

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

Case No: 4709/2021

In the matter between:

BCB CABLE JOINTING CC

Applicant

and

AMPCOR KHANYISA (PTY) LTD

First Respondent

THE CITY OF CAPE TOWN

Second Respondent

THE CITY MANAGER, CITY OF CAPE TOWN

Third Respondent

Coram: Justice J Cloete

Heard: 16 March 2023

Delivered electronically: 5 May 2023

JUDGMENT

CLOETE J:

Introduction

- [1] This is an opposed review in which the applicant (“BCB”) seeks, *inter alia*, the setting aside of a tender awarded by the second respondent (the “City”) to the first respondent (“Ampcor”) relating to the provision of “emergency cable jointing and terminating services for up to 11 KV cables” (the “tender”).

- [2] BCB launched this application on 16 March 2021 in two parts. In Part A it sought an order that pending determination of the relief in Part B the City be compelled to conclude a contract, and allocate work to it, as alternative contractor pursuant to the tender award.
- [3] On 19 April 2021, Part A was settled in terms of an agreed order which reads in relevant part as follows:

‘2. It is recorded that:

2.1 a contract was concluded on or about 3 August 2020 between the second respondent and the applicant, as alternative contractor (“the Contract”) pursuant to the award of tender number...

2.2 the applicant and second respondent will adhere to the terms of the Contract referred to in paragraph 2.1 above, while the Contract remains in effect;

2.3 the applicant’s entitlement to be allocated work, as alternative contractor, in terms of the Contract is dependent on the first respondent as main contractor defaulting in terms of the relevant provisions of the contract concluded between the first respondent and the second respondent pursuant to the award of the Tender...

3. The aforementioned recordals do not constitute an admission on the part of the second and/or third respondents that the applicant is entitled to any of the relief sought in Part A of the notice of motion.

4. The second and third respondents expressly reserve the right to dispute the applicant’s entitlement to any of the orders sought in

Part A of the notice of motion; and to dispute the allegations in the founding affidavit pertaining to the relief sought in Part A of the notice of motion.

5. *The costs pertaining to the relief sought in Part A of the notice of motion, will stand over for determination at the hearing of the relief sought in Part B of the notice of motion.'*

[4] In the amended Part B the following relief is sought:

- 4.1 Condonation for any delay in launching the application;
- 4.2 Setting aside the City's supply chain management policy ("SCMP") to the extent that it seeks to comply with the Preferential Procurement Regulations, 2017;
- 4.3 Setting aside the tender award together with the decision of the third respondent ("City Manager") to dismiss BCB's appeal against that award;
- 4.4 Substituting the award of the tender by awarding it to BCB as principal contractor;
- 4.5 Directing that compensation be paid to BCB, jointly and severally by the respondents, in the amount of R958 820.86; and
- 4.6 Costs on the scale as between attorney and client.

Relevant factual background

- [5] BCB had previously been the contractor and service provider to the City for the electrical work underpinning the tender for 12 years. During 2019 the City advertised the tender with a closing date of 3 December 2019 for a period not exceeding 36 months *'from date of commencement of contract'*.

- [6] From the tender documents it is clear that the tender did not relate to any specific project(s). It instead envisaged a “framework agreement” in which a successful bidder would perform *ad hoc* services for the City as and when the need arose, at agreed rates.
- [7] Bids would be assessed in accordance with a so-called “80/20” calculation, which applies to tenders with a value less than R50 million. This meant that bidders would be scored based on a competitive assessment of their quoted prices with a maximum score of 80 points; and up to 20 “preference points” based on their “contribution level” in terms of the B-BBEE Act.¹ The bidder with the best overall score would be successful, save in exceptional circumstances (as far as can be gleaned from the papers, BCB does not rely on any such circumstances).
- [8] As also evidenced by the tender documents, the City envisaged appointing one successful bidder for all of the tendered work in all of its electrical distribution areas. However, it reserved the right to break up the tendered work, and to appoint both a “main” and “alternative” contractor. The alternative contractor would only be awarded work projects if the main contractor defaulted, and failed to meet its commitment to be on site within 4 hours of notification that work was required.
- [9] The City’s Bid Evaluation Committee (“BEC”) found that both BCB and Ampcor submitted “responsive” bids (i.e. those which met the mandatory requirements of the tender); offered reasonable and acceptable rates; had sufficient experience; and offered adequate resources and staff to complete the work.
- [10] However, when the bids were scored, Ampcor achieved better than BCB. The latter offered the best prices, thus entitling it to 80/80 points for this item. However BCB acknowledged in its bid that it was a “non-compliant contributor” in terms of B-BBEE. In terms of the tender documents, this meant

¹ Broad-Based Black Economic Empowerment Act 53 of 2003.

that BCB had to be scored with 0/20 possible preference points. Ampcor offered competitive prices, which entitled it to 75.07/80 points for price; and was a “level 1” B-BBEE contributor, which entitled it to 20/20 preference points.

- [11] The BEC thus recommended that Ampcor be appointed as the main contractor, and BCB as the alternative contractor. This recommendation was accepted by the City’s Bid Adjudication Committee (“BAC”) and the tender award decision was conveyed to BCB and Ampcor on 11 June 2020.
- [12] Aggrieved by the outcome, BCB submitted an internal appeal to the City Manager. In summary its grounds of appeal were: (a) superior work experience and functionality in comparison to Ampcor; and (b) better pricing than Ampcor. On 13 July 2020 the City Manager advised BCB that its appeal had been unsuccessful. In his accompanying reasons the City Manager confirmed that BCB offered marginally better prices, but this had been eclipsed by the fact that it scored no preference points. Ampcor thus achieved the highest score, and there was no reason that BCB’s claimed superiority should place it above Ampcor. In particular, the City Manager stated that:

‘What the Appellant raises as its upper hand when compared to Ampcor was responsiveness criteria which both tenderers satisfied. Accordingly, based on regulation 5(7) of the PPPFA Regulations, the tenderers had to be evaluated further based on their price and preference points...

Clause 6.3.10.3 of the tender conditions provides that scoring of tenderers would be done in terms of points for price and preference.

The Appellant is correct in asserting that its price was lower than that of Ampcor. However, as alluded to earlier, price is not the only factor to consider when determining the highest ranked tenderer; a tenderer’s preference points must additionally be considered.

The Appellant, as a non-contributor² in terms of Broad-Based Black Economic Empowerment, did not score any preference points.

For further clarity on why Ampcor was successful as Main Contractor, the total scores on price and preference were as follows:-

<i>Tenderer</i>	<i>Price points</i>	<i>Preference points</i>	<i>Total</i>
<i>1. Ampcor</i>	<i>75.07</i>	<i>20</i>	<i>95.07</i>
<i>2. The Appellant</i>	<i>80</i>	<i>0</i>	<i>80</i>

- [13] Almost three months later, on 8 October 2020, BCB enquired from the relevant City official *‘if there has been a commencement date set for the tender...’*. On 16 October 2020 the official confirmed BCB’s appointment as alternative contractor and requested certain documents and information, including *‘the staff that will be used in the contract’*. On 19 October 2020, BCB responded, pointing out that most of the documentation had already been supplied. It also complained about Ampcor’s competence and then went on to state:

‘As per a previous email received from the CoCT regarding our appeal, we were informed that we could seek further legal action within 180 days should we feel that we are not receiving the necessary feedback we require. To date, we do feel that this matter is not being dealt with and hope that this is not the course of action which we may need to follow.’

- [14] On 20 October 2020 the Head: Maintenance and Service Standards for electricity generation and distribution, the City’s Mr Gqwede, responded. In essence, he pointed out that it had taken time to have Ampcor’s cable jointers declared competent by the City’s training centre (due to Covid-19 related restrictions) and stated that:

² A non-compliant contributor is one who does not meet the minimum score for a level 8 contributor in terms of clause 6.3.10.3 4 of the tender conditions.

'As mentioned above we aim to finalise the administrative process this week and issue communication to our users to start placing orders to Ampcor in the coming week. In essence we have not officially commenced with this contract, we have not officially monitored the contractor's performance and therefore cannot agree with [BCB's] comments. The contract allows us to utilise the alternative contractor where necessary, at the moment it is not necessary and we will not invoke this provision yet. As per the norm we will monitor the performance of this contractor and enforce contract conditions as is required from us.'

[15] Almost another month went by until on 18 November 2020, BCB's erstwhile attorney wrote to the City. The relevant portion of that letter reads as follows:

- '3. Our client's further instructions are that no further feedback or correspondence has been received whatsoever in relation to the prospective signature of a contract confirming their appointment as Alternative Contractor. Not only is this situation untenable, but it also runs contrary to our client's experience of the CoCT in such matters...*
- 4. Accordingly, our client is at a loss to understand... why the CoCT has so far failed to attend to the contract compliance matter...*
- 5. With due regard to the aforesaid, we are instructed to call upon you to provide our client with confirmed arrangements for signature of a suitable contract to govern their position as Alternative Contractor... Considering that so much time has passed since the tender was awarded, you are requested to now respond with appropriate urgency and in writing by close of business on Friday 20 November 2020.*

6. *In conclusion, we are instructed to place on record that our client intends to conclude such a contract with the CoCT to regularise any work that it is required to do as Alternative Contractor, but without prejudice to its contention that the tender was irregularly composed, considered and/or awarded and stands to be set aside. In this latter respect our client is mindful of the 180-day period within which it is expected to launch a legal challenge if necessary. That said, our client persists in its hope that the CoCT will confront the incontrovertible difficulties that it has created for itself in the award of this tender (some of which it has, itself, placed on record), and that a Court challenge will not be required to deal with same...'*

[16] On the same date another City official replied that he 'Will respond!'. According to the applicant no response was forthcoming at the time of deposing to the founding affidavit on 15 March 2021 (a further 4 months later). After this application was launched (with Part A enrolled for hearing on 19 April 2021) the attorney for the City and its Manager wrote to BCB's current attorney (on 1 April 2021). BCB was advised that the contract had been concluded with it on 3 August 2020. The City's formal acceptance of the same date was annexed to the letter, for a contract period commencing on 1 July 2020 and terminating on 30 June 2023. As I understand it, this resulted in the agreed order in respect of Part A.

[17] There is no assertion in the answering affidavit of the City and its Manager that this formal acceptance was ever sent to BCB prior to 1 April 2021, and in this respect BCB's version falls to be accepted. However in its supplementary founding affidavit deposed to later on 26 July 2021, BCB nonetheless elected to devote 34 out of 85 paragraphs (or 17 pages of its 40 page affidavit) to the events leading up to settlement of the Part A relief, which was entirely unnecessary and caused the City (and its Manager) to incur costs to deal with this.

Delay

[18] In its founding affidavit BCB relied squarely on PAJA³ and accordingly – as BCB itself acknowledged in earlier communications with the City – it was obliged to launch the review “without unreasonable delay and not later than 180 days” from having exhausted its internal remedy, i.e. its appeal, in terms of s 7(1)(a) of PAJA.⁴ The appeal was determined on 13 July 2020 and the review should thus have been instituted, at the latest, by 9 January 2021.

[19] Section 9 of PAJA provides that a court may “on application” extend the 180 day period “where the interests of justice so require”. What was stated in the founding affidavit on this score is set out hereunder:

‘18. In Part B of the notice of motion, the applicant seeks the following orders:

18.1 An order condoning:...

18.1.2 Any delay in the institution of this application...

86. In light of what is recorded above, it should be clear that the tender could not have been lawfully awarded to the first respondent. The first respondent either made misrepresentations to the second respondent (the applicant alleged that the misrepresentations were fraudulent), leading to the award of the tender, alternatively, the representations of the first respondent were not properly considered before the tender was awarded...

121. Given the applicant’s limited access to the tender documents of the first respondent, and the documents which show what the second respondent did to award the tender to the first respondent, I am not in a position to say precisely what the first respondent put forward to the second respondent, or where

³ Promotion of Administrative Justice Act 3 of 2000.

⁴ Section 7(2)(c) of PAJA does not apply since no relief was sought in terms thereof.

exactly the second respondent went wrong in the award of the tender to the first respondent, as principal contractor, in addition to what is recorded above. The same goes for the actions of the third respondent. What is recorded above, is based on the limited information which the applicant was able to source from various sources and with great effort, before this application was launched. Accordingly, the applicant's legal advisers will only be able to finalise the precise wording of the review relief sought in respect thereof, once this information becomes available through the provision of the rule 53 record of decisions.

122. *The applicant wanted to avoid litigation, but this amounted to a waste of time. The officials of the second respondent are not interested in correcting the unlawfulness which resulted from their unlawful decisions, or even ameliorating the effects thereof. Their refusal to conclude any contract with the applicant is proof thereof.*
123. *It in fact took only a couple of months for the first applicant [sic] to resolve to pursue this weighty matter, to consult with relevant persons who have some knowledge of the facts underlying this matter, to work through what is a set of complicated facts and legal issues, to instruct legal representatives and decide upon the course of action to be adopted. Thereafter the founding papers had to be drafted and settled which, as is apparent from the complexity of the issues and the history of the matter, has in itself been a lengthy task. I respectfully submit that the applicant cannot be accused of having been dilatory in launching this application, more particularly in circumstances in which the second respondent has kept the applicant on a proverbial string, for a long time...*

124. *I respectfully submit that the applicant has acted with all reasonable expedition in investigating, obtaining advice concerning and now asserting its rights.*

125. *In any event, I am advised that as a result of the fraudulent/false (mis)representations of which the first respondent made itself guilty, in the submission of its tender to the second respondent (as explained above), the decisions in favour of the first respondent, specifically the award of the tender to it as principal contractor [under] any subsequently concluded contract, were void ab initio. The result of such voidness obviates any need for condonation.'*

[20] Nothing more was said about the delay in BCB's supplementary founding affidavit (delivered after receipt of the rule 53 record). In its answering affidavit Ampcor pertinently raised the issue of delay. It submitted that there was no proper application for an extension; BCB (which bears the onus) failed to provide any compelling allegations to sustain an extension; and that in any event it was not in the interests of justice for an extension to be granted. Ampcor stated that it has been performing the tendered work, and employed people on the basis that it was properly awarded the tender. Should the tender now be undone, these employees would suffer most and the impact on Ampcor itself would be devastating.

[21] The City and its Manager made similar submissions in their answering affidavit. They pointed out that BCB delayed for eight months (246 days to be exact) after its appeal was dismissed before bringing this application. It now not only seeks to review and set aside the award to Ampcor, but also to substitute that decision with an award to it. They submitted that in the circumstances of this case, not least the significant and far-reaching consequences insofar as Ampcor is concerned, a delay of eight months from when BCB became aware of the decision is unreasonable. They made common cause with Ampcor that BCB provided no reasonable justification for

the delay in instituting the review relief and took issue with BCB's attitude that there is no need to seek condonation for the delay.

[22] In its replying affidavit BCB submitted the following:

‘46. ...[PAJA] allows for condonation, should an application of this nature be launched outside of the period of 180...days. The overall question to be determined in this regard, is where the interests of justice lie.

47. There can be little doubt that the interests of justice demand that the application succeed. First respondent cannot be allowed to get away with its actions, on the basis of delay...

59. ...The first respondent cannot be allowed to benefit from its own wrongdoing, simply because of the lapse of time...

212. The applicant admits that the 180... day period... expired on 9 January 2021. To the extent that condonation is required, the applicant has applied for condonation.

213 It is respectfully submitted that as a result of the conduct which led to the award of the tender to the first respondent, condonation is not required. The applicant applied for condonation *ex abundanti cautela*...

[23] In *Van Wyk v Unitas Hospital*⁵ the Constitutional Court set out the manner in which condonation is to be approached:

‘[20] This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and

⁵ 2008 (2) SA 472 (CC).

circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised... and the prospects of success...

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable...'

[24] In *OUTA*⁶ it was held that:

'At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned... Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all.'

[25] Having regard to the facts and those averments in BCB's affidavits in relation to delay there is an entirely unexplained period preceding the launching of this application of almost 4 months out of the total 8 month period, i.e. between dismissal of the appeal on 13 July 2020 and BCB's first communication to the City on 8 October 2020; and between the response of Mr Gqwede on

⁶ *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others* [2013] 4 All SA 639 (SCA) at para [26].

20 October 2020 and the letter to the City from BCB's erstwhile attorney on 18 November 2020. In addition, the reasons advanced by BCB in respect of the balance of the period are extremely broad, vague, bereft of detail, and are not even elaborated on in the confirmatory affidavit filed by its attorney.

- [26] In *Gijima Holdings*⁷ the Constitutional Court stated that the discretion to overlook an undue delay in instituting review proceedings cannot be exercised in the abstract. There must be a basis upon which to do so, arising from facts placed before the court by the parties, or objectively available factors. In *Khumalo*⁸ the same court said:

'[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'

- [27] Further, in *Tasima*⁹ that court also explained that this discretion should not be exercised lightly:

'While a court "should be slow to allow procedural obstacles to prevent it from looking into the challenge to the lawfulness of an exercise of public power", it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.'

⁷ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para [49].

⁸ *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para [45].

⁹ *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para [142].

[28] It is so that BCB failed to bring a substantive application for extension of the 180 day period. But even if this court is generous to it, and accepts that BCB considered the averments made, coupled with a prayer in the notice of motion, to be such an application, I am nonetheless in no position to determine whether or not the delay was reasonable *in the circumstances*. I agree with Ampcor, the City and its Manager that a delay of some eight months from when the decision to award the tender was finalised is most certainly not negligible. BCB seemingly fails to appreciate that, even if the review proceedings had been instituted within the 180 day period (i.e. by 9 January 2021), this court would still be required to engage in an enquiry to ascertain whether the delay was unreasonable or not.

[29] In my view BCB's true attitude to the issue of delay is displayed by its stance that, given fraud "unravels everything", it was not necessary for it to seek condonation at all but that it did so out of caution. However at the time the application was launched, on BCB's own version, it had no "proof" of fraud. The best it could contend was that either Ampcor made misrepresentations to the City (which BCB "believed" to be fraudulent) or Ampcor's representations were not properly considered by the City prior to award of the tender.

[30] In other words, BCB itself was not even sure of the true nature of its complaint more than eight months after dismissal of its appeal. The assertion of possible fraud at the time when the review application was instituted does not, in my view, assist BCB even if there was merit in its submission that in the case of fraud condonation is not required. In any event BCB has misconceived the legal position. The authority upon which BCB itself relies indicates quite the opposite in challenges to administrative decisions:

'Furthermore, decisions induced by fraud have sometimes been regarded as revocable on the basis that "fraud unravels everything". This common-law jurisprudence is, however, in considerable tension with a principle established in Oudekraal and since developed by the Constitutional Court in a series of cases. In one of these [i.e. Tasima]... a majority of the court expressed the principle as follows:

Our Constitution confers on the courts the role of the arbiter of legality. Therefore, 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.

In a later case, Magnificent Mile Trading,¹⁰ the majority described this principle even more broadly. In the words of Madlanga J, it applies “to any situation where – for whatever reason – an extant administrative act is being disregarded without first being set aside.”¹¹

- [31] To my mind the most prominent factor militating against condonation is the combination of the unexplained delay of 4 months and the wholly inadequate explanation for delay during the balance of the 8 month period. However there is another significant factor which stacks the cards against BCB.
- [32] The contract period for the tender expires on 30 June 2023, a mere 3 ½ months after the matter was argued. Ampcor accepts that it was late in delivering its answering affidavit and has given a satisfactory explanation why this occurred. That affidavit was deposed to on 19 November 2021. However the affidavits of the City and its Manager were delivered around 11 October 2021, and this puts Ampcor’s delay of just over five weeks thereafter in proper perspective.
- [33] It is also no excuse for BCB’s earlier 8 month delay, since by the time Part A was set down to be heard the parties were already almost a year into the three year contract period. Moreover after delivery of the replying affidavit on 15 February 2022 (I accept BCB’s explanation that this further delay was due to ill-health of one of its members as well as its attorney) it was in fact only on 19 September 2022 (another 7 months later) that the registrar was approached for a date to be allocated for the hearing.

¹⁰ 2020 (4) SA 375 (CC).

¹¹ Hoexter: Administrative Law in South Africa (3ed) at 386-387.

- [34] Even then Ampcor, the City and its Manager had to file heads of argument before BCB in order to comply with the relevant Practice Directive. BCB should have filed theirs by latest 22 February 2023 but they were only filed on about 9 March 2023, unaccompanied by any explanation, let alone a condonation application.
- [35] The further unexplained delays outlined above do not portray the picture of an anxious litigant wishing to bring finality to its dispute in a reasonably expeditious manner. The factual consequence is that, even were this court to come to BCB's assistance on the merits, the relief it seeks will be all but rendered moot.
- [36] I thus conclude that to the extent BCB has made out a case for condonation, it must fail, and the application falls to be dismissed on this ground alone. However I nonetheless deal with the merits, for two reasons. The first is that the Supreme Court of Appeal has held that it is not desirable, where possible, for a lower court to determine a matter purely on a point *in limine*.¹² The second is what was stated by that court in *Sasol Chevron*:¹³

'[17] In Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited¹⁴, this court said that in applications for condonation (extension of time in the context of s 9(2) of PAJA), the substantive merits of the principal case may be relevant. The court proceeded to say that in circumstances where the merits are considered to be relevant, they are not necessarily decisive. In Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others¹⁵ this court stated that absent an extension, "the court has no authority to entertain the review application". However, this statement was qualified in South African National Roads Agency Limited v City of

¹² *Spilhaus Property v MTN* 2019 (4) SA 406 (CC) at para [44].

¹³ *Commissioner for the South African Revenue Service v Sasol Chevron Holdings Limited* (1044/2020) [2022] ZASCA 56 (22 April 2022).

¹⁴ *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* 2017 (6) SA 90 (SCA) at para [34].

¹⁵ fn 6 above.

*Cape Town*¹⁶, in which Navsa JA said that this dictum “cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned.”¹⁷

The City’s supply chain management policy

[37] The crux of BCB’s attack is that, since the regulations promulgated on 20 January 2017 by the Minister of Finance while purporting to act in terms of s 5 of the PPPF Act¹⁸ were declared unlawful by the Supreme Court of Appeal in *Afribusiness NPC*¹⁹ on 2 November 2020, so too is the City’s supply chain management policy (“SCMP”) – the so-called domino effect – and given that the award of the tender to Ampcor occurred in terms of the “regulations and” SCMP, this is a self-standing ground for the setting aside of that award.

[38] However the following passages from the *Afribusiness* judgment are instructive:

‘[40] It follows therefore that the Minister’s promulgation of regulations 3(b), 4 and 9 was unlawful. He acted outside his powers under s 5 of the Framework Act [i.e. the PPPF Act]. In exercising the powers to make the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act, which is the national legislation that was enacted to give effect to s 217 of the Constitution. The framework providing for the evaluation of tenders provides firstly for the determination of the highest points scorer and thereafter for consideration of objective criteria which may justify the award of a tender to a lower scorer. The framework does not allow for the preliminary disqualification of tenderers, without any consideration of a

¹⁶ 2017 (1) SA 468 (SCA) at para [81].

¹⁷ See also *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality and Another* 2017 (6) SA 360 at para [12].

¹⁸ Preferential Procurement Policy Framework Act 5 of 2000.

¹⁹ *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA).

tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated framework of the Framework Act.

[41] The Minister's decision is ultra vires the powers conferred upon him in terms of s 5...'

[39] On appeal the majority of the Constitutional Court²⁰ stated that:

'[111] In my view, the impugned regulations are not necessary. The impugned regulations are meant to serve as a preferential procurement policy... Section 2(1) of the Procurement Act [i.e. PPPF Act] provides that an organ of state must "determine its preferential procurement policy" and implement it within the framework laid down in the section... If each organ of state is empowered to determine its own preferential procurement policy, how can it still lie with the Minister also to make regulations that cover that same field?'

[40] Accordingly, as I see it, the fundamental flaw in BCB's argument is its contention that the invalidity of the regulations results in the SCMP being invalid on the basis that it is unconstitutional. The courts found the Minister to have acted *ultra vires* his powers in promulgating those regulations because they were unnecessary to make, since each organ of state is empowered to determine its own preferential procurement policy. There is no direct challenge by BCB to the constitutionality of the SCMP itself. In any event BCB failed to follow the procedure prescribed in rule 16A of the uniform rules of court (for constitutional challenges) and, even if it could be said that some sort of challenge is advanced on BCB's papers, that challenge is thus not properly before the court.

[41] Moreover the Supreme Court of Appeal suspended its declaration of invalidity for 12 months to enable corrective action. Once the Constitutional Court

²⁰ *Minister of Finance v Sakeliga NPC (previously Afribusiness NPC) and Others* 2022 (4) SA 362 (CC).

dismissed the Minister's appeal on 16 February 2022 that 12 month period resumed. Neither court granted retrospective relief. This accords with the general principle that such a declaration should have no retrospective effect.²¹ In the circumstances the SCMP was valid at the time of the tender award.

[42] It also dispenses with BCB's argument that had it not been for the "unconstitutional" 2017 regulations, the 80/20-point system would not have been applied to the tender. As was submitted on its behalf:

'This means that:

- .1 Either a 90/10-point system would have been applied, in terms of the 2011 regulations, as the 2011 regulations would not have been repealed but for the unconstitutional 2017 regulations. The results of this conclusion would mean that the applicant would have scored 90/90 for price and 0/10 for its previously disadvantages status. The scoring of the first respondent on this interpretation is unknown; or*
- .2 No point system should have been applied to this tender in terms of the 2017 regulations, because of the unconstitutionality thereof. The result of this latter conclusion would mean that the tender should have been awarded to the applicant, based on price only.'*

Setting aside of tender award and substitution

[43] BCB advanced 9 grounds for why it believed the tender award to Ampcor should be set aside. Of these only 5 were persisted with in argument, namely: (a) fraud by Ampcor; (b) pricing; (c) the report to the BAC; (d) point scoring; and (e) absence of a quorum for the Bid Specification Committee ("BSC").

Alleged fraud

²¹ *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 at para [32].

- [44] This relates to the cable jointers put forward by Ampcor for purposes of its tender. It is BCB's case that the successful tenderer had to have at least three qualified cable jointers in its employment at close of the tender on 3 December 2019, failing which it could not have met the requirement for its "capacity to proceed with the contract".²² BCB maintained that none of the three cable jointers put forward by Ampcor met this threshold (including a Mr Vicars), but in argument BCB only persisted in relation to two of them, namely a Mr Jones and a Mr Van Staden.
- [45] BCB claimed that Jones lacked the relevant qualifications and had no knowledge of his name being put forward. He also did not reside in Cape Town and had no intention of relocating here. Although Van Staden was resident in Cape Town on date of closure of the tender, he too lacked the necessary qualifications and was dismissed from Ampcor's employ shortly after 3 December 2019.
- [46] These were not complaints raised in BCB's internal appeal to the City Manager, but appeared for the first time in BCB's founding affidavit. The information was apparently obtained by BCB's attorney from Jones and Van Staden. Neither Jones nor Van Staden deposed to a confirmatory affidavit and these allegations thus constitute inadmissible hearsay.
- [47] The only objective "evidence" relied upon by BCB is a list which came into its possession from an undisclosed source on an undisclosed date of certain cable jointers in Cape Town on 3 December 2019, and who allegedly held the required qualifications for the tender. BCB maintained that none of them were employed by Ampcor on that date.
- [48] In its answering affidavit Ampcor pointed out that the same list included Mr Vicars (who was in its permanent employ and was presented in its tender). This is presumably the reason why BCB dropped that complaint. After setting out in detail why both Jones and Van Staden were eminently qualified for

²² Clause 6.1.1.3 of the tender conditions.

purposes of the tender, and stating that it was the intention that Jones would relocate if successful, Ampcor explained that soon after the award (i.e. on 11 June 2020) Van Staden resigned and was replaced by a Mr Samuels. Jones was replaced by a Mr Hackley. Both met the qualification requirements. These replacements occurred with the City's approval in accordance with clause 6.1.5 of the tender documents.

[49] In reply BCB appeared to abandon its "qualification" attack, persisting however with a claim that Ampcor should have disclosed that Van Staden was not employed by it before the award of the tender. This was alleged to constitute fraud on Ampcor's part. In addition much was made by BCB of Jones not being in Cape Town "at the time the tender was awarded" to Ampcor. But nothing turns on this since that was not the relevant date; and to the extent that it might have some significance this was a new case made out in reply which Ampcor was thus precluded from dealing with.

[50] BCB also alleged in its founding papers that in an email dated 20 October 2020, the City's officials admitted that Ampcor's responsiveness was never checked before the tender award was made. But this is a misleading gloss on that email. It actually states that after the tender award the City assessed Ampcor's designated cable jointers at the City's training centre – as expressly permitted in clause 8 of the tender specifications. Ampcor's cable jointers were again found to be competent. This is over and above the minimum requirements in the tender.

Pricing

[51] BCB's complaint is that the manner in which points were allocated for pricing of the tender was irrational since the formula contained in clause 6.3.10.2.4 of the tender documents "made no mathematical sense" when applied to the tender awarded to Ampcor. BCB "assumes" that the City added all the items on the pricing lists of the tenderers together, to determine individual totals per tenderer. These totals were then compared for the awarding of points. According to BCB this was irrational.

[52] However the City provided a complete answer. It explained that it uses a “basket” to evaluate rates. It advises tenderers that a basket will be used but the City cannot make these values known as this would defeat the competitiveness criteria in the tender process. The salient information is made known in clause 6.3.10.3.1 of the tender documents:

‘6.3.10.3.1 Points for price will be allocated in accordance with the formula set out in this clause based on the price per item/rates as set out in the Price Schedule (Part 3):

- *Based on the sum of the prices/rates in relation to a typical project/job.’*

[53] The City also stated that the evaluation of adjudication points was made available to the BAC for consideration. It also pointed out that of the two responsive tenderers, being BCB and Ampcor, BCB scored highest on points but because it scored no points for B-BBEE criteria, on the 80/20 points system utilised for the tender, BCB scored fewer points overall and was thus appointed as alternative contractor.

[54] BCB seems to suggest that if it could show Ampcor should have scored lower than 75.07/80 points for pricing, this would have tipped the overall scale in BCB’s favour, since it scored 80/80 points, and the only differential was the scoring of preference points.

[55] However cut to its bare bones BCB’s irrationality complaint is really nothing more than an assumption. Apart from its (failed) attack on the constitutionality of the SCMP, it has not been able to demonstrate how being provided with chapter and verse of the City’s internal scoring process would place it in a better overall position than Ampcor. Although it alleges that the manner in which points were allocated for pricing of the tender was irrational, BCB can go no further than “assuming” that the City approached pricing in a particular way. To my mind more is required of BCB to persuade this court in its favour.

The report to the BAC

- [56] BCB complained that when the BEC report was submitted to the BAC, pricing and B-BBEE status were not allocated in points, and accordingly those points were not considered when the tender was adjudicated. Reliance was placed on an extract of the BEC report which was annexed to the founding affidavit.
- [57] However the very extract upon which BCB relied clearly reflects that the tender sums were “rates based”; Ampcor was found to be a level 1 valid, verified B-BBEE contributor whereas BCB was found non-responsive; and the 80/20 price preference points system was prescribed in the tender documents as advertised.
- [58] In addition, after the award of the tender BCB requested the City to provide it with the final scoring, to which the responsible City official replied that there was no such scoring for the tender. Although BCB latched onto this to draw a conclusion that therefore no scoring took place, as the City’s deponent pointed out, no final scoring was required since the tender did not have a functionality requirement.
- [59] Again BCB changed tack in reply:

‘318 *I deny that the second and the third respondents were entitled to award the tender without final scoring, simply because of the absence of the requirement of functionality. This concession alone, should cause this application to succeed...’*

- [60] BCB has not explained why it holds this view and the court is left to consider whether this has any merit in the abstract, which it cannot do. But in any event the argument is self-defeating because BCB cannot rely on a process which it contends is fatally flawed for substitution relief (the same applies to most of the other grounds as well).
- [61] For sake of completeness and as pointed out by the City, the lack of a functionality assessment does not render the tender irrational, as

responsiveness was evaluated based on the documents and information submitted by the tenderers. The responsive tenders (i.e. those that met the tender criteria) were evaluated on price and B-BBEE points on an 80/20 basis. The City has a discretion whether a bid demands the burden of a functionality assessment, and it was well within its powers to determine that in respect of this tender it was not required.

Point scoring

[62] The complaint is the same as that pertaining to the “challenge” to the SCMP although it was advanced under the guise of a separate ground. I accordingly do not repeat what is already contained in this judgment.

Absence of a quorum for the BSC

[63] This complaint was raised in BCB’s supplementary founding affidavit and formulated as follows:

‘78. The first meeting of the bid specifications committee took place on 13 September 2019. The above five (5) persons attended the meeting, but there were three (3) apologies... Only two (2) of the persons appointed to the BEC on 3 May 2018, attended this meeting. The applicant challenges the lawfulness of that meeting on the basis that it did not have a quorum...’

[64] Clause 116 of the SCMP provides that:

‘The Bid Specification Committee shall be comprised of at least two city officials as members, consisting of an appointed Chairperson and a responsible technical official. The Supply Chain Management Practitioner serves in an advisory capacity. No bid committee meeting shall proceed without an SCM practitioner.’

[65] The City states that the BSC meeting of 13 September 2019 was attended by two SCM representatives, the chairperson and two other officials from the Line Department. Regulation 27(3) of the SCM regulations provides that:

'A bid specification committee must be composed of one or more officials of the municipality or municipal entity, preferably the manager responsible for the function involved and may, when appropriate, include external specialist advisors.'

- [66] As pointed out by the City the constitution of the BSC for the meeting of 13 September 2019 was thus consistent with the abovementioned prescripts. However BCB maintains that the minimum number of persons by which the BSC committee must be composed does not equate to a quorum. It submits that in the absence of a quorum prescribed by law: (a) there is authority that it is two-thirds of members of the meeting; and (b) if functions are entrusted to a statutory body, it can only act if all of its members are present and unanimous.
- [67] The common law authority upon which BCB relies for the “two-thirds” requirement²³ does not assist it since on the City’s version (which must be accepted on the basis of the Plascon-Evans rule) only three individuals (two City officials and a SCM practitioner) are required to attend BSC meetings and this occurred on 13 September 2019. There is also nothing on the papers that I can find (and BCB itself did not suggest this in argument) that those who attended that meeting were not unanimous in their decision(s).
- [68] Those common law authorities upon which BCB relies for functions entrusted to a statutory body also do not support its argument. The starting point of *Schierhout*²⁴ is that: *‘when several persons are appointed to exercise... powers, then in the absence of provision to the contrary, they must all act together...’*. *Price*²⁵ dealt with the composition of a court in a criminal trial in similar context. *Schoultz*²⁶ and *De Vries*²⁷ applied *Schierhout* and *Price*. On the City’s version the procedure followed accords with the principle.

²³ Voet Commentarius 3.4.7.

²⁴ *Schierhout v Union Government* 1919 AD 30 at 44.

²⁵ *R v Price* 1955 (1) SA 219 (A) at 223E-G and 224C-E.

²⁶ *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander* 1983 (4) SA 689 (C) at 707F-711B.

²⁷ *De Vries and Others v Eden District Municipality and Others* (9164/09) [2009] ZAWCHC 94 (17 June 2009 at para [26].

[69] In any event BCB also relied on various dictionary definitions for the meaning of a “quorum”. The Collins Dictionary describes it as *‘the minimum number of people that a committee needs in order to carry out its business efficiently’*; the Cambridge Dictionary as *‘the smallest number of people needed to be present at a meeting before it can officially begin and before official decisions can be taken’*; and the Merriam Webster Dictionary as *‘the number (such as a majority) of officers or members of a body that when duly assembled is legally competent to transact business’*. BCB’s reliance on these definitions puts paid to its own argument.

Substitution

[70] Given my conclusions BCB’s substitution relief must fail, and as earlier stated, even if it had succeeded on one or other ground, BCB cannot have it both ways. Apart from the ground of fraud, all the others were directed at a fatally flawed process. A finding to that effect would have had the consequence that the tender process was void *ab initio* and would have to commence afresh.

Payment of compensation

[71] Although this claim was introduced in the amended notice of motion, the accompanying supplementary founding affidavit made no mention of it at all and accordingly no case was advanced for any of the respondents to meet. It was also not even alluded to in BCB’s replying affidavit (although this would have been impermissible in the absence of the court sanctioning it on application with an appropriate order as to costs and time for the respondents to deal with it).

[72] Moreover, not a murmur was made of any “exceptional circumstances” to justify compensation in terms of s 8(1)(c)(ii)(bb) of PAJA. The “claim” is thus stillborn and no more need be said about it.

Costs

[73] BCB on the one hand, and Ampcor, the City and its Manager on the other, claim punitive costs against each other. The manner in which BCB

approached and conducted its case is concerning. It also made certain scurrilous attacks on Ampcor and the City. I quote a few examples from its replying affidavit:

- '131. The fact that the first respondent continues to put forward incorrect facts, in order to justify its own unlawful position, and which facts cannot be sustained, justifies a punitive costs order against it. It also justifies the disqualification of the first respondent from all future tenders. Tenderers who win tenders in unscrupulous and/or unlawful ways can be disqualified... thereby preventing future situations such as the present situation, from arising...*
- 137. The conduct of the first respondent is reprehensible and it should be disqualified from future tenders...*
- 157. It appears that the first respondent either did not bother to read the awarded tender properly, or it is intentionally attempting to mislead this honourable court. In light of the fraud it committed in having the tender awarded to it, together with the false allegations the first respondent puts forward in its answering affidavit, the applicant puts nothing past the first respondent...*
- 220. The second and third respondents are being intentionally slow-witted in this paragraph...*
- 274. The interpretation which the deponent to the [City's] answering affidavit gives to the tender document is irrational and with respect, ridiculous. No reasonable person will interpret the terms and conditions of the tender in that manner. As the City's Director: Supply Chain Management, the deponent knows better than to make allegations of this nature on oath.*

275. *In short, it is shameful that a director of the City, which professes to be the best run city in the country, would depose to allegations such as those contained in these paragraphs. If the second and third respondents persist with the line of argument contained in these paragraphs, then oral evidence in this application cannot be excluded. The deponent to the answering affidavit may soon have to explain himself before a High Court judge, for making wholly unsustainable allegations, on oath. He will also have to explain how what he is doing is in the best interests of the second and the third respondents, as well as the ratepayers and residents of this city...*

[74] In respect of the Part A relief, it is appropriate that each party should pay their own costs for the reasons contained in paragraph [17] of this judgment. As far as the Part B relief goes, I am persuaded that a punitive costs award against BCB is warranted. Ampcor has been put to considerable expense to fend off this scatter-shot attack peppered with serious allegations against it. It is deserving of as full an indemnity for its costs as is reasonably possible. The same applies to the City and its Manager, but with the additional factor that they will otherwise have to fund their shortfall out of public funds which could have been utilised for other purposes.

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

- 1. The application is dismissed;**
- 2. In respect of the Part A relief, no order is made as to costs; and**
- 3. In respect of the Part B relief, the applicant shall pay the costs of the first, second and third respondents on the scale as between attorney and client, including any reserved costs orders pertaining to such relief as well as the costs of counsel.**

For applicant: Van Rensburg & Co (Mr L Van Rensburg)

For first respondent: Adv D Borgstrom SC

Instructed by: Dirk Kotze Attorneys (Mr D Kotze)

For second and third respondents: Adv M Adhikari

Instructed by: Riley Inc (Mr J Riley)