



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2019/501

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED: 17 SEPTEMBER 2020

[Signature] 17/9/20

In the matter between:

CITY POWER JOHANNESBURG (SOC) LTD

Applicant

and

**INFINITE BLUE TRADING 29 CC t/a MOTAU PROJECTS
SIYANQOBA PHAMBILI TRADING ENTERPRISE CC
JOLOBE TRADING CC
MAZIYA GENERAL SERVICES CC
EXSERDEL ENTERPRISES (PTY) LTD
CHOSEN ENGINEERING (PTY) LTD
COLSTA PROJECTS CC
F AND J MECHANICALS AND ELECTRICALS CC
MATARELWA ELECTRICAL SERVICES (PTY) LTD
NOTHANI ENGINEERING CC
CANAAN ELECTRICAL CONTRACTORS (PTY) LTD**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11th Respondent**

MASTECH GENERAL TRADING CC	12 th Respondent
WNS PROJECTS CC	13 th Respondent
LEPHATA LA BASHA TRADING AND PROJECTS CC	14 th Respondent
TNJ PROJECT SOLUTIONS CC	15 th Respondent
IMBAWULA TECHNICAL SERVICES AND SUPPLIERS GROUP (PTY) LTD	16 th Respondent
BVELELA ENGINEERING CC	17 th Respondent
MANDEWO IMV PROJECTS CC	18 th Respondent
MUSTARD SEED (PTY) LTD	19 th Respondent
CROMICO TRADING & PROJECTS (PTY) LTD	20 th Respondent
SE MAKROTI TRADING ENTERPRISES CC	21 st Respondent
MERVILLE CIVILS CC	22 nd Respondent
LEFHUMO LWA BAREMA TRADING ENTERPRISE (PTY) LTD	23 rd Respondent
MOLOI TECH (PTY) LTD	24 th Respondent
MAOPENG ELECTRICAL (PTY) LTD	25 th Respondent
OAKANTSWE CONSTRUCTION & PROJECTS CC	26 th Respondent
THALUKANYO TRADING CC	27 th Respondent
SOLID MANAGEMENT SERVICES (PTY) LTD	28 th Respondent
MUNANDIS ELECTRICAL CC	29 th Respondent
RT TSHABALALA CC	30 th Respondent
TAMIBUZZ (PTY) LTD	31 st Respondent
BUSSYNET ADVANCED TRADING JV	32 nd Respondent
JAKI TRADING (PTY) LTD	33 rd Respondent
JUSBEN CONSULTING ENGINEERS CC	34 th Respondent
METHORN CC	35 th Respondent
KP TLAKS ELECTRICAL AND CONSTRUCTION (PTY) LTD	36 th Respondent
CAPOTEX TRADING ENTERPRISE CC	37 th Respondent
BIG O TRADING 528 CC	38 th Respondent
UMBUTHO CIVIL & ELECTRICAL CC	39 th Respondent
MASEMIS TLM (PTY) LTD	40 th Respondent
FUTURE ENERGY ELECTRICAL (PTY) LTD	41 st Respondent
RONARATI (PTY) LTD	42 nd Respondent
ONZA CONSTRUCTION (PTY) LTD	43 rd Respondent
THENGA HOLDINGS (PTY) LTD	44 th Respondent
YANDE ENGINEERING & PROJECTS CC	45 th Respondent
NOLEWU CONSTRUCTION ELECTRICAL	46 th Respondent
CHEMICAL SUPPLIERS CC	
MOHLAWE TECHNOLOGIES (PTY) LTD	47 th Respor

JTB ENGINEERS SOLUTIONS CC	48 th Respondent
MVELEOZISO ENGINEERING SOLUTIONS CC	49 th Respondent
KENT ELECTRICAL SERVICES CC	50 th Respondent
BARRY BUYS PROPERTY CC	51 st Respondent
NKATEKO BUSINESS ENTERPRISE CC	52 nd Respondent
MACHITE ENGINEERING CC	53 rd Respondent
INDONISI INVESTMENTS (PTY) LTD	54 th Respondent
MASHAU SALPHINA ELECTRICAL CC	55 th Respondent
ZIZWE DSD (PTY) LTD	56 th Respondent
MAFU HOLDINGS (PTY) LTD	57 th Respondent
MUALU JV MCCGRI (PTY) LTD	58 th Respondent
PSK CONSTRUCTION (PTY) LTD	59 th Respondent
KHASELIHLE CIVILS CC	60 th Respondent
MATHOHO ELECTRICAL & PROJECTS CC	61 st Respondent
BASH ELECTRICAL CONTRACTORS CC	62 nd Respondent
MALEBOSI TRADING (PTY) LTD	63 rd Respondent

JUDGMENT

[HEARD REMOTELY VIA ZOOM PLATFORM ON 15 SEPTEMBER 2020]

FA SNYCKERS AJ:

INTRODUCTION AND HISTORY

- 1 City Power Johannesburg (SOC) Ltd is a state owned company established under the Local Government: Municipal Systems Act 32 of 2000, to fulfil the constitutional mandate of the Johannesburg Metropolitan Municipality to provide electricity and street lighting to the areas governed by the municipality.
- 2 Its functions are discharged in terms of a service delivery agreement concluded with the municipality.

- 3 In 2018 City Power issued an RFP for Tender 2285S, for a total value of R1,5 billion relating to various services to be performed to enable City Power to discharge its functions towards the municipality in terms of its agreement. Tender 2285S entailed three “streams” of service – network maintenance and capex, street lighting maintenance and capex, and service connections.
- 4 Tender 2285S was awarded, apparently, to 56 respondents.¹
- 5 The first respondent, Infinite Blue, had been providing services to City Power at the time of Tender 2285S, and was one of the tenderers for Tender 2285S. Its tender was, however, excluded on the basis of an assessed failure to pass the functionality requirement.
- 6 In December 2018, City Power concluded contracts with the successful bidders of Tender 2285S for a total amount of R1,5 billion for services to be performed over a period of three years expiring on 30 November 2021.
- 7 When Infinite Blue came to learn of its failed bid, it instituted urgent review proceedings in this court. The review came before Sutherland J and yielded a judgment on 30 May 2019. As emerges from the judgment of Sutherland J, the

¹ I say “apparently” because the judgment of Sutherland J in the review application, to which I refer below, in paragraph 25 refers to these bidders as the 6th to 61st respondents before the court in that application, and its applicable relief regarding the continued performance of services related to the 6th to the 61st respondents at issue in that application. By the time of the order of Yacoob J in October 2019, referred to below, there were 62 respondents and the provisions of services ordered in terms of that order related to the 2nd to the 62nd respondent – i.e. 61 respondents. By the time of the order of Twala J on the 28th of September, the order in relation to which this application was the return date, 63 respondents were at issue, but the relief in question still related to the 2nd to the 62nd respondents. Before me it appeared to be common cause that there were 62 “incumbent” respondents at issue. In the report of the Bid Evaluation Committee relating to Tender 23665, referred to below, in the background section one is told: “City Power awarded a contract of R1,5 billion to 62 service providers in December 2018 for a period of three years that expired on the 30th of November 2021”. This confusion is regrettable, but, in light of the order I make, not material for present purposes. I refer throughout to the entities to whom Tender 2285S was awarded as the “successful bidders” and/or to the “incumbents”, except where it is appropriate to draw a distinction amongst the fluctuating population of respondents.

main reason why the urgent review application took so long to be finalised was unconscionable dragging of feet on the part of City Power, entailing *inter alia* the need for a compelling application with respect to material portions of the record.

8 Sutherland J held that the disqualification of Infinite Blue was unlawful, and in fact appeared from the papers to be so determined and artificially constructed as to reveal *mala fides* on the part of City Power. In essence, a concerted effort on the part of those who evaluated the bids for functionality managed artificially, irrationally and unfairly to secure a functionality score of 74 for Infinite Blue in circumstances where a functionality score of 75 was required in order to qualify for a valuation on the basis of price and BBBEE scores.

9 Sutherland J set aside the award of Tender 2285S to the successful bidders and also, significantly, set aside the contracts awarded to the successful bidders. The following orders were then also issued on 30 May 2019:

“(3) *The tenders submitted to City Power by the applicant (Infinite Blue) and all other tenderers shall be resubmitted for evaluation ab initio.*

(4) *The 6th to 61st respondents are authorised, as an interim measure, to continue to render services to City Power for a period limited to 90 days from the date of this judgment.*

(5) *City Power shall take all necessary steps to expedite the fulfilment of order (3) within the 90 days interim period.*

(6) *No unilateral extension of the service of 6th to 61st respondents shall be made unless sanctioned by an order of the court, on good cause shown.*

- (7) *this judgment shall be brought to the attention of the Chief Executive Officer of City Power and of the Executive Mayor of the City of Johannesburg who shall take steps to enquire into the conduct of the personnel responsible for the management and administration of the bid with the aim of detecting whether a lack of integrity or incompetence explains the irregularities described in the judgment, and a report on the outcome of such enquiry shall be filed with the Registrar of this court within 180 days of the date of this judgment.*
- (8) *City Power shall pay the applicant's costs on the attorney and client scale."*

10 The order in paragraph 4 was explained as follows in paragraph 25:

"A period of temporary continuation by the present successful bidders, i.e. the 6th to 61st respondents, whilst the tender bids are re-evaluated honestly, can be accommodating in an order. A period of three months from date of the order is sufficient for such an interim arrangement."

- 11 Instead of performing and completing the "*honest re-evaluation*" of the tender bids as ordered, City Power came to the view that the process was so vitiated by irregularity that a fresh tender was in fact required. This, it felt, could not be completed within the 90 days it had been ordered to complete an honest re-evaluation.
- 12 It accordingly approached the court urgently, on 27 September 2019, for an application set down for the 8th of October 2019. The 8th of October 2019 was the day on which the 90 day period (reckoned as court days) in the court order expired. The founding papers in the application asserted that City Power had identified material irregularities in the tender process "*in the final stages*" of seeking to comply with the Sutherland J order, which included the fact that "*some of the bid documents were tampered with after the initial evaluation*".

- 13 An order was sought from this court to the effect that the order of Sutherland J did not preclude a cancellation of Tender 2285S and the commencement of a new tender process, relying, *inter alia* on regulation 13(1)(d) of the Preferential Procurement Regulations 2017 to the effect that “*an organ of state may, before the award of a tender, cancel a tender invitation if ... there is a material irregularity in the tender process*”.
- 14 City Power sought what it regarded as “*the extension of the service of the panel members, pending the completion of the fresh tender process*”. For some reason that never became clear, the order of Sutherland J, that related to the 6th to 61st respondents before him, became an order relating to the 2nd to 62nd respondents before the court hearing this latest application launched on 27 September 2019.
- 15 Be that as it may, an order was sought and granted in essence authorising the abandonment of the tender, the re-evaluation of which was the subject of the Sutherland J order, directing a new tender process to be completed within six months and now authorising the 2nd to 62nd respondents (ostensibly those successful under the initial tender and the subject of the Sutherland J authorisation) to continue to render services in the following terms:

“Pending the completion of the new tender process contemplated in paragraph 2 above, the 2nd to 62nd respondents are authorised, as an interim measure, to continue to render services dealt with by the tender to City Power”. (Order 8 October 2019, Yacoob J, paragraph 3)

- 16 The six month period during which this new tender process, which had assumed the number 2366S, was to be completed as ordered by Yacoob J on 8 October 2019, was to expire on 8 April 2020. On 26 March 2020, as a result of the Co

19 pandemic, South Africa (along with most of the rest of the world) went into “lockdown”. On 31 March 2020, eight days before the expiry of the six month period directed by Yacoob J for the finalisation of the new tender, City Power brought another urgent application to this court to extend the period ordered by Yacoob J for a period of two months *“after the end of the lockdown period”*.

- 17 It may be noted that, unlike the order of Sutherland J, the order of Yacoob J did not contemplate its own extension. Nevertheless, on 6 April 2020, Wright J, faced apparently with the same 62 respondents that served before Yacoob J, issued an order with reference to the order of Yacoob J extending the date *“for completing the new tender process contemplated in paragraph 3.1 of the court order”* *“by a period of two months from the date on which the national lockdown ends”*. The order of Wright J also contained the following order 2.2:

“Pending the finalisation of the new tender process, the 2nd to 62nd respondents are authorised, as an interim measure, to continue to render services dealt with by the tender to City Power”.

- 18 Fortunately, the potential vagueness inherent in the notion of the date *“on which the national lockdown ends”* does not concern me as it was common cause before me that this was 30 June 2020.
- 19 By now perhaps unsurprisingly, come 26 June 2020, four days before the expiry of the now extended period, it once again dawned on City Power that it would be *“unable”* to finalise the tender process within the ordered period and would *“require”* a further extension, sought on a precipitously urgent basis. Accordingly, on 26 June 2020 yet another application, with apparent unconscionable self-created urgency, was launched once again seeking an extension for the period to finalise tender 2366S and, of course, seeking

authorisation for the incumbents to continue to provide their services in terms of the contracts that had been set aside by Sutherland J of May 2019.

- 20 Apart from several pages of filing notes and notices of motion (the length of which was due mainly to the fact that there were 62 respondents, and the fact that the affidavit set out a growing history of extensions), the need for the further extension in the 26 June founding affidavit was set out in a paragraph comprising 11 lines of text. Here there was an intimation that before the Bid Evaluation Committee (BEC) could make recommendations to the Bid Adjudication Committee (BAC) for the award of the tender *"the entire tender process must first be considered and analysed by City Power internal auditing"*. The court was told that the internal auditing had completed its work and *"has raised another of queries (sic) that the BEC is working through and addressing"*.
- 21 On 30 June 2020 another extension order was granted by this court.² The 30 June order referred back to the 6 April order and contained the following two important orders:

"2.1 The date for completing the new tender process contemplated in paragraph 2.1 of the order shall be extended by a period of two months (i.e. to 30 August 2020).

2.2 Pending the finalisation of the new tender process the 2nd to 62nd respondents are authorised as an interim measure to continue to render services to City Power".

² I cannot make out from the court order who granted the order.

- 22 It may be noted that, unlike previous orders, that authorised the rendering of services by the incumbents as *"services dealt with by the tender to City Power"*, this order on 30 June 2020 referred simply to rendering services to City Power.
- 23 By this stage, Infinite Blue had had enough. Its attorneys directed a letter to the erstwhile attorneys of City Power on 6 July 2020. One of the subjects of the letter, to which I return below, was the order in paragraph 7 of the Sutherland J order of 30 May 2019, in terms of which the CEO of City Power and the Executive Mayor of Johannesburg were directed to compile a report relating to the hitherto nameless and faceless individuals within City Power responsible for what had been found to be *mala fide* conduct in regard to Infinite Blue's bid in Tender 2285S, and for this report to be filed with the Registrar within 180 days of the order of 30 May 2019. Infinite Blue pointed out that no such report had materialised and expressed suspicions that the enquiry directed in paragraph 7 had not yet commenced. It made various demands in this regard and threatened contempt proceedings. The letter went on to point out that it was by then 430 days after the order that had contemplated the finalisation of the evaluation process within 90 days and *"City Power still continues to utilise the services of the unlawful contractors"*. The letter expressed the following sentiment:

"The impression that is created by the conduct of City Power is that there is a deliberate attempt to stultify the order. The effect of this conduct of City Power is that the unlawful contractors remain in the seat and continue to render services to City Power".

Also the following:

"City Power seems to think that it will be entitled to utilise the services of the unlawful contractors indefinitely on the basis that they can

deliberately fail to do what is necessary to make an award in a new tender”.

- 24 Various further demands were issued including a demand that, should City Power again launch a further urgent application for an extension Infinite Blue be provided at least 10 days' notice of any such application and that City Power also provide updates on the tender process.
- 25 The answering affidavit in this application, which referred to and attached this letter of 6 July 2020, does not indicate whether any response had been received to the letter. City Power's replying affidavit simply ignores the letter.
- 26 Back to the history. The reader might be forgiven for not being surprised by what happened next. It may be recalled that the application for an extension to 30 June 2020 alluded to an internal audit investigation that had raised queries that were being addressed. On 20 August 2020, 10 days before the latest period of extension was to expire, yet another application, the self-created urgency of which went without saying, was launched. What was sought was a rule *nisi* returnable on 15 September 2020. Cause was to be shown why an order should not be granted extending the order granted on 30 June 2020 for a period of nine months. In the interim, the order dated 30 June 2020 was to be extended pending the return date.
- 27 An unsurprisingly indignant answering affidavit was delivered on 21 August 2020 to which a replying affidavit was delivered on 24 August 2020.
- 28 The rule *nisi* was granted on 28 August 2020 by Twala J. For some reason that was not clear to me there were now 63 respondents, but the order granted in terms of the rule *nisi* extended the order of 30 June 2020 which still related to

the rendering of services by the 2nd to 62nd respondents before the court at that time.

- 29 Despite the fact that the rule *nisi* was granted returnable on the 15th of September ostensibly to allow for the filing of comprehensive papers in relation to this new nine month extension that was sought, no further affidavits were filed and so all the affidavits that were filed by the time the matter came before me had already been filed before the rule *nisi* was granted.
- 30 The matter had by now assumed disconcertingly grotesque proportions. The internal audit that had been hinted at in the application for an extension that was granted on 30 June 2020 had yielded a "*probity report*". This probity report, one was told, was tabled before the BAC on 20 July 2020 and it identified a series of 16 irregularities and defects in the procurement process of Tender 2366S, including in the evaluation and recommendation by the BEC. By that stage the BEC had apparently recommended that the labour contract be awarded to a panel of 105 service providers. This is what one reads in paragraph 25 of the founding affidavit. I revert to this number below.
- 31 One is then told that the chairperson of the BAC produced a memorandum which "*made a number of observations about the effect of the probity report*". That memorandum was attached to the papers. The affidavit, deposed to by the acting CEO, states the following:

"The outcome of her memorandum is that the BAC could not adjudicate the tender by approving the recommendation of the BEC. And it could not submit its approval of that recommendation to me, as is required by the tender procedures applicable to City Power. She referred the matter to me, as the accounting officer in terms of the MFMA, in order to seek my intervention".

- 32 This reference in the affidavit of the acting CEO to *“the outcome of the memorandum”* does not appear accurately to render the import and conclusion of the memorandum. The memorandum under section 9 headed *“BEC Deliberations”* recommended as follows:

“Bearing in mind the findings raised by the probity team and the risk highlighted during the procurements process, the BAC concluded that the contract be awarded, subject to the investigation results”.

- 33 There is a recommendation that SCMP processes and controls require an urgent overhaul, that the matters need to be investigated as a matter of urgency and that the investigations should be concluded on or before 14 August 2020 to enable the award and contract process to be finalised before the 30th of August 2020.
- 34 Be that as it may, the founding affidavit proceeded to allege that legal opinion was then obtained to the effect that two of the irregularities pointed out in the probity report were sufficiently material and serious to vitiate the whole tender process 2366S, and to require its abandonment and the commencement of a fresh tender process. I deal with these to the extent appropriate below.
- 35 Accordingly, by 20 August 2020 City Power had adopted the attitude, based on legal advice it said it had obtained, that it could not finalise Tender 2366S, despite the recommendation of the BAC to which I referred above, because of the two serious irregularities that vitiated the whole process, and that it was simply compelled to start the whole process afresh. This, it felt, would take nine months to complete.

- 36 And so, because it was unthinkable that City Power could be without the seamless continuation of the performance of the services at issue, there was nothing to be done other than to retain the incumbents in place, rendering their services, apparently in terms of the contracts that had been set aside in May 2019, for another nine months, or, until such time, which might be several years into the future, when City Power finally decided that it was able to conclude a regular tender process for their replacement.
- 37 It may be noted that the tender that was awarded in December 2018 was to run until 30 November 2021. Were I to grant the order sought by City Power in its notice of motion, the contracts that had been set aside in May of 2019 would run their course, and the bidders whose contracts had been set aside on the basis that they had been irregularly awarded would be remunerated in terms of those contracts, for the full term of those contracts, save for a period of five months.
- 38 This would of course be on the assumption that the terms upon which the services would be authorised to be rendered would continue to be on the terms of the contracts that had been set aside, particularly as far as remuneration was concerned.

ASSESSMENT

- 39 Infinite Blue's basic contention was that granting the order sought by City Power would seriously undermine the authority of the order granted by Sutherland J, and any court order granted in similar circumstances.

- 40 I cannot avoid wholeheartedly agreeing with this central submission of Infinite Blue.
- 41 The particular facts in the instant case entail some very disconcerting features. The review papers that served before Sutherland J did not form part of the papers before me. Nor did the BEC recommendation in Tender 2366S, to which reference was made in the founding papers. Although I had recourse to the judgment of Sutherland J in the review, I felt it was impossible to consider the appropriateness of granting the relief sought without at least considering the contents of the review papers, and I accordingly asked for them and considered them. Furthermore, I asked for and was provided with the BEC recommendation. It was also necessary to have a sense of who the entities were that had provided the services at issue prior to Tender 2285S, what the relationship was between the 60, or 61, or 62, incumbents of Tender 2285S and the 105 tenderers said to have been recommended by the BEC, and where Infinite Blue fit into this picture. I asked for these particulars and was provided them by way of spreadsheets.
- 42 It turned out that there were not 105 entities recommended in relation to Tender 2366S, but 83, 22 of which were recommended for more than one "*stream*", thereby reaching the total of 105 referred to in the founding affidavit. Tender 2366S entailed five streams.
- 43 41 of the 83 entities at issue in the BEC recommendation in Tender 2366S were also successful tenderers in Tender 2285S. Infinite Blue had rendered services prior to Tender 2285S, had been unfairly, irrationally and deliberately "*disqualified*" in Tender 2285S, and had then, although passed for function000-15

lost out in the three streams for which it bid, in Tender 2366S, by the time the tender reached the BEC recommendation.

44 I am in respectful agreement with the finding of Sutherland J that the papers in the review application reveal a concerted effort, in apparent bad faith, to achieve the disqualification of Infinite Blue. Sutherland J was sufficiently concerned with the apparently inexplicable tendentious conduct of nameless and faceless officials within City Power with respect to Tender 2285S to direct the investigation and report that he directed be compiled *inter alia* by the CEO of City Power within a period of 180 days.

45 This was to identify any wrongdoing that could then be dealt with.

46 No report has been forthcoming. In the founding affidavit dated 20 August 2020, almost a year and three months after the order of Sutherland J that a report be compiled within 180 days, the following is stated "*in the interest of disclosure to the court of all facts relevant to this matter*":

"Following the order granted by Sutherland J, City Power referred the matter to the COJ's group forensic and investigation services ("GFIS") for investigation. It appears that there was some investigation. I am not yet sure precisely what was investigated. I am currently looking into that matter. I have initiated an investigation into that matter. GFIS handed the matter back to City Power. It did that without clear direction as to what is to happen with the investigation."

47 There is then a further paragraph stating that external attorneys, the current attorneys of record, have now been appointed to take the matter further as far as investigation is concerned.

48 The contents of paragraph 73 of the founding affidavit, quoted above, by way of a report back on the compliance with the court order with respect to the

reporting, especially in the teeth of the threats of contempt proceedings issued in the Infinite Blue attorney's letter of 6 July 2020, borders on the contemptuous. It would be difficult to achieve a more minimalist rendition of an account, in the style of Ernest Hemingway, with fewer facts contained in seven sentences, than what is achieved in paragraph 73 of that affidavit.

- 49 One of the queries I directed at City Power prior to hearing the matter was that, to the extent that any extant report, even a work in progress version, was in existence, such a report be produced for the purposes of the hearing. The response came by way of a practice note to the following effect:

"It is unfortunately not possible at this stage to provide a preliminary report of the investigation in terms of paragraph 7 of the order granted by Sutherland J. We are instructed that the investigation is underway and that the M&S Attorneys are analysing the relevant documents and interviewing the relevant personnel. The final report will be completed by 31 October 2020."

- 50 I must therefore accept that there is no work in progress report of any kind, and nothing along those lines has yet been produced.

- 51 Here one must note that Sutherland J in paragraph 21 of his judgment remarked as follows:

"In my view, the pattern gives rise to a reasonable suspicions of deliberate manipulation of the process to improperly exclude the applicant, and perhaps others too".

- 52 Furthermore, I recall that part of the reason why Tender 2285S was abandoned, despite the order of Sutherland J to complete the evaluation process, was because it had been revealed that amongst other unspecified "material

irregularities", there had been deliberate manipulation of bids subsequent to their submission.

- 53 Such unspecified but highly disconcerting conceded "*deliberate manipulation*" of bids could only have occurred irregularly within the walls of City Power. The explanation for the conduct of City Power officials, including the CEO specifically charged by court order to compile the report, is either cavalier and brazen disregard for the seriousness of the order, or trepidation at what a proper investigation and report might reveal. Neither is a salutary foundation for yet another request to extend the tenure of the incumbents, apparently on the same terms on which they were irregularly appointed, in terms of contracts set aside by the order of Sutherland J in May of 2019, for a further period of nine months, thereby fully emasculating the effect and authority of the order of Sutherland J.
- 54 And so, in these circumstances, a court might be forgiven for approaching with scepticism the extent to which City Power found itself helplessly confronted, on every occasion at the eleventh hour, with the apparently insuperable and unavoidable need to abandon whatever process it was finalising and to commence a new one afresh, with the supposedly inevitable consequence of the continuation of the tenure of the incumbents.
- 55 The bases upon which it was suggested that Tender 2366S was vitiated by irregularity to such an extent that it needed to be abandoned, and a new tender to be recommenced, were addressed in the founding affidavit and in heads of argument. I engaged counsel for City Power on the cogency of these bases. Counsel submitted that it was inappropriate for me to engage with the merits of the legal advice that had been furnished, and that I was constrained to 000-18

that the tender was fatally vitiated by irregularity and needed to be repeated, as there was no dispute raised in the papers in this regard.

56 I do not believe this to be a tenable submission. To me, the cogency of the apparently unavoidable need to repeat the tender, once again to jettison a process that had been ordered by the court to be finalised within a period of time, lay at the core of any decision to determine whether it was appropriate once again to extend, this time for nine months, the period during which the incumbents would be providing their services, apparently at the rates and on the terms of the contracts that had been set aside by Sutherland J.

57 There is a whiff of contrivance about the bases upon which Tender 2366S is said to be so fatally vitiated as to require yet another tender which would take another nine months to finalise, particularly given the history of this matter.

58 The two fatal irregularities can be captured thus:

58.1 The first relates to the requirement that tenderers complete a full bill of quantities for all streams, even if they were bidding only for some streams and not others. Tender 2285S had apparently worked on the basis that one tendered for all streams, and if one was successful one would then be appointed as and when required for particular streams. Tender 2366S, however, asked bidders to tender only for the streams that they were interested in, thereby not rendering them eligible to be appointed for other streams. Yet, for reasons that were not entirely clear, all tenderers were required to complete the bill of quantities and in effect to submit prices for all the services, even those streams that they were not interested in. I agree that this may be said to be irrational. Whether,

however, it was sufficiently irrational or, as submitted, unfair, to require the jettisoning of the whole tender process despite the history of this matter, is highly questionable. There was no danger that a tenderer would be considered for any stream in relation to which it had filled in a price on the bill of quantities if it was not tendering for that stream. The notion that some tenderers did not fill in the bills for those streams for which they were not tendering and were accordingly disqualified for having non-responsive bids, given that they did not comply with the requirement, and that this was fundamentally unfair, is also not clear to me. Although the requirement did not appear to make much sense, it was nevertheless a clear requirement and one was required to comply with it to submit a responsive tender. There was nothing unfair about regarding those bids that did not comply with what was stated to be an essential requirement as non-responsive, whatever the merits of the requirement in question. It was submitted that the effect of requiring all bidders to enter prices for all streams, even those that they were not interested in bidding for, might have been to discourage some bidders from the bidding process on the basis that they were unable to provide prices for streams that did not lie within their competency. This may be so, but by itself it can hardly be a sufficiently calamitous basis in the present circumstances to require the jettisoning of the whole process at this stage.

- 58.2 The other irregularity or irrationality related to the two competency tests employed by City Power in relation to electricians. There was a test that electricians had to pass to display competence, that formed part 000-20

scoring towards functionality. Failure of this test did not necessarily result in failure of functionality because a bidder might score sufficiently highly on functionality and have a failure of the test that was sufficiently marginal, still to pass the functionality requirement. This was said to be so fundamentally irrational as to require the abandonment of the tender. I do not agree. Furthermore, there was a second test, an internal test, that City Power required be passed before any electrician was entitled to provide services. This second test was a *sine qua non* for being able to provide services. It was said that the second test rendered the first test irrelevant, and if this was so, the relationship between the two tests was so fundamentally irrational as to require the undoing of the tender as a whole. Once again, I do not agree.

- 59 At worst for Tender 2366S, these suggested irregularities rendered it vulnerable to challenge on review, perhaps again at the hands of Infinite Blue. But, having been ordered to finalise the process within six months (a process that City Power had decided to substitute for the re-evaluation process that Sutherland J had ordered be completed within 90 days), and having then achieved extensions of the six month period by another four months, one would have thought City Power would adopt the attitude that compliance with the court order, to the best of its abilities, was more critical than returning a process that was not vulnerable. Or, at the very least, to ensure that any vulnerabilities that might inhere in the process be eliminated within good time to finalise it. What irks particularly is the fact that it appeared accepted as following inevitably from City Power's apparent inability to finalise a regular tender process and to comply with the series of court orders, that it should be allowed, apparently indefinitely,

to undermine the authority and effect of the Sutherland J order and to implement the contracts that had been set aside as irregularly awarded in May 2019.

60 It is only because of the fact that it appears to be unthinkable that an order could be issued that leaves City Power, and accordingly the city that it serves, without these critical services for any length of time, that this air of fatalism about the continued tenure of the incumbents attends these proceedings.

61 As Infinite Blue points out, whether a new tender is required is one thing; what should be happening in the meantime is another.

62 It is difficult to disagree with the following allegations in the answering affidavit of Infinite Blue:

"City Power has succeeded, in spectacular fashion, to stultify the order and judgment of Sutherland J.

The conduct of City Power in this matter illustrates just how difficult it is for an unsuccessful tenderer to obtain effective relief in review proceedings. What was contemplated in the judgment and order of Sutherland J and the current situation are the exact opposite of each other".

63 I am of the view that matters have come to a point where granting the relief sought in the notice of motion would undermine the authority of court orders and the very rule of law. It would serve as a licence to invoke one's own irregularity, or asserted irregularity, and inability to rectify procurement deficiencies, as a convenient and cynical foundation for court-sanctioned implementation of tenders found to be irregularly awarded and set aside.

64 These situations would arise in those cases, like the instant, where the functionality or organ of state at issue can plausibly assert, and a court must

take judicial notice of the fact, that it is critical for the services, the subject matter of an irregularly awarded and set aside tender, to continue being provided pending the rectification of the irregularity.

- 65 It was Infinite Blue's main contention that the appropriate route for City Power to have followed, if it really turned out that it was unable to complete the tender process it was ordered to complete, was to embark upon an emergency procurement as an interim measure, rather than to accept the ostensible inevitability of an indefinite continuation of the performance of the services in terms of the contracts that had been set aside.
- 66 City Power, for its part, contended that to resort to the emergency procurement measures provided for in its Supply Chain Management Policy was "*inappropriate*". It maintained that it would need to go out on a fresh tender in order to comply with the requirements of its emergency procurement procedures and that this would take a number of months and again require competency tests once suitable bidders had been identified, that themselves would take several weeks to finalise.
- 67 The bases upon which City Power resisted the appropriateness of resort to its emergency procurement processes were not persuasive.
- 68 It is difficult to avoid the conclusion City Power has failed to make out a case that it is appropriate in any world that respects the authority of court orders to grant the relief that had been sought in its notice of motion. Yet, simply dismissing the application would leave City Power and the city that it serves potentially without any procurement of critical services until at least emergency

services could be procured, and this achieved without further irregularity, pending the finalisation of a regular tender process to substitute Tender 2366S.

- 69 The appropriate order to grant in this application is a matter of ascertaining and granting an order that is just and equitable in terms of section 172(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996.
- 70 Counsel for Infinite Blue submitted that the only court that was faced with a “*constitutional matter within its power*” and that made an order in terms of section 172(1)(b) was the court constituted by Sutherland J and that later courts, including this court in this application, were constrained either to extend the remedy extended by Sutherland J or to decline it.
- 71 I do not agree. First of all, the order and remedy granted by Sutherland J was superseded by the order and remedy granted by Yacoob J on 8 October 2019. This is so even if one leaves aside the apparent discrepancy relating to the identity of the respondents authorised to continue providing services. More fundamentally, however, this court is undeniably considering a constitutional matter within its power in the present circumstances and it need not in my view be faced with any fresh review before this is the legal reality that confronts it.
- 72 The importance of crafting an appropriate remedy that doesn’t in any particular way flow dogmatically from a declaration of invalidity, in the context of tender awards, appears sufficiently clearly from several decisions of the highest courts including in particular *State Information Technology Agency v Gajima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) and *Buffalo Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

- 73 The fact that I am now faced with the need to fashion an order more than a year after the original remedy fashioned by Sutherland J, subsequently radically upended and superseded by several further orders, does not change the fact, in my view, that it is still now a matter of what falls to be done in terms of section 172(1)(b), in the unfortunate circumstances of the present case.
- 74 As a starting point, whatever order is granted must avoid rendering the authority of the order granted by Sutherland J nugatory, or, perhaps, further entrenching the extent to which City Power has already achieved this lamentable end. Avoiding further harm to the rule of law should be a priority.
- 75 Confronted with this imperative, counsel for City Power during argument no longer pressed for the relief in the form sought in the notice of motion – i.e. continuing with the incumbents in place in terms of their current contracts for a period of nine months, pending the hoped for finalisation of the tender that was to replace Tender 2366S.
- 76 I do not believe it is appropriate for this court to direct City Power to award a tender in terms of the BEC and BAC recommendation under 2366S as the appropriate order. As counsel for City Power pointed out, nobody asked for this. This is not decisive, but certainly not ideal. Furthermore, City Power, for better or for worse, has adopted the attitude on oath that it is required to run a fresh tender and that the irregularities in Tender 2366S are such as to be irreconcilable with the proper discharge of its statutory functions, that in turn serve constitutional functions. Ordering the award of a tender to bidders recommended by the BEC (and tentatively by the BAC) would amount to rather

radical substitution of the functions of the BAC and the City Power executive by this court. If possible, the court should be slow to do this.

- 77 For reasons already enunciated, however, an order to be avoided is an order that simply places the incumbents in continued occupation, especially upon the terms of their current contracts that have been set aside.
- 78 It was suggested by Infinite Blue, in supplementary heads of argument submitted on the day of the hearing, that it might be appropriate to authorise the incumbents to continue providing the services but not at any profit. I was referred to *Allpay 2*³, in particular paragraph 67, for the submission that it was constitutionally impermissible to allow a situation where the incumbents continued to benefit by way of a profit from their unlawful contracts.
- 79 I do not read the confirmation in *Allpay 2* of the principle, to be taken into account in the fashioning of an appropriate order, that nobody should profit from his own wrong, as amounting to precluding an order as an appropriate order following the setting aside of contracts, that would entail the continued rendering of services that were going to be rendered in terms of the contracts that were set aside, on a basis that is profitable.
- 80 Although the solution suggested by Infinite Blue is tempting, I cannot ignore the undeniable fact, as submitted by counsel for City Power, that authorising the incumbents to provide the services, but not allowing this to be done on any commercial or profitable basis, would tend to lead to a situation where the services end up not being provided, or at the very least would severely

³ *Allpay Consolidated v CEO SASSA* 2014 (4) SA 179 (CC).

endanger the continued critical integrity of the provision of such services. I can hardly appropriately order the incumbents to continue to provide the services, especially if this would be on a no-profit basis.

81 Part of the difficulty in the instant case derives from the fact that the orders “authorising” the incumbents to continue to provide the services (whether they refer back to the tender as did the orders from 8 October 2019 onwards, or whether they did not, as was the case with the order on 30 June) did not make clear on what basis and for what remuneration such services were “authorised” to be rendered. Despite submission from counsel for Infinite Blue to the contrary, it seems to me that, once a court authorises a service provider to render services but does not direct that such services be rendered, the only sensible basis upon which such services would be envisaged to be rendered would be by way of agreement with the employer, and such agreement would have to include terms as to remuneration.

82 I am also mindful of the fact that it is undesirable for the court, and not its proper province, to be crafting contracts, and in particular to be setting prices, as an appropriate remedy flowing from an award declaring a tender process irregular and setting it aside.

83 I enquired from City Power whether it was practically feasible to have the services in question performed, pending the finalisation of a fresh tender, by the 83 service providers that had been recommended by the BEC under Tender 2366S, less the 41 service providers amongst these 83 that formed part of the incumbent service providers successful under Tender 2285S or, if not, whether it was feasible to have the services performed by the remaining 42 s

providers and those who, in substitution of the 41 incumbents among the BEC 83, would have been "*second in line*".

84 City Power's response was that this was not feasible and that the required work could not safely be entrusted to the remaining 42 service providers. It also struck me that, to the extent that the 41 incumbents amongst the 83 recommended service providers under Tender 2366S were successful on price, an order that disqualified them for the interim period pending finalisation of a fresh tender would have the effect of compelling City Power to have the services rendered at higher rates than they would have been rendered in terms of the BEC recommendation based on the most competitive surviving bids. This would amount to requiring inefficient and expensive service delivery as a way of salvaging the authority of the order of Sutherland J.

85 Once City Power adopted the attitude that it could not responsibly simply exclude the 41 incumbent service providers that formed part of the panel of 83 under aborted tender 2366S, it became a perilous task for this court, in an effort to save the authority of the court order of Sutherland J, to craft an order in terms of which the interim services would be provided by a panel comprising those who were recommended by the BEC (and it appears the BAC) under Tender 2366S, less the 41 incumbents amongst the number, plus such further service providers as passed the functionality test under Tender 2366S and were next in line for award (deeming the 41 incumbents to have been disqualified).

86 I was sorely tempted by such an order as the most sensible way to save the authority of the Sutherland J order. I was, however, concerned that there was insufficient material before me by which to be satisfied that this w00028

appropriate order that would not endanger the ability of City Power to fulfil its functions.

- 87 City Power moved towards urging me to adopt, as the most sensible interim solution, provision of services by the 83 service providers recommended by the BEC on the terms that they would have had contracts concluded with them in terms of Tender 2366S.
- 88 Of course, whatever happens in this regard, there would have to be some period during which the incumbents continued to provide the services pending the appointment of, and handover to, the new *"interim"* service providers.
- 89 Infinite Blue contended that it would be highly inappropriate for me to direct an interim solution that in effect amounted to the awarding of Tender 2366S. Of course, Infinite Blue was unsuccessful in Tender 2366S although it passed the functionality hurdle.
- 90 As an alternative, I was urged by Infinite Blue to direct City Power to employ the 83 recommended 2366S bidders as a closed list from which an emergency procurement exercise was to be undertaken, akin to the accredited list from which such quotations could be taken in terms of the emergency procedures under the supply chain management policy of City Power.
- 91 If this were to be done, it would amount to restricting City Power to choose among the 83 recommended bids for 2366S, when it is urging me to authorise services to be provided by these very bidders. This would amount to directing the award of Tender 2366S, on the BEC recommendation, something Infinite Blue was adamant I should not do.

- 92 Of course, as counsel for City Power pointed out, such an accredited list provided for in its emergency procedures does not exist and was in the ordinary course the product of a competitive process itself.
- 93 Infinite Blue also urged me to consider the possibility of directing those who provide the interim services to be providing them at the lowest quoted rate of the rates in Tender 2366S, and to direct that City Power appoint for interim services only those prepared to provide the services at the lowest quoted rate.
- 94 In my view, there are several severe difficulties with such an approach. First, that comes perilously close to crafting a contract for the parties. Second, the fact that one was dealing with five different work streams will entail a sufficient degree of differentiation in the services to be provided that any order purporting to direct any kind of flat "*lowest*" rate would likely fall foul of several unintended inefficiencies even if such an order were in principle to be appropriate, which I highly doubt.
- 95 It really is a matter of choosing the least amongst several evils. The most important evil to avoid is continued undermining of the authority of the order of Sutherland J.
- 96 I have settled upon the following as the most appropriate order, and one which, when put to counsel for City Power, did not as I understood it elicit any objection on the basis of its unworkability or incompetence. It seems that, pending the finalisation of a tender process to replace Tender 2366S, the City should embark upon an emergency procurement process to fulfil its current service needs that were addressed by Tender 2366S. It should employ for purposes of this process as eligible bidders only all those tenderers that passed functionality

in Tender 2366S. They should tender for specific work streams and for the rendering of month to month services pending an award under the new tender that is to replace Tender 2366S.

THE REPORT

- 97 Something must be done to protect the authority of paragraph 7 of the order of Sutherland J.
- 98 It appears to me, *prima facie*, that the Chief Executive Officer of City Power is in contempt of such order.
- 99 The order was directed at the Chief Executive Officer of City Power and the Executive Mayor of Johannesburg. Neither was (at least personally) a party to the proceedings before Sutherland J. It was not even made clear to me in the papers whether the order was brought to the attention of the Executive Mayor of Johannesburg, as was ordered by Sutherland J. As for the Chief Executive Officer of City Power, he or she is captain of the ship. As such, he or she must bear responsibility. I am told that the investigation now being conducted by the attorneys for City Power is to be finalised by the end of October. So be it. It seems appropriate to me that a rule be issued calling upon the CEO to show cause by the end of October why he or she should not be held in contempt and potentially committed for contempt. It is also appropriate for any affidavits to be served in this process to be served on Infinite Blue, for it to put in such response as it may deem appropriate to assist the court in adversarial proceedings.

COSTS

100 Infinite Blue submitted that, whatever the outcome of this application, City Power should be ordered to pay the costs.

101 The order granted is not the order that was sought by City Power. It is more closely aligned with the initial central submission of Infinite Blue than with various incarnations of a wishlist of orders that developed during the course of argument. In my view, Infinite Blue's intervention and opposition were critical to salvage what was left of the authority of the order of Sutherland J. It also achieved what can only be described as substantial success in the application. I cannot see why it should not have its costs.

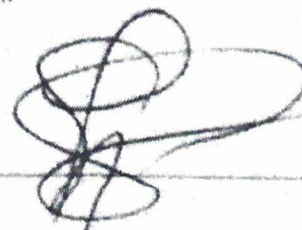
ORDER

102 The following order is made:

1. Pending the finalisation by the applicant of any tender process in substitution of Tender 2366S –
 - 1.1 the applicant is directed to embark upon an emergency tender procurement process, in respect of the monthly rendering of the services envisaged in Tender 2366S, utilising as a closed list of eligible tenderers for such emergency procurement all bidders that were assessed to pass functionality in Tender 2366S;
 - 1.2 the emergency process envisaged in 1.1 above shall be completed by no later than 31 October 2020, and whatever the state of the recommended or final outcome by 31 October 2020

shall be employed as the outcome of such emergency procurement process and shall be accordingly implemented;

- 1.3 until 31 October 2020, the 2nd to 63rd respondents are authorised, as an interim measure, to continue to render services to City Power as envisaged in Tender 2285S.
2. A rule *nisi* is issued, returnable on 2 November 2020, in terms of which the Chief Executive Officer of the applicant is directed to show cause why he or she should not be held in contempt of paragraph 7 of the order of Sutherland J of 30 May 2019 issued in Case No. 501/2019, and should not be committed to prison for contempt.
3. Any affidavit seeking to show such cause shall be delivered to the first respondent and uploaded on Caselines under this case number by 9 October 2020.
4. Any answering affidavit in response to such affidavit showing cause shall be delivered by 23 October 2020 and any replying affidavit by 28 October 2020.
5. The applicant is to pay the costs of this application including the costs occasioned by the employment of two counsel.



17/9/20

FA SNYCKERS AJ

17 September 000-33

Date of Hearing: 15 September 2020

Judgment Delivered: 17 September 2020

APPEARANCES:

On Behalf of the Applicant: TJ Bruinders SC

N Stein

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On Behalf of the First Respondent: NGD Maritz SC

APJ Els

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