REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 11437/2022

In the matter between:

CITY OF CAPE TOWN **Applicant**

And

RAMM SYSTEM (PTY) LTD **First Respondent**

t/a RAMM TECHNOLOGIES

NESTSTAR (PTY) LTD **Second Respondent**

Heard: 7 - 9 June 2023

Delivered: 10 August 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 10 August 2023 at 10h00.

JUDGMENT

LEKHULENI J

[1] There are three separate applications before this court. The first application is for judicial review in terms of the principles of legality. In the first application, the applicant seeks an order declaring that the award of tender number 169S/2019/20 (“tender 169S”) to the first respondent for supplying and delivering vehicle tracking and recovery to the applicant's vehicles expired on 30 June 2023. In the alternative, the applicant seeks an order that the decision of the applicant's Bid Adjudication Committee ("the BAC"), taken on 22 June 2020 to award tender number 169S to the first respondent, is invalid and that it be reviewed and set aside.

[2] The first respondent opposed the application and further launched a counter-application (the second application) against the applicant. In the counter-application, the first respondent seeks an order that the applicant be ordered to conclude a contract with the first respondent for the supply and delivery of vehicle tracking and recovery service and equipment by counter-signing the tender documents published by the applicant in respect of tender 169S. In addition, the first respondent seeks an order that the said contract would be subject to a condition that the contract period would be for 36 months in accordance with the tender document, commencing on the date when the applicant concludes the contract with the first respondent.

[3] While the impasse of tender 169S was pending between the applicant and the first respondent, the applicant proceeded to issue a tender invitation in respect of contract 198S/2022/2023 (a new tender) for precisely the same goods and services as envisaged in terms of tender 169S. The applicant proceeded in this regard without prior notice to the first respondent and without providing any indication of its further intentions regarding its self-review application in respect of tender 169S.

[4] Pursuant to that tender invitation, the first respondent applied for an interdict against the applicant (the third application) for an order interdicting the applicant from awarding tender 198S to any person. The first respondent also sought an order that the applicant be interdicted and restrained from contracting with any third party pursuant to the tender award. At the hearing of these applications, the court was advised that the applicant has since cancelled tender 198S. As a result, the interdict

application became moot, and this court was asked only to consider the question of costs in respect of the interdict application. The second respondent did not oppose the applicant's application. Instead, it filed a notice to abide the decision of this court.

THE BACKGROUND FACTS

[5] The first respondent has provided vehicle tracking services to the applicant for over fifteen (15) years. Currently, the first respondent provides tracking and recovery services for the applicant regarding tender 387G, which was awarded on 28 November 2016. This contract is for the maintenance of tracking devices that the applicant purchased from the first respondent. Regarding this tender, the first respondent receives a monthly service fee from the applicant depending on the number of tracking devices it maintains. Tender 387G is scheduled to endure until 30 June 2025.

[6] On 15 November 2019, the applicant published tender 169S for the 'Supply and Delivery of Vehicle Tracking and Recovery', with a closing date of 20 January 2020. When advertising tender 169S, the applicant sought a vehicle on-board monitoring system: fleet tracking, fleet management (system generated reports), and fleet recovery systems. The main difference between tender 169S and tender 387G is that in terms of tender 169S, the applicant intended to rent tracking devices it may require from a supplier instead of purchasing such devices. Essentially, tender 169S contemplated the rental of vehicle tracking devices as opposed to the acquisition thereof. Tender 169S was intended to run alongside tender 387G, which the applicant concluded with the first respondent for maintenance and services of the vehicle tracking devices currently installed in the applicant's vehicles.

[7] Leading up to the closing date of the advertisement for tender 169S, the first respondent addressed an email correspondence dated 14 January 2020 to the applicant, challenging the tender specifications and requesting clarifications. Among others, the first respondent was concerned that the tender conditions had no evaluation criteria and weightings. The first respondent was also concerned with the possible overlap between tender 387G and tender 169S. The first respondent challenged the bid specifications because it contended that they envisaged the possibility of two tracking systems being run by two different service providers, one

under contract 387G, by the first respondent and one to be appointed pursuant to tender 169S.

[8] On 15 and 16 January 2020, the applicant responded and advised the first respondent that tender 169S (rental of new tracking devices) was different from contract 387G (maintenance of existing fitted tracking units). Furthermore, the applicant allayed the first respondent's fears and advised the first respondent that if the latter wished, it was at liberty to submit an offer for tender 169S, where it would have to compete with other bidders.

[9] The first respondent submitted a bid for tender 169S under cover of its letter dated 17 January 2020 with various attachments. Among others, the first respondent submitted a compliance statement with its bid document concerning tender 169S. The covering letter refers, in two instances, to the inclusion of the compliance statement, which constitutes the crux of the dispute between the applicant and the respondent. Ordinarily, a compliance statement acts as a checklist, which bidders submit with their bids for tenders detailing how they comply with the tender specifications.

[10] The first respondent stated that it always submits a compliance statement in response to any tender advertisement, including all tenders the applicant and other municipalities advertised. The first respondent further asserted that bids awarded by the applicant to the first respondent over the last 15 years have always been accompanied by a compliance statement prepared in the same format with colour coding and bold fonts as the compliance statement in terms of tender 169S. The first respondent further states that it is clear from the minutes of the BEC meeting held on 21 February 2020 that when evaluating the first respondent's bid, the BEC considered the compliance statement, which formed part and parcel of the tender submissions. In addition, according to the audio recording of the BEC meeting held on 21 February 2020, which was provided in terms of the Rule 53 review record, it is evident that the BEC members considered the compliance statement and made reference to it when evaluating the bid.

[11] The first respondent's compliance statement is divided into two columns. In the first column, the first respondent listed the tender specifications of tender 169S and

incorporated its interpretation of the specifications. In the second column indicating whether it complies with the specifications, the first respondent stated 'noted' or 'comply'. These comments (comply, noted) were also in respect of those tender specifications against which the first respondent included comments or its interpretation in the first column. The first respondent's comments and interpretation of the tender specifications in the compliance statement are concordant with the contents of its letter dated 14 January 2020, in which it complained about the overlap of the two contracts (tender 387G and tender 169S).

[12] The applicant's Bid Evaluation Committee ("the BEC") evaluated the bids at its meeting on 30 January 2020, 21 February 2020, and 4 September 2020. The BEC found that the first and second respondents' tenderers were responsive. The two respondents were requested to demonstrate a presentation on 15 May 2020. On 7 May 2020, the applicant asked the first respondent to demonstrate the operability of its equipment and services as provided in the tender documents. On 15 May 2020, the first respondent demonstrated its presentation of the operability of its equipment to the BEC, based on the required services. The BEC was satisfied with the report from the first respondent.

[13] On 19 May 2020, the BEC discussed and evaluated the first respondent's demonstration of the required services and concluded that it was satisfied and impressed with the presentation. The BEC subsequently submitted its report to the supply chain management Bid Adjudication Committee ("the BAC"), wherein it was confirmed that the first respondent complied with the tender requirements in all respects.

[14] The applicant, however, asseverated that when it considered and evaluated the first respondent's bid, the BEC did not consider the compliance statement attached to the bid, in large part because of the formatting of the compliance statement and the use of a dark font colour made it difficult for the BEC to distinguish between the tender specifications and the applicant's additions. This, coupled with the absence of any indication in the bid documents that the first respondent sought to vary the tender specifications in its bid, contended the applicant, meant that the BEC remained unaware of the significance of the compliance statement.

[15] The applicant further avers that on 20 June 2020, the BAC considered the report of the BEC, which did not mention or discuss the compliance statement, and awarded tender 196S to the first respondent in terms of the tender specifications. On 22 June 2020, the applicant informed the first respondent that its offer for tender 169S was successful, and the tender was awarded.

[16] Subsequent to the tender being awarded, on 27 July 2020, the applicant notified the first respondent per email that an appeal had been lodged against the award of the tender in terms of the Municipal System Act 32 of 2000 and that the first respondent would be advised of the outcome of the appeal and commencement date of the contract should the appeal be dismissed.

[17] The applicant dealt with appeals by disgruntled tenderers in respect of this tender. On 22 December 2020, the applicant transmitted a draft Memorandum of Agreement to the first respondent with a request for signature by 28 December 2020. In the said memorandum, the applicant informed the first respondent that the applicant received numerous appeals concerning the tender. The applicant further informed the first respondent that all Supply Chain Management contracts entered into between the applicant and all service providers must be reviewed by the applicant's legal services department before signing to ensure that such agreements meet legal standards.

[18] In response, the first respondent advised the applicant that prior to the contract being awarded, it asked for clarification on a number of points. The first respondent wanted to revisit the issues it raised before the conclusion of the agreement, particularly the variation and additions contained in the compliance statement. The first respondent also contended that it was surprised that it was requested to enter into a Memorandum of Agreement with the applicant as this ran contrary to the tender documentation. According to the first respondent, the applicant's tender documentation stipulated that by signing the Offer and Acceptance attached to the bid, the applicant accepted the offer submitted and concluded a contract with the supplier.

[19] The applicant rejected the proposal of the first respondent of the incorporation of the compliance statement and its amendments to the Memorandum of Agreement. The applicant contended that the additions in the compliance statement were

amending the tender specifications and could not be included in the Memorandum of Agreement. The first respondent refused to sign the Memorandum of Agreement and insisted that such memorandum must reflect its full bid, including the compliance statement.

[20] The first respondent insisted that the applicant must sign the offer and acceptance of the tender documents to complete the agreement. The first respondent sought to incorporate its compliance statement to form part of the Memorandum of Agreement. The applicant rejected this proposal and contended that the inclusion of the compliance statement into the memorandum of agreement would result in significant changes to the tender specifications, which would be to the prejudice of other tenderers and would also conflict with section 217 of the Constitution.

[21] The applicant also averred that if the BEC had considered the compliance statement as an integral part of the first applicant's bid, and included it in its evaluation, the BEC would have declared the first respondent's bid non-responsive. Over many months, the parties' corresponded and could not reach a consensus. The first respondent insisted that the compliance statement form part of the Memorandum of Agreement. On the other hand, the applicant contended that the insertion of the compliance statement into the Memorandum of Agreement would result in significant changes to the tender specification of tender 169S, particularly in that the compliance statement purports to integrate tender 169S with tender 387G.

[22] On 19 May 2021, the applicant sent a clarification report to the first respondent. In the clarification report, the first respondent was requested to review and inset comments on the appropriate column for the contract to commence. The clarification report dealt with the specifications in terms of the tender, the first respondent's response to it as set out in the compliance statement, and the applicant's comments thereto it. In addition, the applicant's comments in the clarification report were that compliance with the tender specifications must be adhered to. In addition, that not adhering to tender specifications would render a tenderer non-compliant, thus non-responsive. The first respondent was requested to reaffirm that it would abide by the specified tender specifications of tender 169S.

[23] The first respondent took issue with the clarification report and viewed it as a review of the first respondent's compliance statement, which it argued should have been dealt with prior to the tender award. The first respondent further insisted that the applicant was not entitled *ex post facto* to request the first respondent to clarify in terms of the clarification report how it would be attending to the implementation of the tender or to ask the first respondent to re-affirm upfront that it would comply with the specifications of the tender as a pre-condition for the conclusion of the contract as that constituted a unilateral moving of the goalposts. In addition, the first respondent contended that in its covering minute dated 17 January 2020, which accompanied its tender submission, stated clearly that a detailed compliance statement was attached to its covering letter and that it clearly stated that its offer was based upon their compliance response, and associated documentation enclosed with its tender submission.

[24] Despite several correspondences and meetings, the parties could not break the deadlock regarding this impasse. Subsequently, the applicant's City Manager addressed a correspondence to the first respondent on 12 July 2021. He advised the first respondent that the award of tender 169S to the first respondent was unlawful. The City Manager averred that this was so because when it evaluated the first respondent's bid and awarded it tender 169S, the applicant did so without considering the compliance statement annexed to its bid. The applicant further advised that it is constitutionally obliged to take steps to correct its unlawful award. However, it could not do so unilaterally as it was *functus officio* to correct its decision to award tender 196S to the first respondent because that decision was finally made.

[25] The applicant proposed to the first respondent to agree to the revocation of the award of the tender 169S as an exception to the *functus officio* rule so that all the bids in respect of tender 169S could be re-evaluated. The applicant further advised the first respondent that unless it agreed to the revocation of the award of tender 169S, the applicant was left with no other option than to approach the court for a self-review of the applicant’s award of tender 169S to the first respondent. In response, the first respondent declined to waive any of their rights and contended that the award of tender 169S was lawful. The first respondent refused to consent to the revocation of the award.

[26] On 14 July 2022, the applicant launched this self-review application to set aside tender 169S awarded to the first respondent. On 3 August 2022, the first respondent filed a notice of its intention to oppose the applicant's self-review application. On 7 November 2022, while the applicant's self-review application was pending and undetermined, the applicant issued a tender invitation for bids in respect of tender contract 198S, which was intended to provide precisely the same goods and services concerning to tracking vehicles as tender 169S.

[27] The first respondent disputed that the applicant was entitled while the self-review application was pending, and the award of tender 169S to the first respondent remained valid and lawful to advertise tender 198S. It contended that this constituted a severe and unlawful infringement of the first respondent's right in terms of tender 169S and indicated that it intends to apply for an interdict on an urgent basis to interdict the applicant to not award tender 198S. After the discussion between the parties' legal representatives, on 08 December 2022, the applicant made an undertaking in writing to the first respondent that it would not award a tender in respect of tender contract 198S on or before 28 March 2023. As a result of this undertaking, the parties agreed on date for the hearing of the interdict application. As explained earlier, at the hearing of these applications, the court was advised that tender 198S was cancelled. The only issue that remained for determination regarding the interdict is the question of costs.

PRELIMINARY ISSUES

[28] There are two preliminary issues that this court is enjoined to consider, namely: Condonation for the late filing of the self-review application and an Application to strike out paragraphs 35 to 101 of the applicant's replying affidavit to the self-review application. For the sake of completeness, I will deal with these two preliminary issues *ad seriatim.*

CONDONATION FOR THE LATE FILING OF THE SELF-REVIEW APPLICATION

Whether the applicant's delay in filing the self-review application was unreasonable?

[29] It is common cause that the applicant's review application was served on 14 July 2022, more than two years since the tender was awarded to the first respondent on 22 June 2020. The applicant contended that its officials were initially unaware of the first respondent's stance on the compliance statement. They only became aware in February 2021. Thus, the proverbial clock to commence the self-review application started ticking as far back as February 2021. The applicant, therefore, took almost 15 months to launch its self-review application. In the notice of motion, the applicant sought condonation to the extent that the court considers that the applicant delayed unreasonably in launching the self-review application.

[30] It is now settled that an organ of State seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA. See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC). In terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), any proceedings for judicial review in terms of section 6(1) thereof must be instituted without unreasonable delay and not later than 180 days. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 48, the Constitutional Court confirmed that, unlike a review in terms of PAJA, a review under the doctrine of legality is not subject to a 180-day time bar.

[31] The guiding factor is whether the application has been brought within a reasonable time. A legality review must be initiated without undue delay, failing which the court can refuse the application or overlook the undue delay. Whether a delay was undue or unreasonable is a factual inquiry upon which a value judgment had to be made with due regard to all the relevant circumstances. *Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal* 2014 (5) SA 579 (CC) para 49.

[32] The Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd (supra)* set out a three-stage inquiry in determining the question of unreasonable delay. First, the court noted that it must be determined whether the delay was unreasonable, which is a factual inquiry involving a value judgment. *Secondly,* if the delay was unreasonable, whether the applicant has provided a satisfactory explanation for the delay (which must cover the entire period of the delay).

Thirdly, if the delay was unreasonable and no satisfactory explanation has been provided, whether the delay should be overlooked, which is a flexible approach. This involves a legal evaluation taking into account the following factors:

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

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

32.3 The conduct of the party concerned bringing the review (in this case the applicant) particularly for State litigants because they are often best placed to explain the delay and are subject to a higher duty to respect the law and rectify unlawful decisions. *Merafong City Local Municipality v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) para 61. However even if a functionary has not acted as a model litigant or constitutional citizen there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance. *Department of Transport and Others v Tasima (Pty) Ltd; Tasima (Pty) Ltd and Others v Road Traffic Management Corporation and Others* 2017 (2) SA 622 (CC) para 168.

[33] There is a further catch-all consideration, based on constitutional grounds, namely, that even where there is no basis for a court to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare the State's conduct unlawful. This is so because 172(1)(a) of the Constitution enjoins a court to declare any law or conduct that it finds inconsistent with the Constitution invalid – often referred to as the ‘the *Gijima* principle’. *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (supra)* para 40-41; *Bigen Africa Services (Pty) Ltd and Others v City Of Cape Town and Others* (18681/2020) [2021] ZAWCHC 107 (1 June 2021) at para 24.

[34] At the hearing of this application, Ms O'Sullivan, who appeared on behalf of the applicant, conceded that the applicant accepts that its explanation for the delay in bringing its self-review is limited and does not meet the requisite threshold of explaining all the periods comprising the delay. However, Counsel contended that the

impasse between the parties had the effect that the tender could not be implemented, and the applicant was ‘damned if it did and damned if it didn't.’

[35] Ms O' Sullivan further submitted that the first respondent had been aware of the applicant's intentions concerning the review since December 2021 and that the tender was never implemented. As a result, there was no prejudice to the first respondent. Counsel argued that the first respondent was aware of the applicant's concerns about the amendment of the tender specifications. In expanding her argument, Ms O'Sullivan argued that the first respondent was aware of these facts before submitting its tender. According to Counsel, the BAC's award of the tender to the first respondent deviated substantially from the mandatory constitutional and legislative precepts and is unlawful.

[36] Meanwhile, Mr Schreuder, who appeared on behalf of the first respondent, submitted that the applicant failed to give a full and plausible explanation for the significant delay in bringing the self-review application. Counsel submitted that the delay had prejudiced the first respondent. Mr Schreuder further submitted that the first respondent was awarded a tender in June 2020, and nearly three years later, a contract has yet to be concluded, and the first respondent is nowhere closer to knowing where it stands. Counsel submitted that the first respondent is entitled to certainty and finality so that it can appropriately regulate its affairs.

[37] Furthermore, Counsel submitted that even if the delay had not prejudiced the first respondent, the applicant's failure to bring these proceedings with due expedition has, on its version, caused manifest prejudice to the applicant, its staff, and the public. To this end, Counsel argued that the applicant has been unable to procure the tracking devices that are essential to the safety of its staff for three years since it was first awarded the tender. This prejudice, counsel argued, which the applicant has not addressed at all, is equally relevant to the question whether the Court should exercise its discretion in the applicant's favour.

[38] I am mindful that the parties engaged in a series of correspondences to break the deadlock between them for an extended period without success. However, the correspondence makes it clear that the first respondent insisted on including its

compliance statement as early as January 2021 after being informed that the appeal processes had been finalised. The first respondent has insisted that the offer and acceptance of the Memorandum of Agreement must incorporate its compliance statement as part of its bid documents. The applicant objected to this request as it believed such a concession amounted to a variation of the tender specifications.

[39] Notwithstanding, the applicant did not immediately act to correct the said unlawfulness expeditiously within the boundaries of the law and the interest of justice. *Khumalo and another v members of the Executive Council for Education: Kwazulu Natal (supra)* at paras 35 – 36. Had the applicant expeditiously dealt with the self-review, the issues could have been ventilated and resolved. Viewed against the applicable legal principles, these considerations led me to conclude that the delay was indeed unreasonable.

Whether the applicant has provided a satisfactory explanation for the delay

[40] There are huge unexplained gaps in the applicant's version regarding the delays. The applicant had to give a complete and thorough explanation for the delay. For instance, the first respondent rejected the City Manager's request in November 2021 to set aside the award by agreement as the applicant was contending that the award of the tender to the first respondent was unlawful. In November 2021, the first respondent advised the applicant that it would not agree to the revocation of the tender. The applicant should have explained in its application why it took a further eight months to proceed with the self-review application only in July 2022, and it failed to do so.

[41] I am mindful that there was a stalemate between the parties. The first respondent was unsatisfied with the advertised tender specifications and endeavoured to conform and align its bid by submitting the compliance statement. The tenuous explanation that the applicant proffered that parties were engaged in correspondences, hence the delay, in my view, is deficient and falls short of the requirements that ordinarily should be met in applications of this nature.

[42] In this regard, I agree with the views expressed by Mr Schreuder that the delay in bringing this application has been so inordinate and has been to the prejudice of the applicant and its employees. Importantly, given that tender 169S had not yet been implemented, the applicant could not obtain tracking devices for its vehicles. Furthermore, the applicant was advised of the significant risk faced by the applicant's fleet due to several vehicles not having the necessary monitoring equipment fitted and the vulnerability of the City staff due to the vehicles not having tracking devices.

[43] On a conspectus of all the facts, I am of the view that there was an inordinate delay in bringing this application. I am further of the opinion that the explanation proffered by the applicant in this matter is deficient and unsatisfactory. The contention that the review application was prepared as expeditiously as possible in the circumstances is hollow and fundamentally flawed as the facts do not support it. I conclude, therefore that based on the facts placed before court, the applicant's explanation is unsatisfactorily. However, following the guiding principles discussed above, the enquiry does not end there. The next question to consider is whether this court should overlook the delay. I turn to consider that question.

Whether the delay should be overlooked?

[44] Having found the delay unreasonable with no satisfactory explanation, should the court overlook the delay? This is a flexible approach that this court should engage in. To this end, this court must consider the potential prejudice to the affected parties and the possible consequences of setting aside the impugned decision to award the tender to the respondent.

[45] It must be stressed that the issues raised in this matter are constitutionally contestable. Section 195(1)(a) of the Constitution provides that the public administration must be governed by democratic values and principles, including a high standard of professional ethics. The applicant's conduct must be consistent with this standard. The first respondent has insisted that the Memorandum of Agreement must include its compliance statement. As it will be demonstrated later in this judgment, the compliance statement conflicts with the tender specifications. The compliance statement purported to integrate tender 169S and tender 387G.

[46] If this court were to dismiss the applicant's application based on the inordinate delay, the applicant would be bound to contract with the first respondent contrary to its tender specifications. The applicant would be constrained by its decision to award the tender to the first respondent contrary to its tender specifications. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26. The applicant would be bound to contract with the first respondent on the terms and specifications of the first respondent. In *Minister of Home Affairs and Another v The Public Protector* 2018 (3) SA 380 SCA para 38, the Supreme Court of Appeal held that until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.

[47] Furthermore, if the decision to award the tender to the first respondent is not revoked, the award would remain contrary to the procurement principles as it creates an unfair advantage to the first respondent. The applicant would be severely prejudiced while the first respondent, on the one hand, would be placed in an advantageous position to the prejudice of other tenderers. *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at para 14. The argument raised by Ms O'Sullivan that the first respondent's purported amendment of the specifications was unfair, and skewed the competitive process, is spot on and to the point.

[48] Consistent with the *Gijima* principle, if this award is allowed to stand, it would offend against section 217 of the Constitution, which enjoins the applicant as an organ of State, when it contracts for goods or services, that it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. While I appreciate that reference was made to the compliance statement in the first respondent's covering minute of the bid documents, the first respondent did not indicate that its bid was conditional to the compliance statement. It cannot be accepted that the first respondent be exempted from the tender specifications while at the same time, other tenderers are subjected to the applicant's tender requirements. Such an approach is objectionable, unlawful, and cannot be countenanced. All bidders had to comply and ensure their bid documents conform to the advertised tender specifications.

[49] The insistence of the first respondent to have the compliance statement forming part of the agreement is very telling. It is telling that the first respondent endeavoured to vary the tender specification by incorporating its compliance statement in the parties' agreement to secure the tender for itself on terms that are most advantageous to it. The first respondent deviated and wanted to avoid adhering to and complying with the terms and conditions set out in the specification, which meet the applicant's needs and requirements. This was erroneously overlooked by the BEC. As previously stated, such an approach offends section 217 of the Constitution. In these circumstances, forcing the applicant to contract with the first respondent would be unlawful and contrary to the five pillars of procurement discussed above.

[50] Significantly, there is no prejudice to the first respondent if the impugned decision is revoked. Whilst I understand that the first respondent is entitled to certainty and finality so that it can appropriately regulate its affairs, it has not suffered prejudice. Notably, thus far, the first respondent has not incurred costs regarding that tender. More so, the tender has not yet been implemented. Since January 2021, the first respondent has been made aware of the applicant's concerns of its modifications of the tender specifications. On the other hand, the prejudice that the applicant would suffer if the award is not set aside, is far-reaching. To my mind, the prejudice that will be suffered by the applicant far outweighs any prejudice that the respondent would suffer if the tender award is not revoked.

[51] In any event, I am of the view that it is in the interest of justice that the delay be condoned. Consequently, to the extent that I have found that delay in launching this application was unreasonable, in the circumstance of this case, the delay should nevertheless be overlooked.

APPLICATION TO STRIKE OUT

[52] The first respondent has applied that paragraphs 35 to 101 of the applicant's replying affidavit to the review application be struck out because they impermissibly raised new matters in reply. The first respondent contends that it is impermissible for the applicant, for the first time in reply, to have explained the basis upon which it contends that the compliance statement constitutes a material deviation from, or

amendment to, the bid specification. The first respondent further contends that the applicant was required to make out its case in the founding affidavit, and it did not do so. In its founding affidavit, the applicant alleged that had the BEC considered the compliance statement and included it in its evaluation, the BEC would have declared the first respondent's bid unresponsive. It was submitted that the applicant did not explain why the BEC would have done so. Belatedly, confronted with the gaping *lacuna* in its founding affidavit, the applicant has impermissibly attempted to bolster its case in reply by setting out at considerable length the multiple respects in which the compliance statement allegedly represents a material deviation from the tender specification.

[53] The key consideration in striking out applications is that of prejudice. *University of the Free State v Afriforum and Another* 2017 (4) SA 283 (SCA) at 296E-F. Rule 23(2)(b) of the Uniform Rules makes it abundantly clear that a court shall not grant the striking-out application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted. It is trite that an applicant must make out a case and produce all evidence it desires to use to support its application in its founding affidavit filed with the notice of motion.

[54] In exceptional cases, an applicant would be allowed to make out or supplement a case in its replying affidavit and may thus risk those additional allegations being struck out. *Bayat v Hansa* 1955 (3) SA 547 (N) at para 553C- E. For instance, an applicant may bring in a fresh matter in a replying affidavit if this is by way of a reply to a defence raised by the respondent in the answering affidavit. However, the rule against new matters in reply is not absolute and should be applied with a fair measure of common sense. *cf Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 449 (T) at 511F); *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para 15.

[55] In this case, the applicant averred in para 41 of its founding affidavit that it had considered the compliance statement and prepared a schedule setting out its reasons for not being able to accommodate the first respondent's changes to the tender specifications. In response to these averments, the first respondent denied at para 141 of its answering affidavit that its compliance statement changed the tender

specifications. Pursuant to that denial, the applicant was compelled to respond in detail and indicate in what respect the first respondent sought to vary the tender specifications.

[56] In my view, it was permissible for the applicant pursuant to the first respondent's denial, to put up further information in paragraphs 35 to 101 of its replying affidavit to explain the extent of the first respondent's alterations to the tender specification. The impugned paragraphs of the replying affidavit deal in detail with how the first respondent's compliance statement seeks to alter the tender specifications. This was in response to the first respondent's denial that the compliance statement altered the tender specifications. The submission that the applicant is raising some new averments in reply is erroneous and cannot be sustained. More so, in its founding affidavit, the applicant recorded the respects in which the compliance statement varied the specifications. And the first respondent was also aware of those averments when the self-review papers were served.

[57] What compounds the difficulty with the respondent's striking out application is that the first respondent also instituted a counter-application against the applicant. As correctly pointed out by Ms O'Sullivan, the applicant's replying affidavit serves a dual purpose. It served as an answering affidavit to the counter-application, and it also served as a replying affidavit to the self-review application. Ms O'Sullivan further argued that the applicant was free to plead whatever evidence it wished in an answering affidavit, without restriction, in answer to the counter-application. This is so because the first respondent, viz the applicant in the counter-application, enjoyed a right of reply to it.

[58] These arguments, in my view, are undoubtedly correct. It cannot be expected of this court to strike out specific paragraphs of the applicant's replying papers for purposes of the self-review application only, but to leave them in the same affidavit and take them into account for purposes of the counter-application. That would be absurd and untenable.

[59] My conclusion, therefore, on this preliminary point is that the first respondent's application to strike out must fail. I will not deal with the striking out application in the

interdict application as that application is moot. I turn to consider the application on the merits.

ISSUES FOR DETERMINATION – ON THE MERITS

[60] From the discussion set out above, the substantive issues that this court is enjoined to consider are the following:

1. Whether the self-review and the first respondent's counter-application are moot.

2. Whether the inclusion of the first respondent's compliance statement in its bid documents rendered its bid non-responsive. Put differently, did first respondent's compliance statement vary the tender specifications?

3. If so, did the BEC, during the tender evaluation process, consider and appreciated that the first respondent's compliance statement amended the tender specifications?

4. Notwithstanding, Is the applicant still obliged to conclude the tender contract with the first respondent including its compliance statement?

[61] For the sake of convenience, I will consider these disputed issues sequentially.

Whether the self-review and the first respondent's counter-application are moot.

[62] At the hearing of both applications, namely: the applicants' self-review, and the first respondent's counter-application, the applicant contended that both applications are moot because, by the time judgment is handed down, the judgment will have no practical effect because the tender would have expired on 30 June 2023, and thereafter, there will be no live issue between the parties. The applicant contended that there is no need to consider the merits of the matter any further because setting aside the tender award and remitting it to the BAC for reconsideration will be academic as the tender will expire on 30 June 2023. To this end, the applicant delivered a Rule 28 notice, in which it sought to amend the Notice of Motion to include a declaratory

order in a new Prayer 1A that the award to the first respondent of tender 169S for the Supply and Delivery of Vehicle Tracking and Recovery expires on 30 June 2023.

[63] It was submitted on behalf of the applicant that during the evaluation of the first respondent's bid for tender 169S, the applicant's BEC did not appreciate the true meaning of the applicant's compliance statement, which it submitted with its bid. Ms O'Sullivan contended that the BEC interpreted the compliance statement chiefly as a checklist confirming the first respondent's compliance with the tender specifications. Had the BEC properly understood the first respondent's insertions or the first respondent's compliance statement for what it was, Counsel argued, the BEC would have declared the first respondent's bid non-responsive and disqualified the first respondent. Pursuant thereto, the contention proceeded; the BEC found the first respondent's offer responsive and recommended to the BAC that the latter's bid be accepted and that the tender be awarded to it, to run from date of commencement until 30 June 2023. The BAC accepted the recommendation of the BEC and duly resolved to make the award accordingly.

[64] Meanwhile, Mr Schreuder submitted that the decision by the BAC to award tender 169S to the first respondent vested the right in the latter to insist that a contract be concluded by the applicant with the first respondent upon the terms and conditions set out in the bid document. The fact that the BAC decided that the contract would terminate on 30 June 2023 does not render this matter moot after that date. Counsel submitted that, when the applicant launched its application, the applicant correctly appreciated that the contract period was not limited to 30 June 2023 and that there was the prospect that, if the applicant were granted the alternative relief it seeks, namely, of remitting tender 169S to the BAC for reconsideration, the latter would need to re-evaluate the tender and thereafter award it for a period that extended beyond 30 June 2023.

[65] Furthermore, the first respondent contended that this case is not moot because the BAC intended to make the award for 36 months from the date of conclusion of the parties' written contract, which has yet to take place. Mr Schreuder further submitted that the tender award does not expire on 30 June 2023 and that the applicant has a budget for a further 3 years because it has advertised tender 198S. The first

respondent, therefore, sought an order that the applicant be compelled to sign the tender documents and conclude an agreement with the first respondent for a period not exceeding 36 months from the date of conclusion of the agreement. According to Mr Schreuder, the tender awarded to the first respondent runs for a period of 36 months from date of conclusion of the contract between the parties and not from the date of the BAC award.

[66] Mootness is when a matter no longer presents an existing or live controversy. The doctrine is based on the notion that judicial resources should be utilised efficiently and not be dedicated to advisory opinions or abstract propositions of law and that courts should avoid deciding abstract, academic, or hypothetical matters. See *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at para 15.

[67] It has been the understanding of all the parties involved that tender 169S was to run for three years, with 30 June 2023, as the contract's end date. The chronology of events and the communication between the parties attest that the agreement between the parties was terminable on 30 June 2023. The deadlock between the parties frustrated the coming to fruition of the contract in respect of the tender awarded to the first respondent. The BEC's report approved by the Branch Manager on 25 October 2019 to the BAC, recommended that the tender be awarded to the first respondent and expressly stated that the contract period will be from date of commencement until 30 June 2023.

[68] On 22 June 2020, the BAC considered the BEC's Report and expressly resolved as follows: "*for the reasons set out in the [BEC's] report, the tender offer submitted by RAMM System (Pty) Ltd t/a Ramm Technologies for tender 169S/2019/20 for the supply and delivery of vehicle tracking and recovery, be accepted from 1 July 2020 until 30 June 2023" (my underlining).* The BAC expressly recorded that the award of the tender to the first respondent terminates on 30 June 2023. Subsequent to that, the decision that the tender was awarded to the first respondent was communicated to the first respondent in line with the BAC resolution of 22 June 2020.

[69] On 22 December 2020, the applicant sent the Memorandum of Agreement to the first respondent for signature. The front page of the said document explicitly sets out the contract period of the agreement being from the date of commencement to 30 June 2023. Clause 1.1 dealing with acceptance, records that by signing this form of offer and acceptance, the City of Cape Town accepts the offer submitted by Ramm (the first respondent), thereby concluding a contract with the supplier for a contract period from the date of commencement of contract until 30 June 2023.

[70] As it happened, the first respondent refused to sign the contract as it insisted that its compliance statement must be incorporated into the contract, which the applicant rejected. There were several exchange of correspondence between the parties. On 21 July 2021, the applicant sent the first respondent a final draft of the Memorandum of Agreement and asked the respondent to sign. The front page of the draft agreement also specified the duration of the contract as being from the date of commencement of the contract to 30 June 2023. The first respondent signed this agreement and sent an electronic copy back to the applicant under cover of its letter of July 2021. The respondent did not object to the cut-off date of 30 June 2023. It signed the contract and asked the applicant to return a signed copy. In addition, it incorporated its compliance statement into this agreement which the applicant found repugnant to the tender specifications.

[71] Notably, in its correspondence to the applicant dated 26 November 2021, Mr Welham, representing the first respondent, stated as follows:

> *"The termination date of Tender 169S is 30 June 2023. For all intent and purpose (sic), it has 19 months left to run. There is a provision in the contract, insisting that the incumbent service provider commences de-installation 6 months prior to termination of contract (para 1.1.7.2). By implication this tender [169S] has 13 months left to run." (my underlining)*

[72] From the foregoing, it is abundantly clear that for all intents and purposes, the parties intended and were in *ad idem* that the contract would be for three years, with the cut-off date being 30 June 2023. The respondent's argument that the agreement between the parties did not terminate on 30 June 2023 conflicts and contradicts the documentary evidence discussed above, particularly, the correspondence exchanged

between them. Ms O'Sullivan argued, and correctly so, in my view, that it is not legally permissible for the first respondent to blow hot and cold by adopting mutually inconsistent positions in this fashion in that it initially accepted that the BAC intended the contract between them to cut-off on 30 June 2023. Later, in its replying affidavit of the counter-application, the first respondent adopted a different stance that the BAC intended that the contract must run for 36 months from the conclusion of the written contract.

[73] The argument that the BAC intended that the contract must run for 36 months from the date of conclusion of the written contract ignores the fact that the BAC's resolution determined the end date of the contract being 30 June 2023. To hold otherwise would be acting contrary to the clear intention of the parties. Crucially, it is not disputed that the applicant plans and budgets its intended services over a three-year cycle. The 30 June 2023, tender 169S deadline, coincided with the applicant's budgetary cycle or financial year-end. This is also borne out by paragraph 7 of the applicant's Directive 21 of 2018, which provides, among others, that all contracts must have predetermined end dates. The Directive notes further that the end date must be recommended in the BAC report and contained in the BAC resolution. Indeed, the BAC resolution recommended an end date of 30 June 2023 for the tender it awarded to the first respondent.

[74] Significantly, the applicant cannot be expected to contract with third parties for the rendering of services when such services have not been budgeted for. The applicant’s budgetary process is limited to a three-year horizon. The termination date of tender 169S on 30 June 2023 was consistent with the applicant's three-year budgetary cycle, as formulated in its Medium-Term Revenue and Expenditure Framework. Ordinarily, a municipality wishing to conclude a long-term contract that may impose financial obligations on the municipality beyond the three years covered in its budget must comply with section 33 of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA").

[75] Section 33 of the MFMA requires that special procedures be undertaken regarding any contract that will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year. In particular, in

terms of section 33, the draft contract that the municipality proposes to conclude must be publicised and circulated for comment by the local community and interested parties. The purpose of section 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. See *ICT-Works (Pty) Ltd v The City of Cape Town* (6582/2020[2021] ZAWCHC 119 (18 June 2021) at paras 72 and 88.

[76] It is common cause in this matter that tender 169S was advertised for a maximum of three years without following the section 33 MFMA approval process. It was intended to run up to 30 June 2023. A contract that is concluded and runs beyond 30 June 2023, as contended by the first respondent, would be outside of that period, thereby activating the requirements of section 33 of the MFMA. The tender was awarded on 22 June 2020 and was intended to run till 30 June 2023. A budget for that period was allocated. The 30 June 2023 has since come and passed before the realisation of the intended contract. Save for the assumption made regarding the advertisement of tender 186S; there is no evidence presented before this court confirming that the allocated budget is still available for tender 169S.

[77] On a conspectus of all the evidential material placed before this court, the self-review, and the first respondent's counter-application, are moot. The tender expired on 30 June 2023, and there is no live issue between the parties. *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* 2020 (4) SA 409 (CC) para 52. The first respondent has been the author of its own misfortune. It was furnished with a Memorandum of Agreement, and it insisted on the inclusion of its compliance statement that had the potential to vary the terms of the tender specifications. In its correspondence dated 20 January 2021 to the applicant, the first respondent stated that before the contract was awarded, it asked for clarification on several points and wanted to revisit the latter and incorporate them into the tender contract. The applicant rejected this proposal and advised the first respondent that no incorporations to the contract could be made as this will be noted as a conflict with the tender specifications.

[78] Crucially, the first respondent's bid was not conditional upon the compliance statement. Several employees of the applicant beseeched the first respondent to sign

the Memorandum of Agreement in line with the tender specifications, and the latter did not oblige. At all material times relevant hereto, the first respondent knew that the intended contract was budgeted for and terminable on 30 June 2023. Notwithstanding this knowledge, it refused to sign the Memorandum of Agreement, excluding the compliance statement. The first respondent cannot legitimately cry foul and blame the applicant for the expiration of the tender. In my view, the first respondent suffers the consequences of its imprudence and lack of sound judgement.

[79] At the hearing of these applications, it was argued on behalf of the first respondent that the compliance statement could not vary the terms of the tender specification. Mr Schreuder submitted that the compliance statement is legally irrelevant as the tender specifications and the BAC's award are to be determined by the tender documents, which also determine the terms, conditions, and format of the contract to be concluded between the first respondent and the applicant. It was further contended that the tender specifications, as the terms of the contract, would prevail over any variation that the first respondent intended to insert into the agreement in terms of the compliance statement.

[80] While having a superficial attraction, I have some difficulty with this argument. Surely, the applicant could not be expected to mindlessly sign a tender contract that *ex facie* was problematic and could potentially breed conflict between the parties. The first respondent's insistence on incorporating the compliance statement indicates that the first respondent intended to enforce its deviation from the tender specifications when the contract was actualised.

[81] It must be borne in mind that the deadlock between the parties hampered service delivery and exposed the applicant and its employees to risk. The applicant feared, and correctly so, in my view, that the conclusion of the agreement with the inclusion of the first respondent's compliance statement would frustrate its objective of ensuring the provision of services to its residents in a sustainable manner as envisaged in chapter 7 of the Constitution.

[82] In my opinion, the applicant was well with its right to insist that the respondent sign the Memorandum of Agreement without the inclusion of the compliance

statement, especially because the first respondent is still contracted to the applicant in terms of tender 387S. It was prudent for the applicant to refuse the incorporation of the compliance statement as this would have blurred the lines between tender 169S and tender 387G. This would have been inimical to a fair and lawful tender process. Therefore, in view of all these considerations, I conclude that this matter is moot. Ordinarily, this finding would lead to the end of the dispute; however, for the sake of completeness, I deem it prudent to consider the remaining disputed issues briefly.

Whether the inclusion of the first respondent's compliance statement in its bid documents rendered its bid non-responsive.

[83] This disputed issue raises two subsidiary questions; *first,* did the first respondent's compliance statement vary the tender specifications? *Secondly,* did the BEC, during the tender evaluation process, appreciate that the first respondent's compliance statement did so? In my view, these questions are intertwined, and I will deal with them concurrently for the sake of brevity.

[84] The purpose of a compliance statement is simply for bidders to indicate whether or not they comply with the specifications of the bid and, if not, the extent of non-compliance. Ms O'Sullivan stated that when completing the compliance statement schedule, bidders were required to indicate the particular item number and the description of each of the specifications, and then in a separate column to indicate whether or not they comply and, if not, the extent of non-compliance. The applicant notes that the compliance statement was intended to be a checklist, which is how the BEC regarded and dealt with it.

[85] Meanwhile, Mr Schreuder argued on behalf of the first respondent that the compliance statement is of no legal relevance in the contractual relationship between the parties as it could never serve to amend the tender specifications or the contract terms prescribed in the tender documents. Counsel contended further that the status of the compliance statement falls to be determined against the wording of the tender document, tender conditions, terms, and tender specifications.

[86] I have some difficulty with the proposition of Mr Schreuder. If the compliance statement is intended to serve as a checklist, the question that begs is why did the first respondent made some additions to it and how it would comply with the tender. The first respondent's insistence that the compliance statement must be incorporated into the agreement lends credence to the applicant's submission that the statement does indeed amends the tender specifications.

[87] Importantly, before the tender could be awarded to the first respondent, the latter raised concerns in its correspondence dated 14 January 2020 on a possible conflict between the existing tender 387G and tender 169S and demanded an explanation on how this would operate side by side. The applicant, in response, required that all information, processes, procedures, and performance measurements in tender 169S be separated from the vehicle tracking maintenance contract 387G that the first respondent had with the applicant.

[88] It is undeniable that in its compliance statement, the first respondent intended to integrate the two contracts in line with its letter to the applicant dated 14 January 2020. The applicant insisted that the tender 169S or any subsequent tender should not be integrated with any other different contract. Demonstrably, in terms of the tender specification, under the column Hardware requirements, the applicant had to control all data that emanates from tender 169S. In the compliance statement, the first respondent indicated that it intended to integrate this data within its existing contract with the applicant under contract 387G.

[89] The first respondent purported to amend the tender pricing, stating that the rental per unit will change every six months, notwithstanding that the contract price adjustment provisions in tender 169S do not provide for escalation. Paragraph 6.2.5 of the tender specifications dealing with air response team, required that the response shall include both dedicated ground and air response teams in recovering the City's assets. In its compliance statement, the first respondent stated that the mobilisation of the air response team is done at the discretion of the aircraft operating company. Furthermore, the compliance statement varied the definition of mandatory items that must be offered for the bid to be considered. I do not intend to deal with all the intended

amendments or variations that the first respondent proposed in the compliance statement.

[90] Although not clearly admitted, these variations seem to be common cause. The first respondent argues that these variations are irrelevant as the specifications of the tender prevail over them. This argument in my view, is fundamentally flawed and contradictory in terms. The respondent insisted on including the compliance statement in the memorandum of agreement as it intended to enforce it against the applicant. This resulted in a deadlock of two years. Additionally, the first respondent now seeks an order in the counter-application that the applicant be ordered to conclude a contract with it that would incorporate its varied tender specifications, as set out in its compliance statement.

[91] A conspectus of all the evidence reveals that this tender's award to the first respondent was invalid and unlawful. It conflicted with section 217 of the Constitution. The bid was awarded to the first respondent, notwithstanding that its bid varied the tender specifications. When the tender award was made to the first respondent, other bidders were not placed on the same footing as the first respondent. The first respondent's bid did not comply with the tender specifications or the applicant's requirements. Notwithstanding, its bid was treated in error as responsive on the basis that it complied with the eligibility criteria.

[92] There is far more force in Ms O'Sullivan’s argument that it could not be expected that the applicant permits the variation of tender specifications only in respect of one tender, and without the proposed changes being communicated to other bidders before the closing date to allow them to adjust their bids if they wanted to. That would materially breach the principles of a competitive bidding process contemplated in the procurement legislative and policy regime applicable to tender 169S. In my opinion, the bid of the first respondent ought to have been eliminated as non-compliant.

[93] I am further of the view that there was a serious dereliction of duty among the applicant's officials, in particular, members of the BEC. From the minutes of their evaluation, it is evident that they had a cursory look at the bid documents of the first respondent. They did not scrupulously consider or thoughtfully pay attention to the first

respondent's bid documents, particularly the compliance statement. Had they done so, they would have rejected the first respondent's bid as non-responsive. They treated the tender as responsive and complied with the tender specifications, even though it altered the tender specifications or the evaluation criteria.

[94] Notwithstanding the finding I made hereinabove, I must stress the fact that the defence raised by the applicant that the BEC did not consider the amendments to the specifications in the compliance statement attached to the bid, in large part because the formatting of the compliance statement and the use of a dark font colour made it difficult to distinguish between the tender specifications and its additions is concerning, to say the least. The BEC had a statutory duty and, by extension, a constitutional duty to ensure that the bid documents comply with all the relevant specifications of the tender. About eight officials of the BEC failed to bring their minds to bear when they considered this bid. One would expect that this slackness among the City's officials would be guarded against in the future.

[95] Mr Schreuder argued on behalf of the first respondent that the BEC indeed considered the first applicant's compliance statement in its deliberations. In amplification of his argument, Counsel referred the court to the minutes of the BEC where it was noted that the first respondent complies with the tender specifications. I do not agree with this argument. Whilst I deprecate the ineptness of the BEC officials, it must be borne in mind that the issues raised in the compliance statement were addressed with the first respondent before it submitted its bid. The tender specifications that concerned the first respondent were discussed by some members of the BEC with the first respondent before the latter could submit its tender documents.

[96] Members of the BEC also clarified the first respondent's concerns at the clarification meeting before the bid was submitted. The first respondent was assured that the two tenders (169S and 387G) would not overlap and must be treated separately as such. The pricing in terms of the tender and the mandatory tender specifications were also explained to the respondent. Crucially, the fact that the two tenders had to be treated differently was also addressed in several correspondences with the first respondent by the BEC members before the tender's closure.

[97] From the minutes of the BEC, nothing suggests that the BEC, decided to condone the integration of the two tenders as proposed by the first respondent in its compliance statement. Furthermore, there is nothing in the minutes of the BEC suggesting that its members decided to condone the inclusion of the first respondent's deviations (as contained in the compliance statement) to the tender specifications contrary to the stance it held when it engaged the first respondent before the submission of the tender.

[98] There is also nothing intimating that the BEC considered the additions in the first respondent's compliance statement and agreed to depart from what it told the respondent during the clarification session that the two tenders are separate and would be treated as such. What is clear, though, is that despite the additions of the compliance statement, which differed from the BEC's stance on the tender specifications, the BEC noted that the first respondent complied with all the tender specifications.

[99] Evidently, the minutes tell a different story. The BEC's material oversight came to its attention after the award of the tender to the first respondent was made. It is revealing that the BEC did not consider the amendments or insertions in the compliance statement, which conflicted with the tender specifications. The chronology of events and the correspondences between the parties immediately before the bid was submitted clearly indicates that the BEC had not considered the compliance statement in depth as required. The BEC failed to appreciate the true nature and import of the first respondent's compliance statement. Had it done so, it would have eliminated the first respondent's bid as non-responsive for violating the tender specifications. Given all these considerations, I am of the opinion that the award of tender 169S to the first respondent was unlawful and must be set aside.

The Counter Application

[100] Regarding the counter application, the first respondent seeks an order for the applicant to conclude a contract with it by counter-signing the Form of Offer and Acceptance on page 6 of the tender document. The first respondent also contends that the agreement in question should be subject to further conditions that the contract

period shall be for 36 months in accordance with the tender document, commencing on the date when the applicant concludes the contract with the first respondent. I addition, the first respondent contends that the price of the vehicle tracking and recovery services and equipment supplied by the first respondent shall be adjusted according to the CPI in accordance with the tender document and calculated with effect from 1 July 2020.

[101] I have already found that the intended contract between the parties was terminable on 30 June 2023. I have also found that the counter application is also moot. In addition to the above finding, it is essential to note that the BAC's award expressly specified that it was from 1 July 2023, terminating on 30 June 2023. This decision of the BAC stood unless set aside by a court of competent jurisdiction. *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers* 2020 (4) SA 375 (CC) para 1. If the first respondent wanted a contract for 36 months beyond 30 June 2023, it had to have taken the BAC's award on review. As correctly pointed out by the applicant's Counsel, the BAC's award is an administrative decision that stood and remained effective and binding unless reviewed and set aside. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) paras 26 and 31. From these findings, it is evident that the counter-application must fail.

COSTS

[102] The general rule is that the successful party is entitled to his costs. The Supreme Court of Appeal has frequently emphasised that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of the facts in each case. In essence, the decision is a matter of fairness to both parties. *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) Sa 1045 (SCA) at 1055F-G.

[103] It is common cause that the applicant delayed in launching its self-review application. The self-review application was necessitated by the negligence of the applicant's BEC when they adjudicated the first respondent's tender documents. The first respondent's compliance statement was at variance with the tender specifications. On the other hand, the counter-application had no merit, and the first respondent should have challenged the decision of the BAC to award the tender until 30 June

2023. In my view, this is a typical case in which each party must pay its own costs in respect of the two applications. However, I am of the view that the first respondent's application for striking out paragraphs 35 to 101 of the applicant's replying affidavit was unmerited and unwarranted. The first respondent must pay for the costs of that application.

[104] Regarding the costs of the interdict, the applicant argued that the first respondent has failed to distinguish between the advertising of a tender, and the award of a tender. Ms O'Sullivan submitted that the advertising of tender 198S did not give rise to any rights on the part of any third party, and it did not infringe the rights of the first respondent. Counsel further stated that tender 198S was for a different period. In Counsel' view, only the award of a tender gives rise to rights. I do not agree with this proposition. In my view, it was unlawful for the applicant to publish tender 198S while its legality review on tender 169S remained undetermined. Tender 198S was for the same services envisaged in tender 169S which was already awarded to the first respondent. The fact that it was for a different period is neither here nor there.

[105] It was instructive for the first respondent to protect its rights by launching the interdict application. The publication of the new tender amounted to a threat and an unlawful interference with the first respondent's rights. The first respondent could not be expected to bring an application for an interdict long after the tender has been granted and its rights have been infringed. Such an application for an interdict would have been an exercise in futility. If the tender was awarded to a third party as suggested by Ms Sullivan, the only way the first respondent could protect its right was to apply for the review of the award and not to apply for an interdict. To this end, I agree with Mr Schreuder that the applicant's conduct of initiating a fresh procurement process under tender 198S, was irresponsible and opportunistic. In my view, the first respondent legitimately brought the interdict application to protect its rights and to interdict the applicant from awarding a tender that was already awarded to it. Consequently, the applicant, in my view, must be ordered to pay the costs of the interdict application.

ORDER

[106] In the result, the following order is granted:

106.1 The late filing of the self-review application is hereby condoned.
106.2 The application to strike out is hereby dismissed.
106.3 It is ordered that the award of tender 169S/2019/20 to the first respondent for the Supply and Delivery of Vehicle Tracking and Recover expired on 30 June 2023.
106.4 To the extent necessary, it is ordered that the decision of the applicant's Bid Adjudication Committee taken on 22 June 2023 to award tender number 169S/2019/20 for the Supply and Delivery of Vehicle Tracking and Recover for a contract period ending 30 June 2023 to the first respondent is declared invalid and unlawful.
106.5 Furthermore, to the extent necessary, the decision of the BAC taken on 22 June 2020 to award the tender to the first respondent for a contract period ending on 30 June 2023 is reviewed and set aside.
106.6 Each party is ordered to pay its own costs in respect of the self-review and the counter-application.
106.7 The first respondent is ordered to pay the costs of the striking out application.
106.8 The applicant is ordered to pay the first respondent's costs in respect of the interdict application. Such costs to include the costs of two counsels were so employed.

LEKHULENI JD
JUDGE OF THE HIGH COURT

Appearances

For the Applicant:	Ms M O'Sullivan SC and Mr N de Jager
Instructed by:	Toefy Attorneys

Applicant's attorneys

For the First Respondent: Mr Schreuder SC

Mr Quixey

Instructed by: Maurice Phillips Wisenberg

First Respondent's attorneys