REPORTABLE

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

Case No: 6582/2020

In the matter between:

ICT-WORKS PROPRIETARY LIMITED **APPLICANT**

and

THE CITY OF CAPE TOWN **RESPONDENT**

JUDGMENT HANDED DOWN ELECTRONICALLY

ON 18 JUNE 2021

FRANCIS, AJ

Introduction:

[1] This case concerns a contract concluded in 2011 between ICT-Works Proprietary Limited ("ICT") and The City of Cape Town ("the City"). The contract was pursuant to a tender for the installation and maintenance of an automated fare collection system for the MyCiti Bus Service.

[2] The City is a municipality established in terms of Local Government: Municipal Structures Act[1] which, amongst other things, manages the metropolitan area of Cape Town. ICT is a company with limited liability duly established and incorporated as such according to the laws of the Republic of South Africa.

[3] There are two distinct but related applications before this court with regard to the contract.

[4] In the first application, ICT seeks declaratory and interdictory relief to enforce the contract until it expires in August 2025 ("the main application"). While the City accepts that the contract in its current form expires in August 2025, it opposes the main application on the basis that the contract is unenforceable due to a mistake relating to the duration of the contract and, in addition, the person signing the contract on behalf of the City lacked the requisite authority to sign a contract which expires in August 2025. In the City's view, the contract was intended to be for a limited period of 7 years and was envisaged to expire in February 2018.

[5] The second application is a conditional counter-application ("the self-review application") in which the City seeks to review and set aside decisions of its Council made in 2010 leading to the conclusion of the contract, and to declare the contract unlawful. It also seeks ancillary relief concerning the prospective

[1] 117 of 1998.

effect of the orders sought. ICT opposes the City's self-review application and denies that the contract was concluded unlawfully.

Background

[6] Extensive background information, evidence, and argument was proffered on a variety of issues, not all of which are relevant for the purpose of this judgment as will become evident later. Accordingly, I recite hereunder only those facts which I consider to be immediately relevant to the decision reached. These facts are largely common cause or not seriously disputed by the parties.

[7] On 27 March 2008, the City's Council resolved to support the investigation into the development of an Integrated Rapid Transit ("IRT") system for Cape Town based on the concept and principles of a Bus Rapid Transit ("BRT") system. The IRT system is an initiative intended to transform the public transport sector over time by integrating all public transport modes into an improved and coherent system for the commuter. An integral part of the multi-modal transport system is the BRT system which consists of a network of trunk bus and feeder bus services provided throughout the city that integrates with the Metro Rail Passenger Services, minibus taxis, conventional scheduled bus services, and metered taxi services.

[8] On 17 July 2009, the City advertised a public tender for the Automatic Fair Collection System ("AFC system"), under Tender No. 24G/2009/10, for the:

"***DESIGN, SUPPLY, DELIVERY, INSTALLATION, TESTING, AND COMMISSIONING OF THE IRT FARE SYSTEM, THE SUPPLY AND DISTRIBUTION OF FARE CARDS, AND THE PROVISION OF MAINTENANCE AND OTHER RELATED SERVICES***" ("the tender").

[9] The entire project in relation to the tender concerned the MyCiti Bus Service which provides bus services in and around various suburbs in Cape Town and the city centre.

[10] In the main, implementing the AFC system comprises the design, installation, commissioning, and maintenance of automatic control gates at different bus stations operated with smart cards, and designing and implementing a technologically advanced bus fare collection system that entails the use of a contact list smart card payment system ("the Works"). The payment system enables passengers to "tap on" and "tap off" when passengers enter into and leave the station, respectively. The smart cards are pre-loaded with a specific amount of money and are debited each time the passenger utilises the bus service.

[11] The tender had two distinct components: the one relating to the implementation and commissioning of the AFC system and the other relating to the operation and maintenance thereof.

[12] As far as the installation and commissioning of the AFC system is concerned, the tender envisaged that this would occur in two milestones: the first milestone was to be completed on 5 May 2010 and involved the implementation of a temporary fare system through the so-called AFC hand-held equipment, while the second milestone was to be completed on 16 February 2011 and entailed the installation, testing, and commissioning of the permanent equipment necessary for the operation of the AFC system.

[13] As far as the maintenance and operation services were concerned, the tender provided that both shall "*commence on the date that the Engineer issues a Taking- Over Certificate*" and shall *"continue until 30 June 2015*".

[14] The closing date for the submission of tenders was 4 September 2009, by which date 4 bidders, including ICT, submitted tenders.

[15] After the evaluation of the tenders, ICT was adjudged to be the only responsive bidder and, on 13 August 2010, the City appointed ICT as the preferred bidder.

[16] On 13 August 2010, the City Manager authorised the Manager: Integrated Public Transport, Mr Bassier, to engage in negotiations with ICT to conclude the contract. He, in turn, requested Mr Davie Bosch ("Mr Bosch"), the Manager: Business Development on the Integrated Rapid Transport team, to chair the negotiation meetings. The City also appointed its delegated agent, Techso, which

was also the Engineer appointed by the City for the project, to take part in the negotiations.

[17] Given the nature and duration of the contract, the City embarked on the process prescribed in terms of section 33 of the Local Government: Municipal Finance Management Act[2] ("the MFMA"). Where a contract is intended to last longer than three municipal financial years, section 33 of the MFMA requires a municipality to publicise background information on the proposed project and invite written comments from the local community, and solicit the views of the government departments involved with local government ("the section 33 process").The City initiated the section 33 process with regard to the IRT project on 25 June 2010 and the public were invited to provide their comments by 31 July 2010. The various government departments were also requested to provide their comments.

[18] In anticipation of the negotiations, the Engineer issued a letter to ICT which set out the parameters of the negotiations with regard to the AFC system tender and, on 14 September 2010, the first negotiations meeting took place in Cape Town between representatives of the City and ICT.

[19] The draft contract which formed the subject matter of the negotiations was based on the standard form FIDIC[3] conditions of contract for Plant and Design Build for

[2] 56 of 2003.

[3] The FIDIC Suite of Construction Contracts is written and published by the International Federation of Consulting Engineers. The "FIDIC" acronym stands for the French version of the Federation's name (Federation Internationale des Ingenieurs – Conseil).

electrical and mechanical plant, and for building and engineering works, designed by the Contractor (First Edition, 1999 – the so-called "Yellow Book"). A series of meetings were thereafter held between the parties, with the Engineer providing report-backs to the City.

[20] On 8 November 2010, the City's Bid Evaluation Committee ("BEC") presented its report to the City's Bid Adjudication Committee ("BAC") about the proposed contract. The report recorded that the subject matter of the report was a 7-year contract for the implementation, operation and maintenance of the AFC system, that approval had been granted to appoint ICT as the preferred bidder, that negotiations were concluded with ICT, and that approval was now being sought for an award of the tender by the BAC.

[21] The BAC met on 8 November 2010 and awarded the tender to ICT, subject to the approval of the City's Council in terms of section 33 of the MFMA. The BAC resolved that "*for the reasons set out in the report and subject to Council approval in terms of Section 33 of the MFMA and subject to confirmation that sufficient funding is available for the duration of the tender, the offer submitted by [ICT] … be accepted in the negotiated total amount not exceeding R376 285 716.09 (incl. VAT) from date of commencement of contract for a period of 7 years for maintenance, warranties and operations"*. The resolution records that the BAC also confirmed that the maintenance was included in the 7-year contract.

[22] On 15 November 2010, the Engineer provided a final report back to the City. The Engineer reported that the negotiations had highlighted the necessity for a Schedule of Deviations. On 16 November 2010, the Engineer e-mailed the City's Senior Legal Advisor, Ms Maureen Whare ("Ms Whare"), about the different sets of documents that would form part of the final contract and raised the issue of the Schedule of Deviations and posed various questions I relation thereto. On 17 November 2010, Ms Whare responded to the Engineer by interpolating her answers into the Engineer's e-mail.

[23] On 26 November 2010, Mr Bosch attached the proposed Schedule of Deviations to an e-mail which he sent to the Engineer. The proposed Schedule of Deviations comprised 13 pages. Pages 10 and 11 of the Schedule of Deviations records the amendment of clauses 13B.2 (b) and 13B.6 (b) of the proposed contract which deals with the commencement and termination periods for the maintenance and operations services, respectively.

[24] The effect of the proposed amendments was that the maintenance and operations part of the project would commence from the issuing by the Engineer of a Taking-Over Certificate once the Works had been completed and would continue thereafter for a period of 7 years.

[25] On 25 November 2010, the City presented a report (written by Ms Whare) to the Mayoral Council ("MAYCO") in relation to the approval sought from the Council for the award of the tender in terms of section 33 of the MFMA ("the section 33 report").

[26] The section 33 report is extensive. The executive summary states that on 27 October 2010, the Council approved the updated Business Plan for Phase 1A of the MyCiti IRT project and that the Business Plan had provided for the appointment of contractors for the AFC system "*for a seven-year period"*.

[27] The report summarised the outcome of the public consultation process undertaken by the City as prescribed in the MFMA. In relation to the AFC system contract, the section 33 report observed that *"(t)his proposed seven-year contract is for the implementation, operation and maintenance of an AFC system for the [integrated rapid transit] system …*"

[28] The section 33 report recommended that the Council take into account, with regard to the AFC system contract, that the financial obligations for each financial year of the AFC system contract were covered as follows:

Cost	**2010/11 YR 1 (R m)**	**2011/12 YR 1 (R m)**	**2012/13 YR 1**	**2013/14 YR 1 (R m)**	**2014/151 YR 1 (R m)**	**2015/16 YR 1 (R m)**	**2016/17 YR 1 (R m)**	**Total**
Capital	77.08	186.36	40.80	7.66	7.76	7.87	8.10	**335.63**
Operation	0.72	.	13.27	14.15	15.23	16.47	17.83	**77.66**

Total	**77.89**	**186.36**	**54.07**	**21.80**	**22.99**	**24.34**	**25.92**	**413.29**

[29] The section 33 report went on to record that the financial obligations were "*to be funded as follows:*

- *Through a total budgetary provision of R335.63 million over a 7 year period which is to be funded from the Public Transport Infrastructure and Systems grant (PTISG), and*

- *Through a total operating budgetary provision over 7 years of R77.66 million, which will be paid for partially from the operational income and, in so far as it will not be covered, has been included in the budgeted net Operating System Deficit provision for the IRT. This is initially funded from the Rates with a possibility of finding a partially from the Public Transport Operating Grants (PTOG), whom access to the grant is secured as is supported by national policy. The National Department of Transport (NDOT) has agreed that as a transitional measure over the first three years, the PTOG can be utilised in as far as the deficit is covered through the above mechanisms to allow time for the PTOG arrangements to be finalised".*

[30] Section 7 of the section 33 report provides the background to the public consultation process that was undertaken. It also discusses the reasons for the proposed 7-year term of the tender. Table 1 in section 7.5 of the section 33 report summarised comments received by the City. The fourth row of the table

discloses that the length of contracts publicised by the City was for 7 years, and that the National Treasury had supported the proposed 7-year contract period whilst the provincial government had taken a view that a longer contract was justified. The City's response was that "*(s)etting the contract lengths at seven years with an obligation on the suppliers to ensure the efficient running of the systems over the whole period creates an Incentive on the part of the part of the supply to ensure that the initial implementation is of a high quality.*"

[31] The section 33 report concludes by listing its appendices. Appendix IV was described as a "*CD to reach [the Council] by 26 November – Fare System: Full Contract …*"

[32] On 1 December 2010, the City's Executive Mayor placed the section 33 report on the agenda for Council's consideration at the Council meeting to be held on 9 December 2010.

[33] The Executive Mayor recommended to Council that it:

[33.1] Take into account that the financial obligations of the City were for 7 years. The operating and capital budget for each of these years from 2010/2011 through to 2016/2017 was reproduced from the table in the section 33 report setting out the City's financial obligations.

[33.2] Take into account that the obligations were to be funded through a total capital budget which was to be funded from the Public Transport Infrastructure and Grant System, partially from operational income, initial funding from rates, and the possibility of partial funding from the Public Transport Operating Grant.

[33.3] Support the inclusion of the required operating and capital budgetary provisions to cover the Automatic Fare Collection System contract for the 7-year contract period in the Medium-Term Revenue and Expenditure Framework (MTREF) for the City in the total amount of R376 285.09 (incl. VAT) plus R37 000 000.00 (incl. VAT) for the estimated contract price adjustment for a 7-year period.

[33.4] Approve the entire specific contract documents relating to the AFC system tender.

[33.5] Authorise the City Manager or his delegate to sign the contract for the tender.

[34] The Council adopted all the recommendations of the Executive Mayor at its meeting held on 9 December 2010. In addition, the Council resolved that:

[34.1] The terms of the contract were noted.

[34.2] As prescribed by section 33 of the MFMA, "*a recommendation was to be submitted to MAYCO for recommendation to Council, to the effect that:*

(i) The Council is satisfied with the City of Cape Town ("the City") will secure a significant capital investment or will derive a significant economic or financial benefit from the contract;

(ii) It approves the entire contract exactly as it is to be executed;

(iii) It authorises the City Manager to sign the contract on behalf of the City of Cape Town."

[35] The City explains, in its answering affidavit in the main application, that it cannot "*establish with certainty whether or not the Schedule of Deviations was provided to Council on 9 December 2010*" because it was unable to find, in its records, a copy of the CDs on which would have been stored the full contract with the Schedule of Deviations. Mr Bosch's evidence is that he believes that the Schedule of Deviations would have been included in the CD which, in turn, would have served before the Council.

[36] On 24 February 2011, Mr Marsden signed the contract on behalf of the City; the contract had already been signed by ICT.

[37] The contract provides that it will be in two phases:

[37.1] The first phase is the implementation phase. It involves the construction and

installation of the relevant Works. It commences on 25 February 2011, and continues until the Engineer issues a Taking-Over Certificate.

[37.2] The second phase is the maintenance phase. It commences when the Taking-Over Certificate is issued and continues for a period of seven years

[38] The issue of the duration of the contract arose in October 2015 during an exchange of correspondence between Ms Greenwood, the City's AFC Project Manager representing the City, and ICT on when the maintenance period would commence in the context of the change in the milestones that had been agreed by the parties. The City eventually accepted ICT's explanation that the maintenance period of the contract commenced on the issue of the Engineer's Taking-Over Certificate.

[39] There was some delay in the completion of the Works, and the Taking Over Certificate was only issued by the Engineer on 2 August 2018. The Engineer also certified that the implementation phase was completed on 1 June 2018. In

terms of the contract signed by the parties, this means that the maintenance period would commence from the issue of the Taking-Over Certificate on 2 August 2018 and continue for a period of 7 years thereafter. In effect, the total contract period was more than 14 years.

[40] On 30 November 2018, the City wrote to ICT stating it had been reviewing all existing contracts for compliance with section 33 of the MFMA and it was discovered that in terms of the section 33 process embarked on by the City, the contract period was in fact 7 years. The City, therefore, concluded that the contract was no longer valid as it had expired on 28 February 2018 (7 years after the commencement date of 28 February 2011)[4].

[41] On 13 December 2018, ICT replied that the contract terms were clear, and that the City was required to abide by them.

[42] After taking legal advice, on 25 July 2019, the City advised ICT that the City Manager maintained that the contract had expired in February 2018, that the City would seek condonation to extend the contract, and would issue a formal letter after meeting with the City's Legal Services Unit the following day.

[43] In August 2019, the City failed to pay the ICT invoice for June 2019.

[44] After meetings to attempt to resolve the impasse, ICT and the City signed another contract, Contract 2A, in order to facilitate payment. The City then

[4] The date should have been 25 February 2011 since the agreement commenced on 25 February 2011.

resumed payment for the work which was completed under the AFC system contract.

[45] On 27 March 2020, the City issued a new Tender, "***TENDER NO: 295S/2019/20 – SUPPLY, INSTALL, COMMMISION, OPERATE AND MAINTAIN THE IRT FARE SYSTEM AND OTHER-RELATED SERVICES*"** which was essentially the same as the AFC system tender for which ICT had been appointed.

[46] On 8 June 2020, ICT launched an urgent application, seeking an interim interdict precluding the City from making a new tender award pending the finalisation of an application for a final interdict.

[47] On 29 June 2020, ICT and the City concluded a further contract for the continued provision of services by ICT. This was without prejudice to the rights and remedies of either of the parties under the AFC system contract, and their dispute with regard to the validity and duration of this contract.

[48] In July 2020, the parties agreed to an order providing a timetable for this matter. In accordance with that agreement, ICT delivered a revised notice of motion on 21 July 2020.

[49] On 26 October 2020, the City filed its conditional counter-application, in which it sought:

[49.1] The review and setting aside of the Council's approval of ICT's tender for the contract, its approval of the AFC system contract, and its authorisation of the City Manager or his delegate to sign the contract on behalf of the City.

[49.2] A declaration that the contract was unlawful and invalid to the extent that it was inconsistent with the approvals granted in terms of s 33 of the MFMA by providing for a 7-year operations and maintenance period after the issuing of a Taking-Over Certificate.

Issues and submissions

[50] It is common cause that the contract as currently worded runs until August 2025. This is apparent from the Schedule of Deviations and the Taking-Over Certificate issued by the Engineer.

[51] ICT relies on the plain wording of the contract and seeks a declaratory order that the contract is still extant and continues until August 2025.

[52] The City, on the other hand, contends that it was always intended that the total contract period would be for seven years. The City alleges that the amendment of clauses 13B.2 (b) and 13B.6 (b) discloses a mistake which was unnoticed

because Ms Whare and the Engineer did not work initially with the Schedule of Deviations but with phrases disembodied from their contractual context. They had intended merely to effect changes to the contract to cater for the considerable time which had elapsed since the contract had been put out to tender. Furthermore, Mr Marsden did not have the authority to sign a contract binding the municipality to a contract which was, in effect, for more than 14 years instead of the 7 years as intended by the City. Accordingly, the City is of the view that the contract has lapsed and is of no force or effect.

[53] ICT bases its claim for the enforcement of the contract in the main application on the law of contract. Similarly, the City also relies on the private law of contract - mistake and lack of authority - to avoid being bound by the AFC system contract. Out of an abundance of caution, the City has applied by way of a counter-application for an order declaring the contract to be invalid as it was not in compliance with section 33 of the MFMA.

[54] The City has sought to argue that its defences of no authority and mistake are contractual defences which arise from facts which occurred after the award of the tender. In this regard, the City places great weight on two decisions: ***Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others***[5] and ***Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd***[6]. In ***Thabiso Chemicals***, Brand JA held that, once the

[5] **2001 (3) SA 1013 (SA)** at paragraph [11].
[6] **2009 (1) SA 163 (SCA)**.

tender in that case was awarded, the relationship between the parties was governed by the principles of contract law[7].

[55] These cases, however, do not assist the City. They concern conduct *after* the conclusion of the contract. When the contract terms were being negotiated, ICT was a preferred bidder and the tender had yet not been awarded to it. The tender was only awarded after Mr Marsden had signed the contract and the City Manager had notified ICT that the City had awarded the contract to it (ICT)[8].

[56] The decision by the City to conclude the contract is public in nature. It has obvious impacts on the public and the public interest (not to mention the use of public funds). And it was made within the legislative and regulatory framework governing local government, including the MFMA. In ***Polokwane Local Municipality v Granor Passi (Pty) Ltd and another***[9], Wallis JA dealt as follows with the submission that a resolution taken by a municipality in relation to a contract was contractual and could not be reviewed and set aside under PAJA:

> *The resolution undoubtedly embodied a decision. Was it of an administrative nature? In my view a decision regarding the implementation of a contract to which the municipality is a party is an act of administration. It was taken by an organ of state, exercising a public power or function in*

[7] At paragraph [18]. See also, ***Steenkamp NO v Provincial Tender Board, Eastern Cape*** **2006 (3) SA 151 (SCA)** at paragraph [12] referring to ***Logbro Property CC v Bedderson NO*** **2003 (2) SA 460 (SCA)** at paragraph [10].
[8] See, ***Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George and Others*** **[2005] JOL 13628 (C)**.
[9] **[2019] 2 All SA 307 (SCA)** paragraph [11].

relation to the enforcement of a contract concluded in terms of the empowering provisions governing transactions of this character. It had a direct, external legal effect and adversely affected Granor's rights. It did not fall within any of the statutory exceptions. Accordingly, it was administrative action and reviewable under PAJA."

[57] When Mr Marsden signed the contract, he was not exercising a power in terms of a clause in the contract and he was not exercising a private contractual power. He was exercising a public power, delegated to him by the City Manager, whose powers to conclude a contract are governed by statute (the MFMA). Furthermore, Mr Marsden did not exercise an independent discretion when signing the contract but was merely a signatory to a contract which had already been negotiated and which the Council had resolved to accept. Such conduct plainly falls within the ambit of administrative action (and is in any event the exercise of public power).

[58] In my view, whether or not specific performance should be granted or whether the City should be allowed to escape the consequences of the contract through mistake or lack of authority, depends on whether or not the contract is lawful. If the contract is unlawful, any acts (or decisions) taken as a consequence of the unlawful contract are rendered invalid.[10]

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

[59] Fundamental to the resolution of both applications is the answer to the question: was the municipality empowered to conclude the contract that it did or, put differently, was the contract lawfully concluded in compliance with the legislative prescripts which had to be followed in concluding the contract? As the Constitutional Court remarked in ***Fedsure Life Insurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*** [11]:

> "… *a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate were lawful. The rule of law – to the extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law".* (footnote omitted)

[60] The City submitted that it is not obliged to bring a review application in circumstances where the contract was purportedly not properly concluded (because of a mistake or lack of authority) or had lapsed due to the effluxion of time. The City's contention is without legal foundation. The Constitutional Court has held that organs of state may not engage in self-help when they contend that there has been an irregularity in public administration: they are obliged to approach the courts to determine the question[12].

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[11] 19**99 (1) SA 374 (CC)** at paragraph [56].

[12] ***Merofong City Local Municipality v AngloGold Ashanti Limited*** **2017 (2) SA 375 (CC)** at paragraphs [41], [42] and [62].

[61] The City does not dispute that its powers to contract are derived from and limited by the MFMA. That is public power. Alleged non-compliance with the MFMA is at the core of the City's case. Mr Marsden's actions stand unless reviewed and set aside as long as he was purportedly exercising a power derived from statute and doing so for the purpose of concluding a public contract. As Counsel for ICT argued, the decision to conclude a contract, and the actual conclusion of it through signature, are inseparable: they stand or fall together.

[62] Logically, the same principle must apply to the contractual defence of mistake. The foundation of the two defences is the same, namely a lack of consensus between the parties - in the one case, because of the content of the contract, and in the other case, because of the lack of authority to bind one of the parties. If an allegation of lack of authority gives rise to the need for review, so, too, must the allegation of mistake.

The counter-application

[63] In its conditional counter-application, the City seeks to set aside its decision of 9 December 2010 to approve the contract in terms of section 33 of the MFMA, and its decisions to approve the tender and to authorise its City Manager or his delegate to sign the AFC system contract on behalf of the City. The City contends that the Council did not approve the entire contract exactly as it was

executed, as required by sub-section 33(1)(c)(iii) of the MFMA.[13] Accordingly, the decision did not comply with a mandatory and material procedure or condition prescribed by the MFMA, and thus contravenes the MFMA.

[64] The City is candid (and it is common cause) that there is doubt as to whether or not the full Schedule of Deviations served before the Council. However, according to the City, this issue is unimportant because the recommendation upon which the resolution was based presupposed a 7-year contract and not a contract in excess of 14 years.

[65] For its part, ICT opposes the counter-application on three grounds:

[65.1] firstly, the City's review application is unreasonably and impermissibly late;

[65.2] secondly, non-compliance with section 33 of the MFMA does not automatically result in nullity as the Council complied with the provisions of section 33 of the MFMA in its decision-making process; and

[65.3] thirdly, even if the City's arguments about section 33 of the MFMA are correct, the City's conduct was unconscionable when measured against the constitutional principles of reliance, accountability and rationality and,

[13] SSection 33(1)(c)(ii) of the MFMA provides that a municipal must adopt a resolution in which "*it approves the entire contract exactly as it is to be executed*".

in light of its conduct, the City should be estopped from raising the alleged invalidity of the contract.

[66] Before considering the submissions of the parties, it is necessary to consider the general legal principles that have evolved relating to the principle of legality and self-review by organs of state, as well as the relevant legislative instruments against which the City's conduct is to be measured.

The principle of legality and self-review

[67] The principles governing self-reviews by organs of state and reactive challenges to extant administrative and executive decisions appear to be settled, and it is possible to distil the following principles from the existing legal authorities:

[67.1] Organs of state acting in their own interest and seeking to set aside their own decisions, must rely on the principles of legality and may not rely on the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")[14]. However, there is very little distinction between the grounds of review of administrative action under PAJA and the review of executive action under the principle of legality. Plaskett AJA (as he then was) on behalf of the Supreme Court of Appeal, explained this in ***Minister of Home Affairs and Another v Public Protector***[15]

[14] ***Gijima*** paragraph [38].
[15] **2018 (3) SA 380 (SCA)** at footnote 25.

"… broad grounds going to the lawfulness, procedural fairness and reasonableness of official decisions have been recognised … The only difference in the grounds of review that I can discern at present is that those exercising executive power have been exempted from having to act fairly … and disproportionality (as an aspect of unreasonableness) has not yet been recognised as a ground of review…"

Thus, those exercising executive power may rely on the PAJA grounds of review in a legality review except those grounds relating to reasonableness and procedural fairness, and they may also rely on procedural rationality[16].

[67.2] Decisions made by organs of state which are not challenged in the appropriate proceedings, by the right parties seeking the right remedy, at the right time, are treated as effective and binding, unless they are set aside by a court – even if the decisions may be vitiated by some irregularity[17]. As the Supreme Court of Appeal observed in ***Minister of Home Affairs and Another v The Public Protector,*** "*until a court is appropriately approached and an allegedly unlawful exercise of public*

[16] ***Law Society of South Africa and Others v President of the Republic of South Africa 2019 (3) SA 30 (CC)*** paragraph [61]-[65].

[17] ***Oudekraal Estates (Pty) Ltd v City of cape Town 2004 (6) SA 222 (SCA)*** paragraphs [26]-[31]; and ***Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers*** **2020 (4) SA 375 (CC)** paragraph [1].

power is adjudicated upon, it has binding effect merely because of its factual existence" [18].

[67.3] Once the subject has relied upon a decision, a government cannot, barring specific statutory authority, simply ignore what it has done. Organs of state are not entitled to simple disregard administrative actions, even if they believe the decisions to be unlawful, unless and until those decisions are set aside by a competent court. To do otherwise, would be impermissible self-help, which is contrary to the rule of law[19]. Organs of state have a higher duty to respect the law, to fulfil procedural requirements, and to respect rights when doing so[20].

[67.4] Where an administrative decision has not been frontally challenged in review proceedings, and a party challenges its validity in opposing proceedings in which the other party relies on the decision, the party impugning the decision raises what the Constitutional Court terms a "reactive challenge"[21]. Where the party concerned was aware of the decision, and a legal challenge was immediately available to it, the delay rule plays an important role[22].

[67.5] The delay rule applies to reviews under the principle of legality. It requires a party to institute review proceedings within a reasonable time. The

[18] **2018 (3) SA 380 SCA** paragraph [38].
[19] ***Kirland*** paragraphs [89] and [103].
[20] ***Ibid*** paragraph [82].
[21] ***Department of Transport and others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC)** paragraph 135.
[22] ***Merafong*** paragraphs [70]-[74].

Constitutional Court has emphasised that this requirement is informed by the constitutional duty on all organs of state to perform their constitutional obligations without undue delay[23]. The requirement "*is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions"*[24].

[67.6] The issue of delay is determined by using a two-stage process.[25]

[67.7] In the first stage, the court determines whether the delay is unreasonable or undue. This is factual enquiry in which all relevant circumstances are considered, and the court makes a value judgment[26]. The court will consider the explanation provided for the delay and the explanation should cover the entire period of the delay. Where there is no explanation, the delay will necessarily be unreasonable[27].

[67.8] In the second stage, if the delay is unreasonable, the court must determine whether it should exercise its discretion to overlook the delay to entertain the application[28]. There must be a good reason for the court to

[23] ***Tasima*** paragraph [142].
[24] ***Khumalo and Another v MEC for Education: KwaZulu Natal 2014 (5) SA 579 (CC)*** paragraph [47].
[25] ***Buffalo City Metropolitan Municipality v Asia Construction (Pty) Limited*** **2019 (4) SA 331 (CC) ("*Buffalo City*")**.
[26] ***Ibid*** paragraph [48].
[27] ***Ibid*** paragraph [52].
[28] ***Ibid*** paragraph [48].

do so, based on objective facts. The test is flexible and is informed by several factors:

[67.8.1] The potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision, and any prejudice may be ameliorated by the court's power to grant just and equitable remedies[29].

[67.8.2] The nature of the impugned decision. This requires a court to somewhat consider the merits of the challenge[30].

[67.8.3] The conduct of the party bringing the review. In ***Buffalo City***, Theron J held that "*[t]his is particularly true for state litigants seeking to review their own decisions for the simple reason that often they are best placed to explain the delay*".[31]

[67.9] Where a court refuses to determine the validity of a decision (even a decision vitiated by irregularity) as a result of unreasonable delay, the delay "*in a sense would … 'validate' nullity*"[32]. The rationale behind this principle is the need for certainty and finality for both parties affected by a decision as well as the administration of the state.

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[29] ***Ibid*** paragraph [54].
[30] ***Ibid*** paragraph [55].
[31] ***Ibid*** paragraph [59].
[32] ***Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C** (*per* Corbett J, as he then was), cited with approval in ***Oudekraal*** paragraph [27].

[67.10] In exceptional cases, even if a review is unreasonably late and there is no basis to overlook the delay, a court may still be required to declare conduct unlawful[33]. This principle – the so-called "***Gijima*** principle" – applies only where "*the unlawfulness of the impugned decision is clear and not disputed*"[34]. In ***Buffalo City***, Theron J held that this principle must be "*interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined*"[35].

The regulatory framework for the acquisition of goods and services

[68] Every municipality must have and implement a supply chain management policy ("SCM policy") that gives effect to the MFMA's requirements relating to supply chain management[36]. In reflecting the principles of section 217(1) of the Constitution, the SCM policy must be "*fair, equitable, transparent, competitive and cost-effective*"[37]. The City has adopted a SCM policy[38] which is in

[33] ***Buffalo City*** paragraph [63].
[34] ***Ibid*** paragraph [66]. See also, ***Gijima*** paragraph [41].
[35] ***Buffalo City*** paragraph [71].
[36] Section 111 of the MFMA.
[37] Section 112(1) of the MFMA.
[38] Supply Chain Management Policy (Incorporating Preferential Procurement), approved 27 March 2008.

accordance with the MFMA and the Municipal Supply Chain Management Regulations issued by the National Treasury.[39]

[69] A municipality's SCM policy is not only an internal management document that binds the municipality in the execution of its procurement activities but it is also a public document to which parties wishing to participate in tendering processes have a right of access and they must comply with these rules when they participate in any tenders[40].

[70] In general, councillors are prohibited from being involved in procurement matters and may not be members of bid committees or attend bid committee meetings[41]. An exception is made when it comes to the procurement of goods and services which involve long-term financial commitments for a municipality. In contracts of this sort, the council takes centre stage. However, until final approval by the council of a contract with long-term financial commitments, the usual procurement procedures must be followed[42].

[71] If a municipality wishes to enter into long-term contracts that may impose financial obligations on the municipality beyond the 3 years covered in its

[39]Local Government: Municipal Finance Management Act (56/2003): Municipal Supply Chain Management Regulations, GNR. 68, *GG* 27636, 30 May 2005.
[40] ***Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd*** **2008 JDR 1014 (SE)** paragraph [31].
[41]S117 of the MFMA.
[42] Section 33 (4) of the MFMA.

budget[43], section 33 of the MFMA provides that a municipality may enter into such contracts only if:

"*(a) The municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved –*

(i) Has in accordance with section 21A of the Municipal Systems Act –

(aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and

(bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and

(ii) has solicited the views and recommendations of -

(aa) the National Treasury and the relevant provincial treasury;

(bb) the national department responsible for local government; and

(cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national department;

(b) the municipal council has taken into account -

[43] Section 33 (1) of the MFMA.

(i) The municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;

(ii) the impact of those financial obligations on the municipality's future municipal tariffs and revenue;

(iii) any comments or representations on the proposed contract received from the local community and other interested persons; and

(iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a) (ii) (cc); and

(c) the municipal council has adopted a resolution in which -

(i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;

(ii) it approves the entire contract exactly as it is to be executed; and

(iii) it authorises the municipal manager to sign the contract on behalf of the municipality."

[72] It is apparent from the plain wording of section 33 of the MFMA that:

[72.1] The draft contract which the municipality proposes to conclude must be publicised and circulated for comment;

[72.2] The municipal council must carefully consider the municipality's projected financial obligations for each financial year covered by the contract and how those obligations will impact on future municipal tariffs and revenue;

[72.3] The municipal council must consider the comments, representations, views, and recommendations received on the proposed contract;

[72.4] In adopting the resolution, the municipal council must be satisfied that the municipality will secure significant capital investment or derive significant financial economic benefit from the contract;

[72.5] The municipal council must approve the entire contract exactly as it is to be executed – this assumes that the contract to be executed is placed before the council when it makes its decision; and

[72.6] The municipal council must authorise the municipal manager to sign the contract, which the council has viewed and approved, on behalf of the municipality.

[73] Section 33 of the MFMA is important when viewed within the context of a council's strategic responsibility for preparing a financial plan as part of its budgetary process for the municipality. Contracts that will last longer than 3 financial years impacts on municipal budgets and, hence, on future municipal tariffs and other revenue sources to cover the expenditure for the project. Indeed, budgets are a central element of a council's financial duties and functions and it is one of those functions that cannot be delegated[44]. It is, therefore, particularly important, as a general principle, that there is compliance with section 33 of the MFMA. This is underscored by section 19(1)(c) of the MFMA which states that a municipality may only spend money on a capital project if *"section 33 (of the MFMA) has been complied with, if that section applies to the project concerned*"*.*

Was there an unreasonable delay?

[74] There is no dispute that, objectively, the City delayed in launching its counter-application for self-review. The City's Council took a decision on 9 December 2010 to approve the contract which then commenced on 25 February 2011. The City launched a reactive counter-application on 26 October 2020, that is, more than nine years and eight months after the Council took the decision.

[75] ICT submitted that the City's delay in prosecuting its review application is impermissibly unreasonable and has furnished lengthy submissions in this regard. The City, on the other hand, alleges that it has provided a proper

[44] Section 160(2)(b) of the Constitution.

explanation for its delay and that, at a factual level, there was no unreasonable or undue delay.

[76] I deal hereunder with only those aspects of the City's delay that I deem relevant in assessing the issue of the delay:

[77] There is no explanation whatsoever for the delay between February 2011 (when the contract was concluded) and August/September 2018 when the City states it discovered the irregularity whilst conducting a review of all existing contracts to ascertain compliance with section 33 of the MFMA. In ***Buffalo City***, the Constitutional Court noted that, "*municipalities must have effective structures and mechanisms in place to ensure proper oversight for its service delivery project. This is one of its core responsibilities. It must detect and prevent the abuse of taxpayers' monies. A lack of effective oversight leads to a dysfunctionality within the municipality by creating loopholes for fraud and corruption*"[45].

[78] Municipalities are obliged in terms of section 116(1) of the MFMA to conduct a periodic review of all contracts once every three years in the case of contracts for longer than 3 years. If the City had in fact conducted a proper review and complied with its statutory obligation, it may well have uncovered the discrepancy much sooner, as indeed it did during the review of contracts conducted in

[45] ***Buffalo City*** paragraph [81].

August/September 2018. The failure to provide an explanation for this delay makes the delay unreasonable[46].

[79] In the City's replying affidavit in the counter-application, the deponent, Mr Fortune, states as follows with regard to the August/September 2018 review:

> "*The review established that the section 33 process that had been followed did not allow for a contract of longer than seven years duration. On the basis of this, the City Manager concluded that the contract was no longer valid*".

This is the self-same basis on which the City now brings its self-review application. If the City was serious about correcting its non-compliance with section 33 of the MFMA, this would have been an ideal opportunity to do so and one would have expected the City to have immediately taken the necessary legal steps to correct the situation. However, it did not do so.

[80] Between October 2018 and July 2019 (a period of approximately nine months), the City engaged ICT on the validity of the contract and also sought legal advice from its internal and external legal advisors. The City's explanation for this nine-month delay is unreasonable since the Municipal Manager had already taken a firm view that the contract was unlawful in August/September 2018 and this was communicated to ICT.

[46] ***Khumalo*** paragraph [50].

[81] The City entered into a further additional contract (Contract 2A) with ICT in July 2019. Having done so, surely the Municipality must have by then decided that the AFC system contract was at an end. However, it did not nothing much between July 2019 to 27 Mach 2020 (approximately eight months) when the City issued a new tender. In the absence of an explanation, the eight-month delay is unreasonable.

[82] After the City issued a new tender on 27 March 2020, it engaged in settlement negotiations from mid-April to late May 2020, which negotiations were unsuccessful. Again, a period of two months had lapsed (March to May 2020) for which there is no reasonable explanation. What negotiations would have achieved in the light of a clear and material irregularity, is unclear. Settlement negotiations could not cure the irregularity, especially when this irregularity had an impact on budgetary processes. Accordingly, this two-month delay, too, is unreasonable.

[83] The City knew from at least September 2018 that the contract was unlawful for lack of compliance with section 33 of the MFMA and yet it waited until 6 June 2020 for ICT to launch the main application before the City decided to file its counter-application which was done on 26 October 2020. The City provided no explanation for certain periods of the delay and those periods where it did provide an explanation, the explanations provided were largely unsatisfactory.

Indeed, having regard to the City's explanations for the delay, it is difficult not to conclude that the City's delay in bringing the self-review was not only unreasonable but egregious.

Should the delay be overlooked?

[84] In deciding whether or not to overlook the City's unreasonable delay, it is necessary to consider the nature of the impugned decision and the conduct of the City in approaching this court. Each of these factors must be considered separately and the latter alone is sufficient to refuse to overlook the delay[47].

[85] Regarding the nature of the impugned decision, the City contends that the contract is invalid because it is in breach of section 33 of the MFMA in that it is more than 7 years in duration. I agree. From the evidence placed before this court, it is apparent that the City's section 33 resolution of 9 December 2010 was based on the recommendation of the Mayoral Committee of 1 December 2010. This recommendation, in turn, was based on the report of the BAC which was, in turn, based on the report of the BEC. All the reports and recommendations disclosed that the intended contract period for the entire contract, including both construction and maintenance, was 7 years. The information statement that was publicised in terms of the section 33 process makes it clear that the contract period was for 7 years, and the engagement with national and provincial departments was based on a 7-year contract period. Indeed, the City stoutly defended its stance that the contract should not be longer than 7 years. Crucially,

[47] See, ***Buffalo City*** at paragraph [82].

the financial obligations for each of the 7 financial years were disclosed in the recommendation and the subsequent Council resolution.

[86] It is so that there is some doubt whether or not the full Schedule of Deviations, disclosing in effect a contract in excess of 14 years, served before the City's Council. However, what is apparent is that the recommendation upon which the resolution was based admits of no doubt: the Council resolved to conclude a contract which would endure for only 7 years. Accordingly, the fact that the City concluded a contract which endures for more than 14 years is a material irregularity.

[87] Counsel for ICT argued that the failure to comply with section 33 of the MFMA does not nullify the contract. I do not agree. While it is indeed so that non-compliance with certain statutory formalities may not lead to nullity, it is necessary, however, to ascertain whether there was substantial compliance with section 33 of the MFMA in light of its purpose[48].

[88] In my view, the purpose of s 33 of the MFMA is to ensure that the council is fully apprised of the financial impact, both in terms of expenditure and income, of the long-term project on the budget of the municipality. Given the budgetary implications of contracts longer than 3 years, a council ought to consider the sources of funding for the project during each financial year in which the contract for the project is to endure. In this matter, if, on ICT's argument, the contract was

[48] See, ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*** **2014 (1) SA 604 (CC)** paragraph [28]-[30]; ***African Democratic Party v Electoral Commission*** **2006 (3) SA 305 (CC)** paragraph [25].

to endure for at least 14 years, it means that the Council would have had to apply its collective mind to how the expenditure for the AFC system contract would be covered for each of the 14 years and would have to make provision in its budget for this expenditure. However, the financial impact of the project expenditure after year 7 was not made available to the Council.

[89] The length of the contract, and its attendant financial consequences, would of necessity have a ripple effect on other issues which required a resolution by the Council, such as whether or not the project has a financial benefit. Clearly, the Council could only make such a determination if it had all the available information at its disposal for the entire contract period. In the matter at hand, the Council only had at its disposal the financial information for 7 financial years and no longer. It could, therefore, not legitimately conclude that the City would derive a significant economic financial benefit from the contract beyond 7 years.

[90] It was further argued on behalf of ICT that section 33 of the MFMA does not prohibit contracts with a variable termination date: it merely adds a layer of procedure to be followed where a contract will have financial obligations for a municipality beyond the 3-year budget cycle. It was also argued that the contract in this matter was a standard FIDIC contract which made provision for the issue of variation orders where there may be a delay in the completion of the Works or if the scope of the Works was to be increased. This would invariably push forward the completion date of the project.

[91] However, ICT's interpretation of section 33 of the MFMA is difficult to reconcile with the plain wording of the aforesaid section which states expressly that a municipality must make provision for each financial year of the project. In any event, if there were to be variation orders during the course of the contract period which may have required an extension of the completion date of the project, clause 232 of the City's SCM policy (applicable at that time) makes provision for such an eventuality. This clause provides that "*any increase in contract period must be approved by the BAC and that the community must be advised of the proposed increase and be invited to provide written comments thereon*". It is common cause that no application to the BAC was made to increase the contract period after the commencement of the contract.

[92] Furthermore, the section 33 process is not meant to interfere with the normal procurement process. The section 33 process concerns itself with the length or duration of a contract and whether or not adequate financial resources are in place to secure the financial commitments arising from the contract. The Council is not meant to re-evaluate or re-adjudicate the tender. Extending the contract period for longer than 7 years constitutes a material deviation from the tender document in relation to the duration of the contract and, as such, is unfair and in breach of the principles of fairness, competitiveness, and transparency[49]. In

[49] cf. ***Premier, Free State and Others v Firechem Free State (Pty) Ltd*** **2004 (4) SA 413 (SCA)** at paragraph [30].

effect, the contract represents a tender that was materially different from the one that was evaluated and adjudicated.[50]

[93] In my view, it is clear and undisputed that the contract entered into with ICT for a period in excess of 7 years was unlawful in that it contravened section 33 of the MFMA as well as the threshold requirements of fairness, competitiveness, and transparency which are required for a valid procurement process.

[94] On the other hand, the conduct of the Municipality in bringing this application proscribes this court from overlooking the delay. As counsel for ICT so cogently argued, the City's vacillating stance, its resort to self-help, the unacceptable explanation for the delay in bringing this self-review application, and its dilatory attitude, all militate against this court overlooking the delay. I agree and am unable to find any basis upon which the delay may be overlooked.

Relief

[95] This not the end of the enquiry, however. Even where there is no basis for a court to overlook an unreasonable delay, a court may nevertheless be constitutionally compelled to declare the organ of state's conduct unlawful. As the court observed in ***Gijima***, this is so because section 172(1)(a)[51] of the

[50] cf. ***Loghdey v City of Cape Town*** **2010 (6) BCLR 591 (WCC)** at paragraph [49].

[51] Section 172 provides:

"1. When deciding a constitutional matter within its power, a court

a. Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

b. May make any order that is just and equitable, including

Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution[52]. In ***Buffalo City,*** the Constitutional Court held that the ***Gijima*** principle applies "*where the unlawfulness of the impugned decision is clear and not disputed*"[53].

[96] The contract entered into was clearly unlawful on the undisputed facts before this court with regard to the section 33 process. This court must, therefore, declare the contract invalid and set it aside. The unlawfulness of the contract entered into with ICT cannot be ignored and the court is obliged, as in ***Buffalo City*** and ***Gijima***, to set aside a contract it knows to be unlawful. Of course, the court must make an order that is just and equitable and which may ameliorate any hardship which could follow the declaration of invalidity.

[97] ICT has argued that it will suffer actual and potential prejudice if the City's self-review application is upheld. In light of the August 2025 termination date in the contract and the earlier assurances of the validity of the contract provided to ICT by the City, ICT concluded employment contracts, financing contracts, and lease agreements to ensure that it could meet its obligations under the contract.

[98] While it may be so that ICT may suffer some prejudice, one must take into account the fact that ICT is contracted to perform the same services on the same

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i. an order limiting the retrospective effect of the declaration of invalidity; and
ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[52] Paragraph [52].
[53] Paragraph [66].

terms for an uninterrupted period until 30 June 2021, *albeit* under a different contract. This means that ICT has had the benefits of a contract from March 2018 to June 2021, that is, more than three years, without having to tender for it.

[99] Justice and equity dictate that the City should not benefit from its unreasonable delay and nor should ICT be prejudiced by the illegality of the contract. I, therefore, intend making an order declaring the contract to be invalid but not setting it aside retrospectively so as to preserve the rights which have already accrued to ICT. The order does not permit ICT to obtain further rights under the invalid agreement. The declaration of invalidity shall also not affect any payments made by the City to ICT in terms of the contract up to an including 5 July 2019.[54]

Costs

[100] Ordinarily, in a commercial matter like this, even though there are broad issues of public interest at stake, costs would follow the result. Both parties have been partially successful in that the contract was declared to be unlawful but has not been set aside retrospectively and ICT is not divested of its accrued benefits under the contract.

[101] It appears to me, however, that ICT should not be mulcted with the costs of the main application which it brought in good faith and in the absence of any

[54] Apparently, no payments were effected under the contract after 5 July 2019 when another contract, Contract 2A, was concluded between the parties on 10 July 2019.

indication that the City would invoke reactive relief under the principle of legality. The City, too, gave ICT assurances since at least 2015 up until 2018 with regard to the extended duration of the agreement and did not do anything to correct the situation until ICT instituted legal action.

[102] The fact that the City has achieved nominal success to the extent that there is a declaration of constitutional invalidity, does not mean that the City should not bear the consequences of its failure to comply with its constitutional obligation to approach the court to correct the irregularity as soon as it was identified. Substantially, too, and not unlike the position of the respondent in ***Gijima***, it is ICT that succeeds. I say so because it is obvious that the City's belated efforts were directed at avoiding the contract whereas ICT, on the other hand, in good faith took legal action in seeking to enforce the contract and succeeded in not being divested of the benefits accruing to it under the contract.

Order

In the circumstances, I make the following order:

1. The main application is dismissed.

2. The counter-application succeeds only to the extent that the contract concluded between the parties on 24 February 2010 is declared unlawful and invalid.

3. The order in paragraph 2 does not have the effect of divesting ICT-Works Proprietary Limited of any rights which may have accrued to it prior to the date of this judgment and does not affect any payments that may have been made to it in terms of the contract up to and including 5 July 2019.

4. The City of Cape Town is directed to pay the costs of ICT-Works Proprietary Limited in both the main application and the counter-application, inclusive of the costs of two counsel.

FRANCIS, AJ

APPEARANCES:

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