



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 58305/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE ☒ YES ☐ NO
(2)	OF INTEREST TO OTHERS JUDGES ☒ YES ☐ NO
(3)	REVISED
16/7/2019	
DATE	SIGNATURE

In the matter between:

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Applicant

and

ALTECH RADIO HOLDINGS (PTY) LIMITED

First Respondent

THOBELA TELECOMS (RF) PROPRIETY LIMITED

Second Respondent

ABSA BANK LIMITED

Third Respondent

**THE CHAIRMAN OF THE MUNICIPAL COUNCIL OF
THE CITY OF TSHWANE**

Fourth Respondent

NEOTEL (PTY) LIMITED

Fifth Respondent

COMMUNICATIONS SOLUTIONS (PTY) LIMITED

Sixth Respondent

MOBILE TELEPHONE NETWORKS (PTY) LIMITED

Seventh Respondent

BRIGHTWAVE TECHNOLOGIES (PTY) LIMITED

Eighth Respondent

CITICONNECT BUSINESS SOLUTIONS (PTY) LIMITED

Ninth Respondent

EOH MTHOMBO (PTY) LIMITED

Tenth Respondent

JUDGMENT

Baqwa J

- 1 This is an application for review like no other. Whilst the review of own decisions by administrative entities are legion, the uniqueness of this application arises from the change of administration of the applicant from one political party, the African National Congress (ANC) to the Democratic Alliance (DA). It seeks to review and set aside a decision of the applicant ("the COT") in which the broadband network tender was awarded to the first respondent ("ARH") and to have the subsequent contracts set aside.
- 2 The decision to award the tender was taken on 9 June 2015 and the review application was launched on 22 August 2017.

Facts

- 3 In 2013 the COT had an existing network infrastructure of approximately 500 kilometres of fibre. This infrastructure had been utilised by the COT to deliver key governmental services which included security, education, traffic, tourism, internet connectivity and access to information.

- 4 The COT had an interest in upgrading its communications network infrastructure and in 2013, it decided to expand and improve same. The COT envisaged a "Smart City" aimed at combining technologies and targeting both business nodes as well as historically disadvantaged residential areas. Central to this objective was the improvement of service delivery.
- 5 Consequently, the COT set out to identify a service provider to build and operate 1500km of network infrastructure, which would integrate with and complement its existing network. This gave birth to the COT's broadband project.
- 6 The broadband project was spearheaded by two key individuals, namely, Mr Jason Ngobeneni who at the time was COT's City Manager and Mr Dumisani Otumile, the COT's Chief Information Officer. In order to operationalise the project they needed the approval of the Mayoral Committee. This was to ensure that the COT's budget appropriately and comprehensively accommodated a project of that magnitude.
- 7 The Mayoral Committee approved the business case for the broadband project on 15 May 2013 even though it appeared that scant detail was provided on the funding side.
- 8 The Mayoral Committee resolved in broad terms that the COT would not fund the rollout of the broadband infrastructure directly and that it would instead commit to an "off-take amount" to make the business model viable. The "off-take" amount would be a guaranteed minimum yearly amount paid over to the successful tenderer. It envisaged the amount which was to be originally

expended would be R320 million per annum, however it later emerged that R276 515 898 was to come from the COT's operational expenditure budget and its existing budget for the expansion of the ICT network. That budget as it turned out would however be insufficient as it would result in a shortfall of approximately R93 million per annum which would be paid from the 2015/2016 financial year. This meant that the shortfall was not accommodated by the existing budget allocations. The Mayoral Committee resolved however that the COT consider the shortfall through budget prioritization. Budget prioritization is a process through which funds are redirected from other departments on the basis that those departments are not likely to exhaust the budgets allocated to them for the current year.

The Law

- 9 Section 217 of the Constitution provides that when any sphere of government "contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective." These constitute the minimum requirements for a valid tender process and contracts entered into following an award of a tender to a successful bidder.¹
- 10 It is thus a prescript that is enshrined in the Constitution that any procurement process preserves "*the attributes of fairness, or in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.*"

¹ See *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and others* 2008 (2) SA 481 "Millennium Waste" at para 4, referred to with approval in *AllPay Consolidated Investment Holdings and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (1) SA 804 (CC) at para 31

- 11 Equally, a constitutionally-compliant process ought to uphold the values that govern public administration as articulated in section 195 of the Constitution which include fairness, equitability, efficient, effective and economic use of resources; accountability; and transparency.²
- 12 There is threefold purpose in the context of tenders which compels the state to comply with “process formalities.” These are:
- 12.1 Firstly, this ensures fairness to the participants in the bid process.
- 12.2 Secondly, it enhances the likelihood that the outcome of the tender is efficient and optimal.
- 12.3 Third, it guards against a “process skewed by corrupt influences.”³
- 13 For the purposes of determining whether non-compliance with legal requirements vitiates the lawfulness of a decision, a Court must assess the materiality of the non-compliance and in doing so, it must consider the purpose of the provision of the requirement. In this regard the Constitutional Court stated as follows in the AllPay merits:
- “Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance. That strict mechanical*

² See *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) at para 33

³ *AllPay Consolidated Investment Holdings and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (1) SA 804 (CC) at para 24 and para 27 (“AllPay merits”)

*approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision.*⁴

- 14 It bears noting however that, even though the decision to award a tender constitutes administrative action, only a private person and not the state is entitled to pursue a judicial review remedy of its own decision in terms of PAJA.⁵
- 15 When the COT commenced with these proceedings the legal position was that it was possible for organs of state reviewing their own decisions to proceed by way of PAJA or the principle of legality. However, the *Gijima* decision has altered this position.
- 16 In *Gijima* the Constitutional Court declared SITA's decision to appoint a service provider under a contract to be constitutionally invalid. The initiative to review the decision had come from SITA itself even though it was the decision maker. Whilst the Supreme Court of Appeal had found that an organ of state could invoke PAJA, a unanimous judgment by Madlanga J and Pretorius AJ rejected that contention. It found instead that because the State is not a bearer of rights, it cannot avail itself of the right to administrative justice safeguarded in section 33 of the Constitution, or of PAJA, which is the legislation enacted to give effect to that right. The Court articulated itself per Madlanga J and Pretorius AJ as follows:

"Does PAJA apply?"

⁴ See *AllPay Merits* (supra) at para 30, citing *African Christian Democratic Party V. Electoral Commission* [2006] ZACC 1; 2006 (3) SA 306 [CC] at paras 25

⁵ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC) ("*Gijima*")

[18] The answer to this question must surely turn on an interpretation of the Constitution and PAJA. In this regard, the most relevant section of the Constitution is s 33. Before we engage in an interpretation of the Constitution and PAJA, we think it necessary to consider the philosophical underpinnings of the very notion of whom fundamental rights are meant to protect. It is quite axiomatic – it seems to us – that fundamental rights are meant to protect warm-bodied human beings primarily against the State. Why this discussion then? We think it will help inform the interpretative exercise on whether PAJA applies when organs of state seek the review of their own decisions.”⁶

- 17 The above re-statement of the law does not however, mean that an organ of state is deprived of its ability to seek its own decisions to be set aside. The state can and ought to do so on the basis of rationality or legality. Conduct which is deemed to be unlawful ought to be corrected. That is the essence of the principle of legality. Government officials occupy the position of being guardians of the public interest and from that perspective they have not only the power but also the duty to dismantle illegalities. They must therefore approach a court to set aside own decisions and this has been established in a long line of decisions such as *Pepkor Retirement Fund and another v Financial Services Board and another*⁷ where the Supreme Court of Appeal stated that:

“A public functionary may be entitled and even obliged to seek the review by a court of its own decision.”

- 18 The principle was also confirmed in *Gijima* (supra) at paras 40-41 as follows:

⁶ See *Gijima* supra at para 18

⁷ [2003] ZASCA 56; [2003] 3 All SA 21 (SCA)

"The principle of legality may thus be a vehicle for its review. . .

Indeed, we have previously held that the principle of legality would be a means by which an organ of state may seek the review of its own decision."

- 19 COT's case is premised upon its failure to act in accordance with the principle of legality and that its conduct which was inconsistent with the applicable legal provisions was unlawful.

Respondent's case

- 20 The respondents have taken a stance which challenges the *locus standi* of COT's city manager who has deposed to the applicant's (COT) founding affidavit on the basis that the council did not pass a resolution to authorise the city manager to institute the proceedings.

Further they submit that COT is non-suited as a result of the alleged delay in litigating the matter.

In regard to the irregularities raised by the COT, they submit that where such exist, they are not material enough to derail COT broadband project and the underlying contracts.

Preliminary objections

- 21 Dr Moeketsi Emmanuel Mosola deposed to the COT's founding affidavit in his capacity as the City Manager ("City Manager") under the new political administration. In terms of section 60 of the Municipal Finance Management Act, 2003 ("MFMA") he is the accounting officer of the COT and as such he is empowered and obliged to exercise the functions and powers in terms of the

MFMA. These include taking reasonable steps to ensure that the resources of the municipality are utilised effectively.

- 22 In terms of sections 55(2) and 95 of the Municipal Systems Act⁸, the accounting officer is responsible for the income and expenditure of the municipality, and compliance with the MFMA. Notwithstanding these obligations, ARH disputes Dr Mosola's authority despite the mayoral committee having provided a resolution. They contend that the municipal council had not authorised these proceedings further authorising him to act. Given Dr Mosola's responsibilities as an accounting officer, the respondents' objections in this regard can only be regarded as a classical case of splitting hairs.
- 23 In *Democratic Alliance v Masondo N.O. and another*⁹ the Constitutional Court found that while there is no express mention of a mayoral committee in the Constitution, the Constitution envisages the possibility of legislation which regulates and provides further detail on the powers and functions of a municipal council and its organs. This objective was achieved through section 60 of Local Government: Municipal Structures Act¹⁰ which then means there is nothing to impede the municipal council from delegating its powers to initiate litigation to the Executive Mayor and the mayoral committee.
- 24 Further, a complex line of delegation is provided for in the COT's Corporate System of Delegations 2012 ("the System") which was approved by the Special Council on 26 January 2012 and reaffirmed on 31 August 2016. The System

⁸ Act 32 of 2000

⁹ [2002] ZACC28; 2003 (2) BCLR 128; 2003 (5) SA 413 (CC) para 91

¹⁰ Act 117 of 1998

provides that the "Executive Mayor has all residual powers, save those expressly reserved for the municipal council," and that such powers "must be exercised and performed together with the other members of the mayoral committee."

25 The City Manager is then accordingly empowered by the Executive Mayor who delegates to him powers such as

25.1 "[t]he powers in terms of section 62(1) (a) of the [MFMA] to ensure the effective, efficient and economic use of the Municipality's resources"

25.2 "[t]he power to prevent unauthorised, irregular or fruitless and wasteful expenditure and other losses in terms of section 62 (1) (d) of the [MFMA]"

25.3 "[t]he power to depose and/ or sign any affidavits and documents emanating from any legal matter subject thereto that such affidavits/ documents be scrutinised by the Chief Legal Counsel."

26 It would therefore appear from the above that the challenge regarding the ability of the COT Manager to bring this application is not sustainable and that the absence of a municipal council resolution is of no consequence.

Irregularities

27 The challenge regarding the BOT Agreement and the Tripartite Agreement is premised on four main grounds, namely, that:

27.1 The RFP was defective and its publication irregular;

27.2 The evaluation of the bids was marred by unlawfulness;

27.3 Mandatory processes were not complied with subsequent to the award;
and

27.4 The agreements that were concluded pursuant to the tendering process
are unenforceable

These grounds are discussed *seriatim*.

The Supply Chain Management (“SCM”) Regulations published under Local Government Municipal Finance Act¹¹ (“MFMA”)

28 Regulation 21 (b) stipulates that tender documents must “include evaluation and adjudication criteria, including any criteria required by other applicable legislation.” This includes B-BBEE criteria in terms of the Preferential Procurement Policy Framework Act¹² (“PPPFA”). The same requirement is contained in COT’s Procurement Policy which provides that the bid documentation must include the preference point systems to be utilised as well as evaluation and adjudication criteria. A statement regarding the procurement of goods and services outside South Africa had also to be included.

29 The RFP published by the COT was found wanting in the following respects

29.1 It failed to specify that the PPPFA and the Regulations applied to the extent that the bids would be scored on the basis of an allocation of 90 points for functionality and 10 points allocated for specific goals;

¹¹ Act No 56 of 2003

¹² Act 5 of 2000

- 29.2 It failed to specify that the bid evaluation would occur as a staged process and that the bidders should indicate whether goods and services would be sourced locally, within South Africa or not.
- 30 The preferential procurement system applies to tenders which exceed one million rands and ought to have been applied in the COT tender. The 90/ 10 point system as stipulated in s 2(1) (b) (i) which means that 10 points may be allocated for specific goals such as BEE and the remaining 90 points would related to price. This provision of the PPPFA coincides with the COT Procurement Policy.
- 31 Regulation 4 of the PPPFA Regulations stipulates that where functionality is a component of a tender the RFP must specify full details regarding the criteria for measuring functionality. This was not complied with. As the Western Cape High Court stated in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and others*¹³:

"[T]he imperatives of fairness and transparency, laid down in section 217(1) of the Constitution, dictate that prospective tenderers should be properly informed of the tender evaluation criteria to be applied. This information is obviously necessary to enable would-be bidders to decide whether or not to spend time and money on preparing a tender.

To my mind transparency and fairness require that tender evaluation methods should be clearly defined, certain and prescribed in advance in the tender documentation."

¹³ [2013] ZAWCHC 3 at paras 72-73

B-BBEE Certificates

- 32 If a bidder fails to submit original and valid B-BBEE certificates which are necessary in order to apply the preferential point scoring formula, the bidder will be instantly disqualified. Further, a trust, consortium or registered joint venture must submit a B-BBEE status verification certificate for every separate bid in terms of the COT procurement policy. In the COT tender, bidders were put at risk in that they could be disqualified for failing to submit the correct documentation due to the failure to make this requirement explicit in the RFP.

This defect in the RFP ran against the values of transparency and fairness and thus constituted a material irregularity.

RFP used to evaluate bids materially differed from published RFP

- 33 A further irregularity was that the published RFP differed in material respects from the RFP which was used to assess the bids and to determine the tender award. The respondents submit that the compulsory briefing session on 26 September 2014 informed the bidders of the discrepancy between the published RFP and that no bidders were prejudiced as a result of such discrepancy.

- 34 The respondents' submission is however not sustainable in view of the clearly stated view in the COT Procurement Policy which is formulated as follows:

"A briefing session must only be held to clarify some existing issues in the tender document and no new issues can be raised at such a meeting. No material changes can be made to the scope and no major changes can be made to the specification at such a meeting."

The RFP itself provides a mechanism which could have been utilised to try and address the discrepancy namely, issuing addendums and publishing same. This mechanism was not utilised by the COT.

The irregularity created by the use of a different RFP than the one advertised goes to the core of the values of fairness and transparency given the fact that bidders prepare their tenders based on the specifications provided in the published RFP.

- 35 The resultant unfairness has been recognised by the courts in their approach to the matter. In *Premier of the Free State Provincial Government and others v Firechem Free State (Pty) Ltd*¹⁴ Schultz JA said:

"A tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of the tender."

It would in the circumstances not only be incorrect but totally inappropriate to underplay the discrepancy between the published RFP and Otumile's revised RFP and to suggest that it is not material or that it was rectified by a mere briefing session.

¹⁴ 2000 (4) SA 43 (SCA)

- 36 The COT effectively contravened the law as stated in *AllPay Consolidated Investment and others v Chief Executive Officer of the South African Social Security Agency and others*¹⁵ where the following was stated regarding the requirements of an RFP:

"An Organ of state must indicate in the invitation to submit a tender:

- (a) If that tender will be evaluated on functionality;*
- (b) That the evaluation criteria for measuring functionality are objective;*
- (c) The evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality;*
- (d) That no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and*
- (e) That tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the applicable prescribed point systems."*

Improper authorisation of the RFP

- 37 Another irregularity arises out of Otumile's lack of authority to participate in the process of drafting and publication of the RFP.

¹⁵ 2014 (1) SA 604 (CC) at para 35

It was the Bid Specification Committee's role to determine the specifications for the procurement of goods and services by the municipality. In the present case however, both the published criteria and the criteria relied upon were prepared by Otumile and not the BSC. Otumile did not have authority to be involved in the bid-specification process though the respondents argue to the contrary. The respondents submit that Otumile acted in terms of delegated authority bestowed upon him by the then City Manager, Ngobeni. This submission is not sustainable. It was Ngobeni's responsibility as the City Manager of the COT to approve the RFP as per requirement by the SCM regulations. The tender was large and it was likely to run for a long period of time. It was not appropriate for Ngobeni to purport to delegate his authority.¹⁶

Resultantly, the criteria and decisions taken in term thereof were rendered invalid.

Failure to submit Municipal Accounts

- 38 In terms of the RFP tenderers were required to submit municipal accounts for the directors of the tendering entity in which it would be indicated whether they owed any municipal rates, taxes or charges to the municipality. The RFP stipulated this as a mandatory requirement which would result in disqualification upon non-compliance. This sanction was applied to no less than eight tenderers during the evaluation process.

¹⁶ See *Chairman, Board on Tariffs and Trade v Teltron (Pty) Ltd* 1997 (2) SA 25 (A) at 34 E-F

On the contrary ARH which failed to comply with this mandatory requirement was treated differently. ARH did not submit full municipal accounts for its four active directors. Instead it submitted documents for three directors and no documents at all for the fourth director.

ARH does not deny this failure to comply but submits that such failure was not material.

- 39 Regulation 29(5) (b) of the SCM Regulations specifies that the adjudication committee ought to confirm that a tenderer's municipal rates, taxes and services accounts are not in arrears. If they are not up to date the entity is precluded from doing business with the Municipality. The mandatory nature of the requirements is underlined by its repetition in the COT Procurement Policy. The submission of the relevant documents was meant to enable the municipality to assess the status of the directors in relation to the municipality and absent their submission this could not be done. It would thus appear that this is one of the instances where ARH received preferential treatment over other bidders which constitutes an irregularity in terms of section 217 of the Constitution which requires that public procurement occurs "in accordance with a system which is fair, equitable, transparent, competitive and cost effective."
- 40 Further, the COT Procurement Policy also provides that "[t]o be fair, all possible suppliers must have an equal opportunity to bid for the requirements of the City of Tshwane."

- 41 It is imperative that tenderers be treated fairly in relation to each other and this has been emphasised in numerous court decisions. Thus in *Metro Projects CC v Klerksdorp Local Municipality*¹⁷ Conradie JA said:

"[14] Was the tender process followed in the present case fair? A high ranking municipal official purported to give the ninth respondent an opportunity its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not."

- 42 In *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape*¹⁸ the Constitutional Court remarked that tender processes require "strict and equal compliance by all competing tenders on the closing day for submission of tenders." The result of these legal pronouncements is that the disparate and unequal treatment of tenderers renders the tendering process unfair and constitutes an incurable contravention of the legislative provisions. The two tenderers, EOH and ARH became the beneficiaries of preferential treatment.

¹⁷ [2004] 1 All SA 504 (SCA) at para 14

¹⁸ [2006] ZACC 16

Identity of the bidding entity

43 It is axiomatic that an evaluation of a tender bid must be specific. In other words, the identity of the bidding party or company ought to be clear and unambiguous.

44 This view was enunciated in *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality*¹⁹ where the Court stated as follows:

"It is to be noted that apart from the letters of comfort there is no firm commitment forthcoming from these entities in the sense of entering into a joint venture agreement with the third respondent. One has to take into account that the first respondent is dealing with public funds and that, in my opinion, certainty is required as to which of the entities are involved in the joint venture. A loose arrangement such as that proposed by the respondent in this case is not sufficient. Counsel for the applicant correctly, in my view, referred to it as an amorphous body of entities against whom it would be difficult for the first respondent to enforce its rights, should the need arise. In my view it is not enough for these entities to merely state that they will enter into a joint venture agreement once the tender is awarded."

45 In the present case ARH failed to identify itself appropriately in its bid documents. Instead, it relied on business documents of other companies within the ARH group. It identified itself as a private company but in other parts of its bid it purported to be submitting on behalf of a special purpose vehicle (SPV) which had not yet been formed, alternatively on behalf of a consortium of companies.

¹⁹ Case No 641/2012 01-08-2013 ECG at para 72

This is precisely the mischief that is referred to in *BKS Consortium* (supra). ARH was submitting a bid of a non-existing SPV or consortium of companies. This anomaly was to rear its head later when the Build Operate and Transfer agreement was entered into and would be the source of yet another irregularity.

- 46 Provision for a consortium to qualify for BEE points is made in Regulation 11 of the PPPFA Regulations provided that the entity submits a BEE certificate. In the event that the joint venture is unincorporated, the entity ought to submit a consolidated B-BBEE scorecard if it is a group structure. The COT Procurement Policy has a similar provision that a trust, consortium or registered joint venture must submit a B-BBEE status verification certificate for every separate bid. As indicated earlier, each director had to submit a municipal account regarding rates and taxes. This information would inform the scoring of each bidder. As a result, the amorphous manner in which ARH prosecuted its bid was such that it was unclear who the real bidder was, thus making it impossible to evaluate the bid. The conduct of ARH as a bidder was impermissible and unlawful. It ought not to have been allowed.
- 47 Form RDC9 of the RFP is quite explicit in the section which deals with the "Status of concern submitting tender." It requires the tenderer to state whether it is a company, a closed corporation, a partnership, a sole proprietor or a joint venture. ARH's bid documents show that it submitted a bid as a private company. On the item "Certificate of Authority for Joint Venture and Consortia" ARH's response was "Not Applicable."

It is therefore self-evident that ARH's contention that its tender submission made it clear that the ultimate entity which would provide the service was to be a joint venture SPV fails to validate its bid. Neither does Thobela's assertion that "in the end ARH submitted a bid as a sole bidder but made it quite clear in the bid that the ultimate contracting party would be an SPV."

Failure to assess requisite experience

- 48 In terms of the RFP requisite experience was specified as a threshold qualification requirement. Put differently, a tenderer had to demonstrate extensive knowledge in the broadband networking sphere to enable the BEC to differentiate between the bidders. Despite this requirement, the two remaining bidders, ARH and EOH were not tested via a demonstrable network phase.
- 49 The BEC decided not to consider the demonstration network as part of the evaluation process. As motivation for this omission the BEC was of the view that "the two tenderers have a lot of experience."

This omission by the BEC was irrational in that it not only deprived the BEC of an opportunity to evaluate and differentiate the two tenderers on an informed basis in relation to an aspect which was critical to the required service but also flouted the COT Procurement Policy which emphasises that "it must be ensured that goods and services are obtained in the most cost-effective manner." Cost-effectiveness related to obtaining the best product at the lowest possible cost.

As the Supreme Court of Appeal articulates it in *Minister of Social Development and others v Phoenix Cash and Carry - PMB*²⁰:

"It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best-qualified by price."

It could therefore not be concluded in the absence of properly assessing the product offering of ARH that it was the most competitive and cost-effective.

Non-compliance with section 33 of the MFMA

50 The MFMA directs the relevant spheres of local government to protect "... own financial integrity in the short- and long-term so that it can acquire goods and services at reasonable rates without prejudicing its overall ability to service the needs of all the citizens for which it bears responsibility and to whom it is accountable."

51 More specifically section 33(1) thereof opens up the process enabling the relevant stakeholders to comment and ensure that all the prescripts have been adhered to.

It provides as follows:

²⁰ [2007] 3 All SA 115 (SCA) at para 2

"Contracts having future budgeting implications:

A municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only, if –

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

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

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

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

(ii) Has solicited the views and recommendations of –

(aa) The National Treasury and the relevant provincial treasury

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

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

(b) The municipal council has taken into account –

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

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

- (iii) *Any comments or representations on the proposed contract received from the local community and other interested persons; and*
- (iv) *Any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a) (ii) (cc); and*
- (c) *The municipal council has adopted a resolution in which –*
 - (i) *It determines that the municipality will secure a significant financial economic or financial benefit from the contract;*
 - (ii) *It approves the entire contract exactly as it is to be executed; and*
 - (iii) *It authorises the City Manager to sign the contract on behalf of the municipality.*
- (2)”

52 The contract that was being entered into by the COT through the BOT was massive, not only in terms of the implied financial commitments but also in terms of the period for which it would run, namely, 18 years. The provisions of section 33(1) therefore were not only of direct relevance, they had to be scrupulously adhered to because of the potential “impact of those financial obligations on the municipality’s future municipal tariffs and revenue.” (s 33(1) (b) (ii))

From the evidence tendered by the COT it would appear that the requirements set out in section 33 were not adhered to. A few examples discussed below should serve to illustrate this view.

Uncontested Reports

- 53 The evidence presented by the COT included reports by the Auditor General, the National and Provincial Treasury and Audit firm Sekela Xabiso.
- 54 These reports illustrated the non-compliance issues at various stages leading up to the signing of the BOT which were ignored by the City Manager who seemed resolute to continue with the project at all costs despite the concerns raised by other stakeholders.

Absence of a business case

- 55 The Municipal Council failed to comply with the requirements of section 33(1) of the MFMA because the broadband project had no proper business case from the very beginning.
- 56 It is common cause that the original intention of the COT was that the successful bidder would take over the COT's existing 500km network and extend it to 1500km. The intention was that the cost of the existing operators in relations to the 500km network would be "re-prioritised" in the form of the offtake amount. This would imply that the successful bidder would then be responsible for paying existing operators. Whilst this ought to have been a foremost and obvious consideration by the COT and because of the absence of a proper business case, this was not done. As a consequence the Municipal Council did not understand that the BOT agreement did not include ARH/ Thobela assuming responsibility for the existing network. The result was that COT would have to

pay all the amounts due to existing service providers for the 500km network together with the offtake amount for the new 1500km network.

- 57 Bearing in mind the provisions of section 33(1) (b) which enjoin the municipal council to take into account the impact of financial obligation on the municipality's future municipal tariffs and revenue, the COT failed in its duty to safeguard the public purse in this regard. The best way to afford the new network was for the service provider to be responsible for both the existing budget to be "re-prioritised" and the extended network. This did not happen.
- 58 Evidently the Municipal Council was not properly informed of the financial implications of the BOT or alternatively that in assessing the project, the council did not pay proper attention to its future financial implications and its funding.
- 59 If a proper assessment was made, the Council would have been able to establish exactly what the re-prioritisation of the existing budget meant. It would have been able to determine what diverting monies meant and whether the contracts of the existing service providers would have to be terminated and what the implications thereof would be.

The decision of the COT Municipal Council was in the circumstances based on a wrong or alternatively incomplete set of facts thus constituting an improper exercise of public power.²¹

BOT agreement differed from the one authorised

²¹ See *Pepcor Retirement Fund and Another v Financial Services Board and another* 2003 (6) SA 38 SCA at 58G to 59D

- 60 There was non-compliance with both section 33(1) (c) (i) and (ii) by the COT. The BOT agreement which was agreed by the City Manager contained a clause obliging the COT to stand in for payment of Thobela's financial obligations to its funders. This clause was not part of the original BOT agreement which served before the Municipal Council. Clause 33(1) (c) (ii) provides that the Council "approves the entire contract exactly as it is to be executed." The City Manager was not authorised to alter the agreement, he only had authority to sign on behalf of the Council.
- 61 Further, the Tripartite Agreement, which was part of the BOT Agreement was never tabled before the Municipal Council, thus depriving the Council an opportunity to apply its mind to the terms thereof.
- 62 Lastly, in this regard, no resolution was taken by the Council as required in terms of section 33 (1) (c) (i) in terms of which it signified that "the municipality will secure a significant capital investment or will derive a significant capital investment or will derive a significant financial economic or financial benefit from the contract." It is self-evident that the Council was not provided with the full facts on which it could have taken such a resolution. Instead, from the evidence presented it would seem that there was a total disregard of the purpose for which section 33 was enacted and the COT was in total contravention thereof.

Non-compliance with National Treasury directives

- 63 Even though the City Manager did publish notices in terms of section 33 (1) (a) of the MFMA to invite public participation, it does not seem that these yielded any meaningful public participation. There were no public meetings held subsequent to the publication. COT submits that this could be attributed to the paucity of detail in the notices.

There were responses however from public institutions such as the National and Provincial Treasury as well as the Auditor General.

- 64 One of the concerns raised sharply with the COT regarding the broadband project was non-compliance with the provisions of the Preferential Procurement Framework Act²² (PPPFA) and its Regulations. National Treasury contended that the BOT Agreement constituted a Public Private Partnership (PPP). In terms of section 168 of the MFMA a commercial transaction constitutes a PPP if:

- 64.1 The private party must perform a municipal function or use municipal property for its own commercial purposes
- 64.2 The private party must assume substantial financial, technical and operational risk in connection with that function.
- 64.3 The private party must receive a benefit from performing the municipal function

- 65 The COT submits and I accept that because all the above requirements are met, the broadband transaction does constitute a PPP and that it ought to have complied with the relevant statutory requirements. The then COT administration resisted the National Treasury directives and instead engaged in dilatory and

²² Act 5 of 2000

evasive response – which it persisted in until the BOT was submitted to the Municipal Council. This was done in the face of the National Treasury concerns and without the issues raised having been resolved.

- 66 It cannot be gainsaid that the essence of the broadband project was to create a broadband infrastructure which would boost the COT's service delivery. The Regulations published in terms of section 168 of the MFMA define "municipal function" as a municipal service or any other activity within the legal competence of a municipality.
- 67 It is common cause that Thobela assumed substantial financial, technical and operational risk in terms of the BOT agreement and that this served as a basis for the funding arrangement. It is also common cause that Thobela received a benefit in terms of the BOT Agreement and that the agreement constituted a commercial transaction, in terms which Thobela would receive annual payments of the offtake amount and profit by operating as a wholesaler for bulk services.
- 68 Had the COT acceded to and complied with the National Treasury directives, it would have had to comply also with the requirements set out in section 120 of the MFMA in that it would have had to perform a feasibility study prior to concluding a PPP. The feasibility study would analyse the future implications of the project on the COT's operations such as staff redundancies and obsolescence of assets. The feasibility study results would then be submitted to Council which would in turn decide the way forward regarding the project. The Council would make the decision subject to inputs from relevant stakeholders

and the local community. It is common cause that none of these prescripts were adhered to by the COT.

Invalidity of the Contracts

69 The evidence tendered by the COT demonstrates that the BOT and Tripartite agreement are not valid agreements:

Section 116(3) of the MFMA provides:

- “(3) A contract or agreement procured through the supply chain management policy of the municipality or municipal entity may be amended by the parties, but only after –*
- (a) The reasons for the proposed amendment have been tabled in the council of the municipality or, in the case of a municipal entity, in the council of its parent municipality; and*
 - (b) The local community –*
 - (i) Has been given reasonable notice of the intention to amend the contract or agreement;*
 - (ii) Has been invited to submit representations to the municipality or municipal entity.”*

70 In the present case the BOT agreement was subject to a number of suspensive conditions in terms of Clause 4 of that agreement.

The suspensive conditions were to be fulfilled by 30 June 2016 and they included the following:

70.1 The COT was to enter into a Tripartite Agreement on terms and conditions which were acceptable to the Service Provider

- 70.2 The COT had to provide written proof that the offtake amount had been allocated in COT's approved budget.
- 70.3 The agreement and the transactions contemplated therein had been approved in terms of section 33 of the MFMA.
- 71 The parties were aware even at that time that suspensive conditions had not been fulfilled. For example, the offtake amount had not been allocated in COT's approved budget. As a result, and as an attempt to beat the deadline, ARH's attorneys dispatched a letter to COT's legal representatives to extend the deadline to 31 August 2018. Otumile, COT's GCIO signed a letter granting the extension of behalf of COT on 28 June 2016. Otumile was not the COT accounting officer. Accordingly he had no authority to sign the extension letter.
- 72 As alluded to (supra) the BOT was an agreement which had to be approved by the Municipal Council in terms of section 33 of the MFMA. The person authorised to sign on behalf of the Municipal Council was the City Manager who was the COT's accounting officer. The accounting officer must sign the agreement as authorised by the Municipal Council, that is, without any amendments. By implication therefore, any amendments can only be effected by the Municipal Council.
- 73 The attempted extension of the period for the fulfilment of the suspensive conditions by Otumile was null and void. It had no legal consequences. As a result, the suspensive conditions were not fulfilled by 30 June 2016 and the BOT agreement lapsed on the date.

- 74 The submission by the respondents that the COT is estopped from denying Otumile's authority is not sustainable. Estoppel cannot legalise an unlawful act. This was confirmed in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*²³ where the following was said:

"Estoppel cannot, as I have already stated, be used in such a way as to give effect to what is not permitted or recognised by law."

- 75 In the circumstances, Otumile's purported intervention by extending the period for the fulfilment of the suspensive conditions was futile in that it had no legal consequence.

In *Hanuscke Beleggings CC v Kungwini Local Municipality*²⁴ it was stated that the non-fulfilment of suspensive conditions "render the agreement void from inception, unless the parties have agreed otherwise."

Delay

- 76 The respondents strenuously contended that COT's delay in bringing the review application was unreasonable and submitted this as one of the grounds for its dismissal. On the other hand COT submits that there are several compelling reasons for the Court to exercise its discretion in its favour.
- 77 Section 237 of the Constitution provides that "All constitutional obligations must be performed diligently and without delay." Whilst the injunction imposed by the Constitution may be clear and unambiguous in providing a direction, a public

²³ 2008 (3) SA (1) SCA at para 23

²⁴ [2012] ZASCA 112 at para 11

body may conduct itself in carrying out an obligation such as applying for a review of its own decision in such a manner that it may proceed with haste and fall short on the diligence requirements. Circumstances may require a thorough investigation before the necessary action. The determination of reasonableness or otherwise of a delay may therefore ultimately depend on the uniqueness of the circumstances of each case and the Court ought to take those into consideration in making a determination regarding delay.

Background

- 78 The circumstances of the COT case are set out in Mosola's affidavit where the following is stated. The Democratic Alliance (DA) became the head of a coalition government of the COT on 3 August 2016 after winning the Municipal elections. They had committed themselves to rooting out corruption in the administration of the COT.
- 79 On 14 November 2016 the Auditor General issued his annual audit report in which he was highly critical of the broadband project regarding its non-compliance with legislative and other compliance requirements pertaining to the award of the tender. He came to the conclusion that the tender awarded would be regarded as irregular expenditure.
- 80 As a result, the new Executive Mayor announced the establishment of an extended transactional audit of the supply chain management of the broadband project together with the BOT agreement. It became apparent that the BOT

agreement and the processes leading up to the award were marred by irregularities.

- 81 When this process of investigation began, the COT group CIO was still Otumile. Together with the previous City Manager, Ngobeni they were key individuals from the inception of the broadband project. Simultaneously, Thobela was insisting on certain payments in terms of the BOT, maintaining that failure to do so would constitute a breach by COT.
- 82 By the middle of April 2017 COT had approved a new programme manager for the broadband project and investigations were given a further momentum. The investigation was however hampered by difficulties in obtaining access to documentation due to obstacles caused by lack of co-operation from officials who were seemingly still loyal to the previous administration. It was about this time also that Otumile also left the COT. Investigations therefore had to continue in the absence of the two key individuals, Otumile and Ngobeni.
- 83 In order to firm up the investigation process COT engaged Ernst and Young Advisory Services (EY) to conduct an extensive forensic investigation on the broadband contract. EY experienced similar difficulties to those experienced by COT in its earlier investigation. It however managed to conclude its investigation by September 2017, after the launch of this application.
- 84 Despite the overlap in time of the launch of this application and the completion of the EY report in September 2017, it is remarkable to note that they still recommended that COT consider the possible cancellation of the broadband contract on the basis that:

- (a) "The service provider may have contravened the provisions of section 4 of the Competition Act;
- (b) Non-compliance with the provisions of the SCM policies and procedures; and
- (c) The failure of the Municipality to properly address the concerns raised by NT and GPT prior to concluding a contract with the service provider."

85 Whilst the respondents contend that a juristic entity does not change as a result of a new political administration, I accept applicant's submission that a change in political administration is a fundamentally significant fact precisely because of the change not only in personnel but even in decisions that are subsequently taken. What happened is that the officials of the previous administration who vacated their positions with COT were no longer there to account for their omissions and the new officials had to find their way virtually in the dark to establish the correctness or otherwise of the decisions of their predecessors. In relation to the broadband project this was not an easy task given its complexities.

86 In this context it was significant that Thobela sought to challenge the COT founding affidavit by Mosola contending that he had only joined COT in 2017. Rather than weaken the COT's contention regarding delay this challenge reinforced the COT explanation that the new officials needed time to get to grips with the facts before launching this application and ensuring the correctness of the facts in the record.

The interests of justice

87 The reasonableness or otherwise of the delay is not the only issue to consider in order to determine the lawfulness of an administrative decision. In *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal*²⁵ the Constitutional Court pronounced thus: “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.”

88 In the present case the DA became the head of a coalition government of the COT in August 2016. Not long thereafter they commenced investigations into broadband acquisitions project. Spurred on by the findings of the Auditor General, they were already briefing attorneys to launch this application in May 2017, despite the difficulties alluded to earlier.

89 It is appropriate in this regard to make reference to the remarks of Francis J in the matter of *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd*²⁶ (Swifambo) where he said:

“[74] *In my view state institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution.*”

²⁵ [2013] ZACC 49; 2014 (3) BCLR 333 (CC) at para 45

²⁶ 2017 (6) SA 223 (GJ) para 74-79

90 Francis J continued:

"[94] *In my view to hold state institutions too strictly to the prescribed period, and thereby to shield the perpetrators, encourages the commission and concealment of egregious conduct of the nature found in this matter and would discourage prosecution by the state institutions. It would also negatively impact on the administration of justice. There is no prejudice to the respondent if the application is heard. The consequences of refusing to hear the application and, as a result, allowing the invalid decision to stand will be borne by the public at large for many future generations.*

In my view, the hearing of the application will advance the principle of legality and the interests of justice. This is an appropriate case where the time period to have brought the application is extended and should be condoned."

91 In the present matter the tender was awarded on 11 June 2015 and this application was launched in 2017. The period and circumstances under which it was launched are analogous to Swifambo.

92 The merits as presented by COT are buttressed by the findings of the Auditor-General regarding the broadband tender. A few excerpts from that report will suffice.

"24.3 Non-compliance with paragraph 11 of the MFMA (cost-effectiveness)

Paragraph 112 MFMA states that "The SCM policy of a municipality or municipal entity must be fair equitable transparent competitive and cost effective and

comply with a prescribed regulatory framework for municipal supply management.

No evidence could be provided that the CTMM had conducted a comprehensive cost analysis prior to the procurement of the broadband infrastructure project. Furthermore, there was no evidence to demonstrate that the broadband infrastructure project was financially sustainable.

In the absence of a comprehensive cost analysis the procurement process undertaken was in contravention of paragraph 112 of the MFMA."

93 The report continues:

"24.5 The AGSA noted in the report to the executive acquisition committee EAC that the following bidders were disqualified for failing to comply with the administrative and compulsory requirements of the RFP

Table 6

<u>Bidder</u>	<u>Reason for disqualification</u>
Brightwave Technologies	
Citiconnect Business Solutions	
Communication Solutions	
Neotel	
Mobile Telephone Network	

On inspection of Altech Alcom Matomo ("Altech") bid documents the AGSA noted that the bidder did not submit the municipal accounts of each director as required by the conditions of the RFP. The winning bidder submitted a list of four directors

in the bid documents and only attached the municipal account statements of three directors instead of 4 directors.

Altech should have been disqualified for non-compliance with the compulsory requirements of the RFP. It is clear that the BEC did not apply the evaluation process consistently and fairly across all bidders. As a result, it appears as though Altech may have been favoured even though they did not comply with the requirements. This is in contravention of section 112 of the MFMA."

94 Lastly, the report states:

"In respect of 2.3

Management response is noted.

However, the AGSA wishes to appreciate the benefits of the broadband project and the value it will bring to the citizens of the City. It must be noted that the business case referred to by management only reflects the nature detail and extent of the project including the intended benefits. This business case was only done in February 2016. This business case did not include a comprehensive cost analysis of the project. This is in contravention of the requirements of paragraph 112 of the MFMA that requires a procurement of goods and services to be cost effective.

It is therefore incorrect for management to state that "A cost benefit analysis would have been an academic exercise and was not necessary with such extensive business case. It was not going to achieve anything new that is not already covered. In any case the broadband project will also generate additional revenues for the City in our view the city has achieved the same objectives.

Based on the above it is therefore evident that the CTMM procured the broadband without knowledge of:

- *How much the project would ultimately cost the CTMM; and*
- *Without assessing whether the project was financially sustainable."*

95 It patently evident from the conclusions drawn by the Auditor-General that the 18-year long contract awarded to the respondents amounted to a reckless acquisition which would potentially have a negative impact not only on the current COT administration but on successive administrations with the only beneficiaries being the respondents.

96 In the circumstances and with strong prospects of success on the merits, I find that it is in the interests of justice to overlook and condone the delay in bringing this application.

Unlawfulness

97 Having considered all the evidence and the legal prescripts which the COT ought to have complied with when it embarked on the broadband contract, I am satisfied that the cumulative effect of the numerous irregularities from the bidding stage onwards is to render the award of the broadband tender unlawful.

98 I find that the contracts which were entered into, namely the BOT and the Tripartite agreement ought to be declared unlawful and set aside.

Just and equitable remedy

- 99 Once a court has dealt with the merits of an application, it ought to deal also with the remedy that should follow the judgment on the merits.

Section 172(1) (b) of the Constitution provides that subsequent to a declaration of invalidity, a court: -

"may make an order that is just and equitable, including –

- (i) *An order limiting the retrospective effect of the declaration of invalidity;*
- (ii) *An order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect."*

Facts and considerations relevant to remedy

- 100 The applicant brought the present application in the public interest. It sought to impugn the award of the tender and the subsequent agreements on the basis that they constituted an infringement of the legality principle and the non-compliance with several provisions of procurement legislation, the Municipal Systems Act, MFMA, the Supply Chain Management Regulations and Supply Chain Policy of the COT.
- 101 The procurement legislation which is founded on section 217 of the Constitution requires an organ of State which contracts for goods or services to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 102 The evidence shows that in the events beginning with the bidding process and up to the conclusion of the BOT agreement several irregularities were committed

resulting in the process becoming unfair to other competitive bidders. The fundamentally flawed contract was criticised even by the National Treasury who did not recommend the award in terms of section 33 of the MFMA. The Auditor-General also reviewed the contract and found it to be irregular.

- 103 In *AllPay Consolidated Investment Holdings (Pty) and others v Chief Executive Officer, South African Social Security Agency and others*²⁷ the Constitutional Court, referring to the previous judgment of *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape*²⁸, and with reference to a just and equitable remedy said the following at paragraph [29]

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitles the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. . . ."

Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

²⁷ 2014 (4) 179 (CC) (*AllPay II*)

²⁸ 2007 (3) SA 121 (CC)

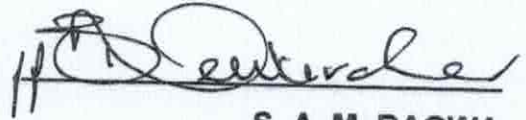
- 104 The COT seeks an order that the contracts in question be declared invalid and set aside whilst the respondents contend that the just and equitable remedy is for this Court to allow the contracts to run their full duration. They contend further that they will suffer financial prejudice if the contracts are set aside.
- 105 It is trite that conduct which is at odds with the applicable legal prescripts and the rule of law ought to be set aside. It is only in exceptional circumstances where the courts have found it justifiable to depart from the general rule. The courts have done so in circumstances where the consequences would be too dire to contemplate. This was the case, for example in *AllPay II* (supra). The *AllPay* remedies sought to avoid the risk of imperilling the rights of acutely vulnerable social grants beneficiaries. There is no such risk in the present case.
- 106 On the contrary, the prejudice which the respondents contend they will suffer, which is primarily financial, must be weighed against the prejudice which the COT and citizens who are its ratepayers will suffer in the event the contracts are not set aside. The COT has a legal and constitutional duty to safeguard both its short and long term financial integrity primarily in the interests of its ratepayers and the public at large. With that consideration in mind the decision to launch the application to have the contracts set aside would not have been made lightly.
- 107 Despite the submissions by the respondents that this Court ought to depart from the general rule of declaring the contracts invalid and setting them aside, I am not persuaded that they have made out a case for such a departure.

ORDER

108 In the circumstances I make the following order:

- 1) The award of the tender, with tender number GICT 01/2014/15, for the provision of a municipal broadband network project to ARH, which decision was communicated to it on 11 June 2015 in a letter dated 9 June 2015 including any purported amendment of such letter is declared invalid and set aside.
- 2) The decision of the Municipal Council of the Tshwane Metropolitan Municipality, in its entirety to *inter alia*, approve the terms and sign-off of the build, operate and transfer agreement ("the BOT agreement") of the Tshwane Broadband Network for the City of Tshwane taken on 28 April 2016 is declared invalid and set aside.
- 3) The decisions of the erstwhile Group Chief Information Officer and City Manager to amend clause 4.1 of the BOT Agreement which was subsequently entered into between the City of Tshwane and Thobela on 5 May 2016, the effect of which was to extend the period provided for the fulfilment of the suspensive conditions alternatively, their purported waiver of such conditions is declared unlawful and set aside.
- 4) The following contracts concluded pursuant to the tender award have lapsed and are unenforceable, alternatively, are invalid and are set aside, -
 - 4.1 the BOT agreement
 - 4.2 The Tripartite Agreement entered into between the City of Tshwane, Thobela, and Absa Bank Limited, signed on 4 August 2016.

- 5) The first, second and third respondents are ordered to pay the costs of the application, which costs include the employment of three counsel.

A handwritten signature in black ink, appearing to read 'S. A. M. Baqwa', written over a horizontal line.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on: 22 – 25 May 2018
Delivered on: 16 July 2019

APPEARANCES

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