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

Case No.:19636/2021

In the matter between:

QLC HOLDINGS (PTY) LTD
t/a QUANTUM LEAP CONSULTING Applicant

and

WESTERN CAPE GOVERNMENT:
DEPARTMENT OF THE PREMIER Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 1 APRIL 2022

MANGCU-LOCKWOOD, J

I. INTRODUCTION

[1] The applicant has brought an application seeking a declaratory order that the respondent's decision of 21 July 2021, in which three contracts (*"the contracts"*) between the parties were terminated with effect from 28 February 2022, is unlawful and invalid.

[2] The applicant is a private company referred to as Quantum Leap. Its directors are Mr Muhammed Shafiq Daniels (*"Mr S Daniels"*) and Mr Ian Swanepoel. At all relevant times, these two directors also held the majority membership in Third Quarter Technologies CC (*"Third Quarter"*), which is a subsidiary of the applicant. The respondent is the Department of the Premier in the Western Cape Government.

[3] In terms of a court order taken by agreement between the parties on 21 February 2022, the matter was to be argued on an expedited basis, and pending judgment the respondent undertook to not make any award in respect of the disputed contracts and the applicant was to continue providing the services in respect thereof.

II. CONDONATION

[4] The respondent has applied for condonation for the late filing of its answering affidavit, and the application is opposed by the applicant. Despite the urgency evident from the timing of the application and the relief sought by the applicant, and the requests made by the parties for this matter to be dealt with on an expedited basis, and the parties' agreement regarding the further conduct of the matter on 21 February 2022, this issue took up much time in the papers and at the hearing before me.

[5] I have considered the condonation application as well as the applicant's opposition to it, which highlights the respondent's tardiness and the inadequacy of the respondent's explanation for the delays. This criticism is well-deserved. It is regrettable that there was such an inordinate delay in delivering the answering papers by the respondent, and that its explanation for the delay leaves much to be desired. However, taking all the issues debated on this aspect into account, which shall not be repeated in this judgment, I am of the view that condonation should be granted. In this regard I take into account the importance of the matter which concerns public funds and public procurement processes; the interests of justice; and indeed, the fact that this is the type of matter whose adjudication is best served by a version on affidavit from the organ of state concerned.

III. THE FACTS

[6] On 17 October 2017 the Provincial Forensic Services (*"PFS"*), an independent unit in the respondent, commenced an investigation into the conduct of one Mr Rodney Daniels (*"Mr R Daniels"*) who was working at the respondent at that time. The first part of the investigation into Mr R Daniels was completed in December 2018 (*"the first investigation"*), and concluded that, between 27 May 2010 until his resignation on 30 November 2017, Mr R Daniels had engaged in fraud, forgery and uttering in order to advance the interests of Third Quarter and that he had engaged in acts of corruption. Amongst other things, it was identified that Mr R Daniels had entered into a commission agreement with members of the applicant whilst he was working for the respondent, without disclosing this fact to the respondent. It is relevant that during the period in question, Third Quarter was awarded two key State Information Technology Agency (*"SITA"*) contracts by the respondent, with Mr R Daniels acting as project manager for both. Those contracts resumed in August 2012, were extended on three occasions, and were completed on 31 July 2017.

[7] In line with the findings of the first investigation the PFS reported a criminal matter to the Directorate for Priority Crime Investigation (*"DPCI"*) for investigation, and the criminal case number CS379/03/2018 was allocated to it. The relationship between Mr R Daniels and Third Quarter was identified for further investigation, and a second investigation ensued to determine whether Mr R Daniels had a corrupt relationship with Third Quarter.

[8] Meanwhile, on 8 July 2019 the applicant submitted bids for the current contracts pursuant to a competitive bidding process. The disclosures required by the bidding documents do not expressly require a tenderer to disclose whether or not they are the subject of fraud allegations in respect of a previous bidding process or in respect of a previous contract held with the respondent or with any other organ of state. The disclosures requested in the tender documents[1], which are relevant to this

[1] At Table C of the tender form headed "Declaration of interests, Bidders past SCM practices and Independent Bid Determination".

case, relate to whether the tendering entity or its principals are companies or persons prohibited from conducting business with the public sector; whether they are listed in the National Treasury Register for tender defaulters in terms of section 29 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (*"PRECCA"*); whether they have been convicted for fraud or corruption during the previous five years in a court of law; and whether any contract between the bidder and any organ of state was terminated during the previous five years on account of failure to perform on or to comply with the contract.

[9] In September 2019 the respondent awarded the current contracts to the applicant, and the contracts came into effect from 1 October 2019 and were to expire on 30 September 2024.

[10] On 22 January 2020 the second part of the PFS investigation was completed, and a report (*"the PFS report"*) was submitted to the respondent. The findings of the second investigation were that there was indeed a corrupt relationship between Mr R Daniels and Third Quarter, and between Mr R Daniels and the applicant during the period 2010 to 2017. Similar to the first investigation, the findings in the PFS report were reported to the DPCI, and a criminal case number was allocated.

[11] According to the respondent the PFS does not disclose details of its investigations with other government departments, including the respondent, until they are completed. There is no clear evidence in these proceedings as to whether or not the members of the applicant were aware of the PFS investigation at the time of bidding for the current contracts, and the affidavits are silent in this regard. For its part, the PFS report states on the one hand, under the section headed "General conditions and limitations", that due to the sensitivity of the investigation, neither Mr R Daniels nor Third Quarter were consulted during the investigation, and that the findings and conclusions in the report were not made available to either of those parties. On the other hand, where the report recommends disciplinary action, it is stated that Mr R Daniels was indeed aware of the investigation.

[12] On 16 December 2020 criminal proceedings relating to the findings in the PFS report commenced, and the accused were Mr R Daniels, Mr S Daniels, Mr Ian Swanepoel and one Mr N Jacobs.

[13] On 16 February 2021 the respondent notified the applicant that it intended to terminate the contracts with effect from 30 September 2021, and granted the applicant 14 days within which to make written representations as to why the contracts should not be terminated. The factual basis for the intended cancellation arose from the PFS investigations. After representations were received from the applicant, and after extensive correspondence between the parties, the contracts were terminated on 21 July 2021.

[14] The letter of 16 February 2021 pointed to certain statutory and contractual provisions as the basis for cancellation of the contract by the respondent. The contractual provisions relied upon for the termination were clause 2.4 of the Service Level Agreements (*"SLA"*) and clause 23.1 of the 2010 General Conditions of Contract (*"General Conditions"*). The statutory provisions were sections 2 and 4 of the Prevention of Organized Crime Act 121 of 1998 (*"POCA"*); Regulation 16A9.1 of the National Treasury Regulations adopted in terms of the Public Finance Management Act 1 of 1999 (*"the Treasury Regulations"*); and provisions of *PRECCA*. In addition, the letter stated that the applicant had a positive obligation to disclose the allegations against it to the respondent when bidding for the contracts, and its failure to do so amounted to fraudulent non-disclosure.

[15] The issue arising for determination in these proceedings is whether the respondent was entitled to cancel the contracts on any of the bases above, an issue I consider below. However, it is well to first consider the applicable legal principles relating to the interpretation of contractual and statutory provisions.

IV. APPLICABLE LEGAL PRINCIPLES

[16] The correct approach to the interpretation of written documents, whether contracts or statutes[2], was set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni).* The exercise of interpretation must take into account the language used, understood in the context in which it is used, and having regard to the purpose of the provision. In *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd*,[3] the SCA restated these principles, emphasising that the starting point is the language of the provision itself, and continued as follows:

> *"…the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined…*
>
> *Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable."*

[17] The decision to award a procurement contract by an organ of state is a matter of public law, which is governed by the Constitution of the Republic of South Africa 108 of 1996 (*"the Constitution"*) as well as procurement prescripts such as the PFMA, Procurement Act and Procurement Regulations. However, there is also a role to be played by private law.[4] In either event, the organ if state is constrained by the principle of legality.

[18] As to the duty to disclose, there is no general rule in our law of contract that all material facts must be disclosed or that non-disclosure always amounts to

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[2] See *Lotter N O and Others v Minister of Water and Sanitation and Others* 2022 (1) SA 392 (SCA) at para 43.
[3] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA).
[4] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) para [75].

misrepresentation by silence. However, silence and failure to disclose a material fact may in certain circumstances amount to a misrepresentation.[5] The current position in law is that if, in the circumstances, it would be wrong to keep silent, then silence amounts to a misrepresentation. The position was summarised as follows in *Absa Bank Ltd v Fouche*[6]*:*

> *"[5] The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure -have been synthesized into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material. That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful. A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances.' [the first leg]*
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> *[6] Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the contract. In the case of a fraudulent misrepresentation, that must have been the result intended by the defendant.[the second leg]"*

[19] I now turn to consider the bases relied upon by the respondent for the termination of the contracts, bearing in mind the legal principles set out above.

V. THE CONTRACTUAL PROVISIONS

[20] Clause 2.4 of the SLAs provides as follows:

> *"The Department shall be entitled to terminate this Agreement forthwith by written notice if the Service Provider:*
>
> *2.4.1. Enters into insolvency,*
> *2.4.2. Commits a fraudulent or dishonest act;*

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[5] *Umso Construction (Pty) Ltd v Member of the Executive Council for Roads and Public Works Eastern Cape Province and Others* (20800/2014) [2016] ZASCA 61 (14 April 2016) para 23; R H Christie & G B Bradfield *Christie's the Law of Contract in South Africa* 6 ed at 287.

[6] *Absa Bank Ltd v Fouche* [2002] ZASCA 111; 2003 (1) SA 176 (SCA) at paras [5] – [6]. Footnotes omitted.

> *2.4.3. Is prevented from performing its obligations hereunder for a period not exceeding 2 (two) months;*
> *2.4.4. Is guilty of any conduct, which is prejudicial to the Department's interests; or*
> *2.4.5. If a judgment is entered against the Service Provider."* [emphasis provided by the respondent]

[21] The text of clause 2.4.2 indicates that it applies to conduct which occurs after the conclusion of the contract. Firstly, the provision entitles a department to terminate *"this Agreement"* in the circumstances described in the sub-clauses. Then, it refers to conduct in the present tense, and not to conduct that was "*committed*" in the past. This interpretation is supported by the remaining provisions in clause 2.4, which also contemplate conduct taking place within the duration of the contract. Clause 2.4.1 provides for an instance where the service provider "*enters into insolvency*". It does not allow for a party to rely on past insolvency which only comes to light in the present. Clause 2.4.3 contemplates the service provider being "*prevented*" from complying with its contractual obligations for a period of two months, which similarly can only relate to conduct which occurs or arises after the agreement is concluded. Clause 2.4.5 contemplates a judgment being "*entered*" against the service provider.

[22] As for clause 2.4.4, on which many submissions were made from both parties during the hearing, it entitles the respondent to forthwith terminate an agreement if a service provider *"is guilty of any conduct, which is prejudicial to the Department's interests"*. In my view, the literal interpretation of this clause is that it applies to any conduct, perpetrated at any time. *"Any conduct"* is wide enough to include previous conduct, and is an indication that this clause was intended to be read as a catch-all provision, encompassing conduct not specified in the other sub-provisions. I am also of the view that, if it were found that the applicant was indeed guilty of the fraud or corruption alleged, that might well constitute conduct that is prejudicial to the respondent's interests because of the nature of those allegations which, amongst other things, involve pecuniary disadvantage to the public purse.

[23] However, the meaning of *"is guilty"* is key to the interpretation of clause 2.4.4. Does it require a court of law to make a finding of guilt, or can anyone reach such a

conclusion? The argument advanced on behalf of the respondent is that the PFS report's findings are sufficient in this regard. It was argued that since the PFS report concluded that a corrupt relationship did exist between Mr R Daniels and Third Quarter, as well as with the applicant, these findings are conclusive and constitute conduct which is prejudicial to the respondent's interests within the contemplation of clause 2.4.4.

[24] However, the facts do not support the respondent's argument. The PFS report, although it concludes that there was a corrupt relationship between Mr R Daniels and the applicant, is prefaced by a list of 'general conditions and limitations' which states at paragraph 1.6.6 that the findings of the report *"should not be construed as…authority that person(s) investigated are guilty of an offence/ contravention as such findings can only be made by a relevant competent judicial authority"*. Indeed, this is the reason that the contents of the PFS report were made available to the DPCI, and the reason why the report concludes with recommendations for further action to be taken including disciplinary action, criminal and civil action. In fact, paragraph 1.6.7 of the 'general conditions and limitations' expressly states that the PFS could not make conclusive findings because, at the very least, Mr R Daniels had not been granted an opportunity to refute the conclusions reached in the report. Thus, factually it cannot be said the conclusions reached in the PFS report are conclusive in any respect since the report itself acknowledges that its conclusions are not conclusive. As a result, it is not necessary to decide whether *"is guilty"* will always require a finding by a court of law. However, it is noteworthy that, in the context of the allegations against the applicant in this case, which involve fraud and corruption, a court of law needs to make a finding of guilt. The allegations amount to criminal offences. An allegation of fraud and corruption cannot amount to *"guilt"* in the context of clause 2.4.4 where it pertains to fraud and corruption.

[25] Turning to the respondent's reliance on clause 23.1 of the General Conditions, it provides as follows:

> *"The purchaser [i.e. the respondent], without prejudice to any other remedy for the breach of contract, by written notice of default sent to the supplier, may terminate this contract in whole or in part:*
>
> *...*
>
> *(c) If the supplier, in the judgment of the purchaser, has engaged in corrupt or fraudulent practices in competing for or in executing the contract."*

[26] The phrase *'corrupt practice'* is defined in clause 1.4 of the General Conditions as *"the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract execution"*. *'Fraudulent practice'* is defined in clause 1.13 as follows:

> *"'Fraudulent practice' means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of any bidder and includes collusive practice among bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive the bidder of the benefits of free and open competition"*

[27] The literal wording of these clauses refers to conduct relating to the current contract concerned. What is required is that the service provider must have "*engaged in corrupt or fraudulent practices in competing for or in executing the contract*". The use of the definite article *"the"* before "*contract*" in clause 23.1 can only be a reference to the current contract to which the General Conditions of Contract are incorporated, and not to other tender contracts. This interpretation is supported by the consequences attached to the termination of the contract in the instance described in clause 23.1. In such event, clause 23.3 of the General Conditions permits the purchaser – the respondent in this case – to thereafter impose a restriction penalty on the supplier by prohibiting the supplier from conducting business with the public sector for a period not exceeding 10 years. Further, in terms of clause 23.6 the restriction penalty must be loaded in the National Treasury's central database of suppliers or persons prohibited from conducting business with the public sector. The scheme of the General Conditions is that an entity which is found to commit

misconduct either during a contract or during the bidding process for that contract, is blacklisted from conducting business with the public sector in the future for a specified period of time. The blacklisting method is evident from Table C of the tender documents to which I have already referred above, which requires a bidder to disclose when submitting a bid, whether they are listed in the National Database of entities which are prohibited from conducting business with the public sector or the National Treasury Register for Tender Defaulters in terms of PRECCA; whether they have been convicted for fraud or corruption during the previous five years in a court of law; and whether any contract between the bidder and any organ of state was terminated during the previous five years on account of failure to perform on or to comply with the contract. A reading of these documents together shows that this blacklisting scheme operates as a screening method in future bids concerning that party.

[28] The respondent's answer to the text and language of these provisions, is generalised. It was argued that the General Conditions provide for the termination of the current contracts in the event of fraudulent or corrupt activities or an abuse of the supply chain system of the respondent in the process of competing for the contracts. However, no specific conduct is alleged to have taken place during the process of competing for the contracts that form the subject of these proceedings. The conduct complained about relates to contracts that were awarded between 2012 and 2017.

[29] Thus the contractual provisions relied upon by the respondent do not assist in the circumstances of this case. I now turn to consider the statutory provisions relied upon.

VI. THE STATUTORY PROVISIONS

[30] As regards the National Treasury Regulations, the respondent relied upon Regulation 16A9.1(f)(i) and (ii) in the letter of 16 February 2021, although the

answering affidavit placed additional reliance upon Regulation 16A9.2. Regulation 16A9.1 provides:

> *"16A.9.1 The accounting officer or accounting authority must –*
>
> *(a) Take all reasonable steps to prevent abuse of the supply chain management system;*
> *(b) Investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified –*
> *(i) Take steps against such official or other role player and inform the relevant treasury of such steps; and*
> *(ii) Report any conduct that may constitute an offence to the South African Police Service;*
> *(c) ...*
> *(d) ...*
> *(e) reject a proposal for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for a particular project; or*
> *(f) cancel a contract awarded to a supplier of goods or services –*
> *(i) if the supplier committed any corrupt or fraudulent act during the bidding process or the execution of that contract; or*
> *(ii) if any official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of that contract that benefited the supplier.*
>
> *16A.9.2 The accounting officer or accounting authority –*
>
> *(a) may disregard the bid of any bidder if that bidder, or any of its directors –*
> *(i) have abused the institution's supply chain management system;*
> *(ii) have committed fraud or any other improper conduct in relation to such system ; or*
> *(iii) have failed to perform on any previous contract; and*
> *(b) must inform the relevant treasury of any action taken in terms of paragraph (a)."*

[31] Similar to many of the contractual provisions discussed above, the portions of Regulation 16A9.1 relied upon do not assist the respondent because they expressly refer to corruption or fraudulent conduct committed during the bidding process of a contract or during the execution of that contract.

[32] As for the respondent's belated reliance on Regulation 16A9.2, I note the applicant's objection[7] that the respondent is precluded from supplementing the statutory bases on which it made its decision to terminate the contracts, which remains law. I observe, however that the express wording of the provision permits an accounting officer to disregard a bid for past infractions, including abuse of the institution's supply chain management system and fraud or any other improper conduct committed in relation to such supply chain management system. It does not permit the accounting officer to terminate a contract. Regulation 16A9.2 is the provision that would have permitted the respondent to refuse to consider the applicant's bids in 2019 on the basis the respondent now relies on. However, that opportunity has passed.

[33] The respondent emphasizes the applicability of section 217 of the Constitution and the provisions of the PFMA when interpreting the Treasury Regulations. Section 217 of the Constitution highlights the importance of the principles governing public procurement processes, which are fairness, equity, transparency, competitiveness and cost-effectiveness. There is no dispute about the applicability of these provisions. Nor is there any doubt that corrupt practices are inherently damaging to procurement processes. There is furthermore no doubt that an accounting officer must take steps, as urged in the Treasury Regulations, to take all reasonable steps to prevent abuse of the supply chain management system, as discussed in *Nehawu*[8]. However, the accounting officer's conduct itself is constrained by the principles of legality and the rule of law.

[34] The provisions of the Treasury Regulations discussed above do not assist the respondent in this case. The respondent does not rely on any allegation that there was fraud or corruption in the tender processes leading to the conclusion of the three contracts during 2019. Nor does it allege that there have been any allegations of fraud

[7] On the basis, amongst others of *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at paras 17 to 18.
[8] *National Education, Health and Allied Workers Union v Minister of Public Service and Administration and others* CCT 21/21 ; *National South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others* CCT 28/21; *Public Servants Association and Others v Minister of Public Service and Administration and Others* CCT 29/21 ; *National Union of Public Service and Allied Workers v Minister of Public Service and Administration and Others* CCT 44/21 [2022] ZACC 6.

or corruption in the implementation of the current contracts. Instead, in its common cause that the allegations that are the subject of the PFS investigations relate to previous contracts and conduct allegedly committed between 2010 and 2017 – more than 18 months before the contracts in issue were awarded to the applicant.

[35] I now turn to consider the application of the provisions of PRECCA, although I note that such reliance was not mentioned in the letter of 16 February 2021, or in the respondent's heads of argument, nor was it pressed at the hearing before me on behalf of the respondent. The answering affidavit also only mentions the provisions of PRECCA by reference to the findings of the PFS report.

[36] PRECCA provides for persons convicted of *inter alia,* corrupt activities pertaining to contracts to be sanctioned, in addition to their sentence, by placing them on a Register for Tender Defaulters. It will be remembered that Table C of the tender documents makes reference to this register. Then, in terms of section 28(3) of PRECCA, the National Treasury may terminate any agreement with the person or enterprise referred but, it must take a number of considerations into account, namely:

> *"(aaa) the extent and duration of the agreement concerned;*
> *(bbb) whether it is likely to conclude a similar agreement with another person or enterprise within a specific time frame;*
> *(ccc) the extent to which the agreement has been executed;*
>
> *(ddd) the urgency of the services to be delivered or supplied in terms of the agreement;*
> *(eee) whether extreme costs will follow such termination; and*
> *(fff) any other factor which, in the opinion of the National Treasury, may impact on the termination of the agreement."*

[37] The provisions of PRECCA indicate that termination of a contract can indeed take place, but only after conviction, and after taking a number the relevant factors outlined above into account. Since there has been no conviction against the applicant, nothing further needs to be said about the applicability of PRECCA.

[38] Before I leave this section I observe that, although there was mention made of the provisions of POCA in the letter of 16 February 2021, no submissions have since

been made in that regard in the papers, in the heads of arguments submitted on behalf of either party or at the hearing before me.

VII. THE LEGAL DUTY TO DISCLOSE

[39] The respondent contends that the applicant had a positive obligation and/or legal duty to disclose allegations of the past fraudulent practices outlined in the PFS report at the time of submitting its bids in 2019, given the materiality thereof, and that its failure to do so, amounts to fraudulent non-disclosure. At the hearing before me, the respondent's counsel took the alleged non-disclosure further to include the applicant's failure to disclose the fact that criminal proceedings were instituted against it.

[40] The first question in terms of the test outlined in *Absa v Fouche* is whether there was a duty upon the applicant to make disclosure of the allegations of fraud and corruption when it submitted its bids for the contracts. The applicant argues that it had no such duty because the allegations of fraud relied upon by the respondent were within the knowledge of the respondent at the time that the tenders were evaluated and awarded to the applicant. In this regard, the applicant points to the PFS investigation which commenced in October 2017, as well as two affidavits deposed by the respondent's employees, Ms Elsa Olivier and Mr Phillip Lazenby, and provided to the South African Police Service with one dated 5 April 2018.

[41] However, as I have already indicated, the respondent states – and is in this respect supported by the contents of the PFS report – that the PFS is an independent unit. Furthermore, the respondent states that the PFS does not reveal the contents of its investigations until they are completed. Again, in this respect the respondent's version is supported by the covering page and the "general conditions and limitations section" of the PFS report, which cautioned the respondent's accounting officer that its contents were *"by their very nature, sensitive and classified as confidential and should not be discussed with or circulated to any unauthorized persons"*. The fact that

Ms Olivier and Mr Lazenby deposed to affidavits in support of the investigation does not mean that the respondent was aware of the contents of the investigation. In any event, Ms Olivier's affidavit does no more than set out the employment status of Mr R Daniels - an understandable contribution, since Ms Olivier's designation at that time was *"Director: Recruitment and Selection"*. As for Mr Lazenby, his affidavit confirmed that the PFS is an independent unit. He is listed in the PFS report as the investigator regarding the alleged conduct that is the subject of the investigation, and, similar to his affidavit, his designation is stated in the report as *"Deputy Director: PFS"*. The covering page mentions only his name as the person to whom enquiries are to be directed. It is not unusual, and is indeed understandable that there should be a separation between the investigation and the respondent, in order to foster the stated values of the PFS, namely working impartially, without fear and without favour; and indeed to inspire confidence in the outcome of its investigations.

[42] I take note of the fact that the first investigation report had already made allegations of fraud with regards to the relationship between Mr R Daniel and Quantum Leap. However, it remains undisputed that the respondent was unaware of these developments – even though they were known to the members of the PFS. The applicant is not in a position to dispute the evidence of the respondent on this aspect, namely that there was a separation between the PFS investigation and the respondent. On the basis of *Plascon-Evans*[9] there is no basis on which to reject the respondent's version that it was unaware of the contents of the PFS investigation.

[43] However, the finding that the information was not within the knowledge of the respondent at the time of bidding does not mean that the information was within the applicant's exclusive knowledge, or, to use the phrasing in *Pretorius*[10], that in a practical business sense the respondent had the applicant as its only source regarding that information. That conclusion, on the facts of this case, is a difficult one to reach,

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[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[10] *Pretorius & another v Natal South Sea Investment Trust Ltd* (under Judicial Management) 1965 (3) SA 410 (W) at 418E-F.

given the public sector in which the respondent operates. Such a conclusion would amount to ignoring the evidence that the PFS investigation was reported to the DPCI and the SAPS as far back as December 2018. This issue is exacerbated by the fact that there no clear evidence of whether or not the members of the applicant were aware of the PFS investigation at the time of bidding for the current contracts, which I have already discussed.

[44] It is difficult to come to a conclusion in this case that the only means for the respondent to acquire knowledge of the applicant's alleged conduct was through the applicant. To apply the test in *Pretorius* as approved in *Absa v Fouche,* honest people in the circumstances of the applicant, in fair dealing with respondent, would assume that the knowledge of the alleged conduct also lay within the knowledge of the respondent and would not assume that it lay within the applicant's exclusive knowledge. Those people would as a result not assume that the respondent had a right to have such information communicated to it by the applicant, because the matters were equally open to common observation, or ascertainable by ordinary diligence, or accessible to both parties alike.[11] Furthermore, the public view would probably be that the respondent should have complied with the statutory duties imposed on it, and properly conducted screening and vetting processes; and/or accelerated its investigation processes to keep apace with its bidding processes in order to better conduct its screening and vetting.

[45] It would be different if the tender documents specifically requested the applicant to disclose knowledge of allegations or known investigations against them. But that is not the case on the facts of this case. To use the language of text quoted[12] in *McCall v Goodall*[13]:

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[11] M A Millner 'Fraudulent Non-disclosure' in (1957) 74 SALJ at 177-200, 185-90. See *Drysdale v Union Fire Insurance Co Ltd* (1890) 8 SC 63 at 65; *Pretorius & another v Natal South Sea Investment Trust Ltd* (under Judicial Management) 1965 (3) SA 410 (W) at 415H-416A, 417H-418B;
Meskin NO v Anglo-American Corporation of SA Ltd and Another 1968 (4) SA 793 (W) I at 799D-808A.
[12] Quoting Spencer Bower's *The Law of Actionable Misrepresentation* 3rd ed by A K Turner (1974) para 89 at 102-3.
[13] *Mccann V Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C).

> *"It is not silence, or reticence, which in itself can amount to a misrepresentation. It must be concealment, or suppressio veri . And these terms import the existence of a duty. A man [or woman] cannot be said to conceal what [s]he is not bound to reveal, suppress what [s]he is under no duty to express, or keep back what [s]he is not required to put forward. There must be a duty of some sort to speak, arising out of the circumstances, in accordance with the principles set out in the text, before the representee can legally complain of the representor's silence. Tacit acquiescence in the self-delusion of another, if nothing is said or done to mislead, or silence which does not make that which is stated false, draws with it no legal liability."*

[46] At the hearing before me, the respondent's counsel emphasised that the applicant's non-disclosure includes its failure to disclose the fact that criminal proceedings were instituted against it. It is common cause however, that the criminal proceedings against the directors of the applicant commenced on 16 December 2020, more than a year after the contracts were awarded. As a result, the applicant could not have made such disclosure at the time of bidding, and no basis has been laid for why or how the applicant would have been in a position to make such a disclosure. In any event, by 16 December 2020, the PFS report had been submitted to the respondent, and accordingly, by then the knowledge of the criminal proceedings was not information that was peculiar to the applicant given that the respondent is the complainant in the criminal proceedings.

[47] Based on the evidence before me there is no basis upon which to conclude that the applicant had a duty to disclose information of the allegations against it, within the contemplation of the first leg of the test espoused in *Absa v Fouche*. As a result, it is not necessary to consider the second leg of the test. In any event, I observe that the respondent has failed to make out a case as to how the alleged non-disclosure induced it to enter into the contracts that are at issue in these proceedings.

[48] In conclusion, I do not agree with the contention of the applicant that as a rule, there is no obligation on bidders to disclose allegations of fraud or corruption in

previous tenders when the relevant organ of state is the one which is investigating a bidder and knows of those allegations. The facts and circumstances of each case have to be taken into account before reaching a conclusion. It is undesirable in any event to create such a rule or precedent.

[49] It is furthermore important to note that the conclusions reached in this judgment relate to the specific facts of this case. Those conclusions do not mean that the respondent is without recourse. The issue, as the facts indicate, is timing. Had the PFS investigation established or reported the alleged conduct to the respondent in time, that may have entitled the respondent to refuse to enter into the current contracts with the applicant. And should the criminal proceedings establish the alleged conduct on the part of the applicant, the respondent will have recourse in terms of the Treasury Regulations, including by blacklisting the applicant for a specified period of time, as already discussed. There may also be occasion to reflect on whether the respondent's tender documents should expressly require an entity to disclose known allegations that are pending against it.

[50] There is furthermore no doubt that fraudulent misrepresentation is material, and that fraud vitiates every transaction known to the law[14]. However, unlike in *Nomasthethu*[15], this is not a case where it has been established that there was fraud perpetrated during the tender process of the current contracts. As the case law has repeatedly stated, organs of state are constrained by principles of legality and the rule of law.

VIII. COSTS

[51] The decision being challenged was made in July 2021, and, on or about 20 October 2021 the respondent advertised the services provided in terms of the

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[14] *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another* [2020] ZASCA 74 (29 June 2020). See also *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* (40/13) [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) (28 March 2014).

[15] See also *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others op cit.*

contracts, with a closing date of 10 November 2021. The applicant only approached the court in November 2021, expecting the matter to be dealt with on an expedited basis, although it states that it did not bring an urgent application. For its part, the respondent caused the delays that are the subject of the opposed condonation application, which I have already pronounced upon, and only submitted its answering affidavit on 15 February 2022. The respondent's delay also ultimately resulted in the matter being postponed from the unopposed roll on 21 February 2021, to a different date. In light of all these considerations, I am of the view that, from 15 February 2022, the respondent should bear the costs of the application.

IX. ORDER

[1] In the result, the following order is made:

a. The respondent's decision of 21 July 2021 terminating the contracts pertaining to Oracle Specialist Services (BID FMA CEI 0002-2019/2020), Oracle Support Services (BID FMA CEI 0003-2019/2020), and Oracle Technical Services (BID FMA CEI 0001-2019/2020), is declared unlawful and invalid.

b. The respondent shall pay the costs of this application as from 15 February 2022.

N. MANGCU-LOCKWOOD

Judge of the High Court