longer term.

[53] The final AGSA management report for the City was signed on 28 January 2020 and the 2018/19 annual report (which includes the AGSA's audit report as required by s 121 of the MFMA) was tabled in the Council on 29 January 2020. One of the issues raised in the audit report was the "biased" drafting of tender specifications. In its management response in terms of s 121(3)(g) the City undertook to take corrective action in relation to this and other irregularities identified by the AGSA. The annual report was referred to the Municipal Public Accounts Committee for consideration.

[54] During the course of February and March 2020 further meetings were held between representatives of the SCM and City, National and Provincial Treasury regarding the matters discussed at the meeting on 25 January 2020 and similar issues. Although the local office criterion was no longer in

contention, the City presented the audit findings to National and Provincial Treasury in an effort to obtain clarity or guidance on appropriate corrective measures to address it.

[55] Still unaware of these engagements and difficulties with the local office criterion, on 10 February 2020 (following the successful conclusion of pricing negotiations), the BEC for tender 293C finalised a report for presentation to the BAC, wherein it recommended the award to the applicants and fourth to ninth respondents at the negotiated rates. This report too did not discuss the local office criterion. On 11 February 2020 an independent due diligence report conducted by Moore CT Forensic Services was finalised and submitted, which found no risks flowing from the evaluation of tender 293C.

[56] Also on 11 February 2020 Valentine's office circulated by way of an email to the City Manager and Executive Directors of the City's departments, an executive summary of the final AGSA management report *'for information and further action where needed'* and to *'mitigate any reoccurrences'* of the irregularities found by the AGSA. The recipients were informed that Valentine's office was engaged in a process to disseminate an audit action plan which, once finalised, would result in the City obtaining input from amongst others National and Provincial Treasury *'to ensure that the City addresses the root causes of the findings'*.

[57] The executive summary included the following, namely *'Bid specifications for some of the tenders were drafted in a biased manner and did not allow all*

potential suppliers to offer their goods or services, in contravention of SCM regulation 27(2)(a).... Further internal communications followed on 13, 14 and 17 February 2020, all of which were largely directed at dissemination of the information pertaining, amongst others, to the AGSA's "biased" criterion finding. One of the recipients was Mr Michael Webster, who from 1 July 2018 to 30 November 2019 was the Director: Water and Sanitation and since 1 December 2019 has held the position of Executive Director: Water and Waste.

[58] According to the City it was a matter of coincidence that the BAC also met on 17 February 2020 to consider the BEC's award report (which made no mention of the local office criterion problem) and the BAC resolved to award tender 293C as recommended. According to the City neither the BAC nor its chairperson (Vorster) were aware at the time of the award of the inclusion of the local office criterion in tender 293C and what it describes as the '*potential implications*' of COMAF 29 on its legality.

[59] The first, second and third applicants were each awarded "Winner" status and the fourth and fifth applicants (together as a joint venture) "Standby Service Provider No. 2" status. On 25 February 2020 Chinasamy arranged for a Top 300 project managers meeting, which is attended by City employees managing the most significant projects being undertaken by it. Of the BEC for tender 293C only two members attended and they were only able to be present some of the time because they had other commitments. During the time they were present, neither recalls any discussion about the local office

criterion. On 26 February 2020 the applicants (and fourth to ninth respondents) were notified of the award, subject to conclusion of the internal appeal and s 33 processes.

[60] Over the period 6 March to 23 July 2020 various steps were taken internally by the City for the envisaged corrective action which included communication between some of its own role players; the applicants were advised that no appeals had been received; certain minor amendments to the draft contracts were proposed and accepted by the applicants and other successful bidders; feedback was obtained from National and Provincial Treasury; and on 6 July 2020 Chinasamy circulated a memorandum to all BAC chairpersons, BSC and BEC members, highlighting, amongst others, the local office criterion as being non-compliant. Neither National nor Provincial Treasury objected to the conclusion of the contracts with the applicants. However Provincial Treasury, in its response dated 24 June 2020, emphasised that contract management of the services *'must give effect to the five pillars of procurement as entrenched in Section 217 of the Constitution'*.

[61] Arising from Chinasamy's memorandum of 6 July 2020 departmental officials who were members of the BEC sought clarity, through management channels, about the implications of the AGSA's findings on the local office criterion for tenders where awards had been made but the contracts had yet to be signed (including tender 293C). Mr Kevin Balfour who is the Head: Infrastructure and Project Implementation in the Bulk Water Branch and chairperson of both the BSC and BEC for tender 293C, wrote a memorandum

on Webster's behalf. Balfour stated that the BEC for tender 293C had received no direct communication in this regard. However they had heard that a list had been compiled of tenders to be cancelled and at least one department had cancelled a tender because it contained the local office criterion. The BEC was therefore uncertain whether or not tender 293C fell into that category. Balfour also set out a number of reasons which militated against its cancellation.

[62] One of these reasons was the view (which he presumably shared with Webster) that the local office criterion did not limit competition for the reason that prospective bidders' tenders would be compliant if they undertook to open a local office if successful (this view was of course not shared by the other relevant City Officials as set out above). Balfour appealed to those concerned not to cancel tender 293C since a replacement tender would not be finalised until approximately November 2021. With the 35C contracts due to expire in September 2020, the Department would not have access to necessary professional services for the whole of the 2020/2021 municipal financial year and the first 5 months of the 2021/2022 year. This would have very serious adverse consequences for the Department's capital works projects and for service delivery, which were summarised in the memorandum and substantiated in the annexures thereto. A perusal of these annexures¹⁸ supports Balfour's entreaty not to cancel because of the adverse consequences.

¹⁸ See in particular Annexure B at pages 773-782.

[63] On 28 July 2020 Webster consulted Jacoby and met with Chinasamy and Vorster. At the meeting it was ultimately concluded that tender 293C could not proceed for the following reasons. First, the AGSA had found the local office requirement in tender 072Q materially irregular and consequently classified the expenditure under the resulting contract with the successful bidder as irregular as well. Second, the City had subsequently had to cancel multiple projects with similar clauses. Third, Council could not be asked to approve contracts that would give rise to expenditure which would be classified as irregular in the next audit. It was also agreed that the process for a replacement for tender 293C should be run on an expedited basis, and that the contracts under tender 35C should be extended before they expired on 30 September 2020. On the same day Webster informed the heads in the Department, including Balfour, who in turn informed departmental officials running tender 293C.

[64] On 14 August 2020 the BEC submitted a report to the BAC requesting it to cancel tender 293C due to a material irregularity in the tender process, i.e. the inclusion of the local office requirement.¹⁹ On 24 August 2020 the BAC met to consider this request. The BAC was concerned that it did not have the authority to cancel a tender after it had been awarded and while the s 33 process was pending. This was due to the Appeal Unit in the City Manager's office having expressed a preliminary view that they were not convinced the BAC had the authority to cancel tenders in such circumstances. The BAC thus

¹⁹ The cancellation was sought in terms of clause 277.4 of the SCM Policy and regulation 13(1)(d) of the Preferential Procurement Regulations, 2017 (GN R32 in GG 40553 dated 20 January 2017).

resolved to refer the matter back to the BEC so that clarity could be obtained regarding the BAC's authority to cancel.

[65] Faced with a sort of "Hobson's choice", on 28 September 2020 the BAC acceded to the Department's request to authorise the extension, on a month-to-month basis until 30 September 2021 at the latest, of three sets of framework contracts concluded under tender 35C, namely Bulk Water, Reticulation and Wastewater Treatment. This decision was made so as to ensure the continuation of critical service delivery, and the BAC accepted the risk that expenditure incurred pursuant thereto could well be found to be irregular in the next audit.

[66] Following a series of engagements thereafter about how best to handle tender 293C, the Department, Jacoby and the City's Legal Office decided to approach the Executive Mayor and Mayoral Committee ("MAYCO") with the request that they recommend to Council that it terminate the pending s 33 process by resolving not to enter into long-term contracts with the applicants (and fourth to ninth respondents). A report to this effect was prepared and signed on 8 October 2020, then vetted for legal compliance and signed off on 12 October 2020. The report described the material irregularity as emanating from a '*recent finding*' by the AGSA.

[67] On 23 October 2020 the Executive Mayor and MAYCO resolved to make such a recommendation to Council. At its next ordinary meeting on 29 October 2020 the Council considered the recommendation and resolved to adopt it. As previously stated, this recommendation was conveyed to the applicants (and

fourth to ninth respondents) on 6 November 2020. No proactive steps were taken thereafter by the City until it launched its reactive self-review (the counter-application) on 15 March 2021, save for agreeing to an expedited timetable for the hearing of the matter after the applicants launched the main application.

Whether the delay was unreasonable

[68] There is no dispute that, objectively, the City delayed in launching its counter-application. A legality review does not have a predetermined deadline within which to launch the proceedings but must be brought within a reasonable time. As with a PAJA review, it is necessary to determine when the clock starts to run. It is now settled law that the clock starts running in legality reviews when the applicant (in this case, the City) became aware of the impugned action or ought reasonably to have become aware of it.²⁰

[69] In *Aurecon (SCA)*²¹ the City (in the court a quo) had brought an application to review and set aside its own decision to award a tender to Aurecon. In both the court a quo and the Supreme Court of Appeal the matter was approached as a PAJA review, but what is relevant for present purposes is that the City, in the face of a considerable delay, argued that it was the date it became aware of the potential unlawfulness that mattered. The Supreme Court of Appeal rejected this interpretation since it:²²

²⁰ *Asla* at para [48].

²¹ 2016 (2) SA 199 (SCA).

²² At para [16].

‘...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 the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions...’

[70] In *Asla* it was held that while the standard to be applied in assessing delay for both PAJA and legality is whether the delay was unreasonable, the assessment is not the same. The distinction lies in the 180-day period prescribed in PAJA. In *Opposition to Urban Tolling Alliance (SCA)*²³ it was found that s 7 thereof creates a presumption that a delay of longer than 180 days is *per se* unreasonable. In the context of a legality challenge however, this necessarily involves the exercise of a broader discretion, since the 180-day bar in PAJA *‘does not play a pronounced role in the context of legality’*.²⁴

[71] Furthermore in *Aurecon (CC)*²⁵ it was stated that:

‘...The City contended that knowledge by the BEC of Aurecon’s involvement in the pre-feasibility study could not be imputed to the BAC and subsequently to the City...

The SMP [Supply Chain Management Policy] defines the “City” as “the municipality of the City of Cape Town or any person(s) or committee delegated with the authority to act on its behalf”. The distinction that the City attempts to draw between what was within its own knowledge and what is within the knowledge of its committees is superficial. It is common cause that

²³ *Opposition to Urban Tolling Alliance v SANRAL* [2013] 4 All SA 639 (SCA).

²⁴ *Asla* at paras [49] to [50].

²⁵ *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at paras [38] to [39].

the BEC and the BAC are committees mandated by the City for purposes of the tender-procurement process. These committees form part of an internal arrangement by the City. Accordingly it may reasonably be expected that all information regarding the tender process which is within the knowledge of the BAC or BEC may be deemed to be within the City's knowledge. In my view that is a weak attempt by the City to deny knowledge of what it ought reasonably to have known.'

[72] Although in the present case the factual situation is the reverse (i.e. knowledge by the City as opposed to its delegated committees) there seems to be no sound reason to draw a distinction in the City's favour. Accordingly, applying the principles in the two *Aurecon* cases, the decision of which the City has been aware all along was the approval on 1 February 2019 by the BEC of the tender document for tender 293C containing the local office criterion. This is therefore the date when the clock started to run.

[73] The City was alerted to the potential unlawfulness of the local office criterion by the AGSA audit team on 28 October 2019. This is thus the date upon which its committees must be deemed to have been aware of that potential unlawfulness.

[74] It is accepted by the City that once it became aware of the irregularity which it maintains vitiated the tender process for tender 293C, it was obliged to act to correct the unlawfulness within the boundaries of the law and interests of justice.²⁶ It also accepts that it had to do so expeditiously. This is because

²⁶ *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) at paras [35] to [36].

s 237 of the Constitution makes expeditious and diligent compliance with constitutional duties an element of legality.²⁷

[75] However the City argues that what it was not required to do was to launch ‘*costly and time-consuming legal proceedings*’ in circumstances where it had the option of solving the matter quickly and cost-effectively through a “pending” statutory process, namely s 33 of the MFMA, since it was not, prior to the Council resolution of 29 October 2020, *functus officio*.²⁸

[76] While it is true that the applicants did not persist with their challenge to the utilisation of the s 33 process for that purpose given the City’s concession that the tender was never cancelled, I do not see how this works in the City’s favour. The fact of the matter is that it nevertheless took the City from 28 October 2019 to 29 October 2020 (a year) to reach the conclusion that the problem could be solved by adopting that process.

[77] It is moreover significant that the tender awards were made on 17 February 2020 and the successful bidders notified on 26 February 2020, which is about four months after the City was alerted to the potential unlawfulness of the local office criterion, and the awards and notifications themselves pre-dated the commencement of the s 33 process by at least a month. In addition the City maintained its stance that self-review was unnecessary until it launched its counter-application on 15 March 2021, five months after the later resolution

²⁷ *Khumalo* at para [46].

²⁸ In contrast to *Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C) at para [147].

was taken on 29 October 2020, and despite its knowledge of the applicants' challenge to the adoption of that process as set out in the main application launched on 11 December 2020.

[78] Viewed against the applicable legal principles, these considerations lead me to the conclusion that the delay was indeed unreasonable.

Whether the City has provided a satisfactory explanation for the delay

[79] As I see it, the fundamental difficulty which the City faces in this leg of the enquiry is that its explanation for the delay only commences on 28 October 2019, whereas the clock started running on 1 February 2019. There is thus an unexplained delay of some nine months.

[80] The Constitutional Court has made clear that the explanation must cover the entire period of the delay.²⁹ Accordingly, even if I were to accept that the City has provided a satisfactory explanation for the balance of the period in question, it has failed to meet this threshold.

[81] No purpose would thus be served by an assessment of the explanation provided for the period 28 October 2019 until 15 March 2021, and I must conclude that on this basis the explanation furnished is unsatisfactory.

Whether the delay should be overlooked

²⁹ *Asla* at para [52].

- [82] The first issue to consider is the prejudice to affected parties and the possible consequences of setting aside the impugned decision. The nub of the applicants' argument on this score is that not only they, but also the City and ratepayers, will be prejudiced if the delay is overlooked.
- [83] They submit that, apart from what they consider to be a lengthy delay in finalising tender 194C (including the internal appeal and s 33 processes), ratepayers will ultimately have to foot the bill for the extra time and resources spent by City officials as a consequence. In addition, the applicants' time spent and financial resources utilised in the process thus far, as well as their potential revenue, will be wasted.
- [84] The applicants' frustration is entirely understandable, particularly given the absence of any suggestion that they have failed to act in good faith throughout. However to my mind their complaints of prejudice are outweighed by the following. First, they have at all times been aware, and have accepted, that the award to them of tender 293C is conditional upon a positive outcome of the s 33 process.
- [85] Second, no rights flow from the submission of a bid, which is something all tenderers must do on their own time and expense. Their main significant actions subsequent to the awards to them (apart from the present litigation) have been limited to negotiating on price, minor amendments to the contracts and corresponding with the City.

- [86] Third, the loss of future revenue is, as the applicants acknowledge, potential only, since the contracts were awarded on an “as and when required” basis within the context of an ongoing competitive pool of successful bidders for the duration of the tender period.
- [87] Fourth, and most importantly, if the City is correct on the core issue, it will be unconscionable for it to be forced to incur irregular expenditure for a period of 5 years³⁰ (presumably at ratepayers’ ultimate expense). Fifth, City officials are salaried employees. They will simply have to work harder and for longer hours.
- [88] Finally, the City agreed to having the main and counter-applications heard together on an urgent basis, since their outcome (subject to any subsequent appeal from this court’s decision) will determine the future course of the process in relation to tender 194C which, if it is to continue, must in any event be concluded by 30 September 2021. Having regard to all of these considerations it is my view that, on the issue of prejudice, the scales must tip in the City’s favour. This is the first reason why the delay should be overlooked.

³⁰ Para 2.2 of the BEC report, record p78.

[89] The next issue is the core one, namely unlawfulness of the local office criterion and if so, its materiality, which stem from the first impugned decision of the BSC on 1 February 2019. In *Aurecon (CC)*³¹ it was stated that:

‘...when carrying out a legal evaluation a court must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision.’

[90] In addition to s 217(1) of the Constitution, s 112(1) of the MFMA requires, in peremptory terms, that when municipalities contract for goods or services they must do so in accordance with a system and SCM policy which is *‘fair, equitable, transparent, competitive and cost-effective’*. In turn, regulation 27(2)(a) of the SCM regulations requires that bid specifications *‘must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services’*. These requirements are carried over into the City’s SCM Policy.³²

[91] It is not required of me to consider the parties’ respective views on the nature of the local office criterion, given that interpretation is a matter of law. I have already quoted clause F.2.1.4.5 containing the local office criterion in tender 293C at paragraph 39 of this judgment, and will thus not repeat it.

[92] The settled principles pertaining to the interpretation of documents³³ are in essence as follows. The starting point is the language of the provision itself,

³¹ At para [49] with reference to *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) at para [40].

³² See clauses 1.24, 1.25, 29, 108, 129 and 408 of the SCM Policy.

³³ *Natal Joint Municipal Pension Fund v Ndumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

read in context and having regard to the purpose of the provision and the background to its preparation and production. It is an objective process and, while a sensible meaning is to be preferred, courts must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. As to background and purpose, it is common cause that the City intentionally included the local office criterion for reasons which the parties agree are rational and beneficial. I now consider the plain language of the clause read in light of the other relevant portions of the tender document.

[93] First, the clause itself commences with the words *'In order to be considered for an appointment in terms of this tender, tenderers must have an office [locally]'*. The bidder is also required, in terms of the same clause, to reflect the address of that office in the same document. This strongly suggests that the local office must already be in existence at the time of submitting the bid in order to qualify for appointment. If this were not the case it is difficult to conceive how a prospective bidder could comply with it.

[94] Second, the clause is located within clause F.2.1 which is headed *'Responsiveness Criteria'* as well as under clause F.2.1.4 which states in unequivocal terms that *'Only those tenders that satisfy the following criteria will be declared responsive'*.

- [95] Third, clause F.3.8 deals with the '*Test for responsiveness*' and clause F.3.8.2 obliges the City to '*Reject a non-responsive tender offer, and not allow it to be subsequently made responsive by correction or withdrawal of the material deviation*'. In turn, clause F.3.11.1 includes a 7-step bid evaluation process which must be followed, and kicks off with the first step being to '*Evaluate all tender offers for responsiveness as per F.3.8, and reject any found to be non-responsive*'.
- [96] The applicants submit that when clause F.2.1.4.5 refers to a bidder being considered '*for an appointment*' this is to an appointment for individual projects executed after tender award. This, they suggest, is bolstered by a comparison with clause F.2.1.4.2 which starts with '*In order to be considered for an appointment in terms of this tender, the tenderer must have the following key personnel in its employment at the close of tender*'. Accordingly, so the argument goes, if the tender document required the local office to be in place at the time of tender, it would explicitly have said so, as it has in the case of key personnel.
- [97] However there is nothing in clause F.2.1.4.2 to indicate that the key personnel concerned must already be located in the local office at the close of tender. They are only required to be in the permanent employment of the bidder at that time, alternatively, the bidder must furnish signed undertakings from specialist consultants/firms having the required personnel, stating that they will undertake the necessary work on behalf of the tenderer in terms of sub-consultant agreements.

[98] Moreover, while those responsible may be criticised for a measure of poor draftmanship, I do not see how the applicants can get around the plain wording of clauses F.3.8.2 and F.3.11.1. These apply equally to clause F.2.1.4.5 and F.2.1.4.2 (along with other responsiveness criteria). To my mind the interpretation for which the applicants contend overly strains the meaning of clause F.2.1.4.5. Instead, properly construed, the clause in question is a responsiveness or pre-qualification criterion which, if not met, must result in rejection of the bid.

[99] The question which then arises is whether a failure to meet that criterion at the time of tender is a material deviation, since immediately after clause F.3.8.2 is F.3.8.3 which reads as follows:

'The Employer reserves the right to accept a tender offer which does not, in the Employer's opinion, materially and/or substantially deviate from the terms, conditions and specifications of the tender documents.'

[100] This must be read together with the remainder of clause F.3.8.2 which provides that:

'A responsive tender is one that conforms to all the terms, conditions and specifications of the tender documents without material deviation or qualification. A material deviation or qualification is one which, in the Employer's opinion, would:

- a) detrimentally affect the scope, quality, or performance of the works, service or supply identified in the Scope of Work,*
- b) significantly change the Employer's or the tenderer's risks and responsibilities under the contract, or*

c) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.'

[101] The applicants submit that the City had a discretion to condone non-compliance with the local office criterion, particularly where the bidders' non-compliance is accompanied by a mechanism permitting it still to meet the rationale or purpose of the provision not complied with, i.e. ensuring the presence of a local office at the time of contract award. This, according to the applicants, means that the tender document complied with the principles of competitiveness and fairness.

[102] In *Afribusiness*³⁴ the Supreme Court of Appeal, albeit in a different context, emphasised that:

'Any pre-qualification requirement which is sought to be imposed must have as its objective the advancement of the requirements of s 217(1) of the Constitution.'

[103] The local office pre-qualification criterion excludes potential bidders who do not have a local office at the time of submitting their bids. This hampers competition. It impedes the fairness of the tender process. It is in conflict with the clear imperatives of s 217(1) of the Constitution as well as s 112(1) of the MFMA, regulation 27(2)(a) of the SCM regulations, and the City's own SCM Policy.

³⁴ *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) at para [38].

[104] The failure to meet both a constitutional and empowering legislative requirement (leaving aside subsidiary instruments such as regulations and policy) can only constitute a material deviation. There is no room for condonation in the sole discretion of the City, whether for practical reasons or otherwise. Nor can the failure to identify this particular criterion (in clause F.3.8.2 of the tender document itself) as one constituting a material deviation somehow confer upon the City a discretion to condone, since it goes to the heart of a fair, equitable and competitive tender process.

[105] For these reasons I conclude that the inclusion of this criterion in tender 293C rendered that tender unconstitutional and unlawful. The nature and extent of the illegality are fundamental. Accordingly the merits of the City's legal challenge are sound. This is the second reason why the delay should be overlooked.

[106] The third issue to consider is the City's conduct. It can fairly be criticised by the applicants for dithering about for a year before reaching the conclusion that tender 293C could not proceed, and for failing to ensure timeous, open channels of internal communication.

[107] However what must also be acknowledged is the practical reality of the inner machinations and processes which the City was required to follow in the face of dealing simultaneously with 42 COMAFS raised by the AGSA. There can furthermore be no question (and indeed the applicants do not suggest otherwise) that the City acted in good faith throughout and with the intent to

ensure clean governance, not only in respect of tender 293C but many others as well. To my mind these factors constitute a basis for the third reason to overlook the delay.

Conclusion

[108] To sum up: the delay was unreasonable; the City failed to provide a satisfactory explanation for the delay; but I am persuaded that there are sound reasons for the delay to be overlooked. It is thus not necessary to consider the *Gijima* principle, nor is it necessary to deal with the revised interdictory relief which the applicants seek.

[109] As far as costs are concerned, although the applicants submitted they should be entitled to their costs even if the counter-application succeeds, I did not understand this to be pursued with much vigour. I agree with the City's submission that there should be no order made as to costs. The City sought a self-review as a result of its own mistake. The main application was a non-vexatious proceeding for the judicial review of an exercise of public power by an organ of state. In these circumstances the *Biowatch*³⁵ principle applies.

[110] **The following order is made:**

³⁵ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).

1. The main application is dismissed.
2. The counter-application succeeds.
3. The following decisions of the first to third respondents (“the City”) are reviewed and set aside:
 - 3.1 The approval by the City’s Bid Specification Committee on 1 February 2019 of the tender documents for tender number 293C/2018/19 (“Tender 293C”);
 - 3.2 The advertising by the City of Tender 293C and its tender documents on 8 March 2019; and
 - 3.3 The decision by the City’s Bid Adjudication Committee on 17 February 2020 to award Tender 293C to the applicants and the fourth to ninth respondents.
4. No order is made as to costs.

J I CLOETE

For applicant: Adv S **Rosenberg** SC, rosenberg@capebar.co.za; 072 831 1554

Adv A **Toefy**, achmat.toefy@capebar.co.za; 083 259 4493

Instructed by: Weavind & Weavind Inc, R Johnson, raiford@weavind.co.za; 082 901 5068

For respondent: Adv A **Breitenbach SC**, breitenb@capebar.co.za; 082 775 0599

Adv K **Saller**, karla.saller@capebar.co.za; 073 185 5461

Adv M **Tsele**, mvtsele@gmail.com; 083 301 2182

Instructed by: Toefy Attorneys, info@toefyattorneys.co.za; 021-110 5515, M Toefy,
083 290 9066

muzzamil@toefyattorneys.co.za;