



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

Case No: **060853/2023**

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHERS JUDGES: NO	
(3) REVISED	
	09 SEPTEMBER 2024
----- SIGNATURE	----- DATE

In the matter between:

**AFRICAN EXPLORATION MINING AND FINANCE
CORPORATION (SOC) LIMITED**

Applicant

and

LME PLANT HIRE (PTY) LTD

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 09 September 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant, African Exploration Mining and Finance Corporation (SOC) Limited [AEM] is a State-owned company which brings a self-review application of a decision taken by its Board on the 21 October 2021 to award bid number AE/VLAK009/2021 to the respondent, LME Plant Hire (Pty) Ltd [LME] [impugned decision].

[2] Pursuant to the impugned decision AEM and LME concluded an agreement in 2022 [rental agreement]. AEM, as a result of the impugned decision seeks that the rental agreement, in terms of section 172(1)(a) of the Constitution be declared constitutionally invalid *ab initio*. AEM too, requires this Court to consider just and equitable relief in terms of section 172(1)(b) of the Constitution. The latter a self-standing prayer.

[3] The review relief is sought approximately 4 (four) months after the agreed term of the rental agreement had already expired, after LME on the undisputed facts, complied with with all its obligations in terms of the rental agreement and, after LME, had already initiated arbitration proceedings for, *inter alia*, monetary relief in terms of the rental agreement.

[4] LME has brought a counterapplication seeking that the rental agreement be declared valid and binding, that its monetary claim, which is the subject matter of the pending arbitration proceeding be, in terms of section 3(1) of the Arbitration Act 42 of 1965 [Arbitration Act] declaring the resolution thereof t no longer subject to arbitration proceedings but rather this application by way of the relief in the counter application [counterclaim].

[5] Both parties agree that if this Court declares the rental agreement invalid *ab initio*, then the relief sought by LME, by way of its counterclaim, cannot be granted and therefore need not be entertained.

[6] Before dealing with the merits of the main application, the respondent, LME brings an unopposed condonation application for the late filing of its answering affidavit. AEM brought its review relief in terms of uniform rule 6 and not in terms of

uniform rule 53. This created confusion between the parties when the answering affidavit should have been filed. In particular if it was only due after the filing of a complete record. LME, out of caution, brings this condonation application in so far as this Court applies rule 6 in which case its answering affidavit would be 3 (three) weeks late. If rule 53 is considered LME contend condonation not unnecessary. Under the circumstances and having regard to the reasons set out, the fact that LME in a review application would be entitled to the complete record to enable it to file a meaningful answering affidavit, the delay is condoned. AEM did not oppose the relief nor sought to supplement its founding papers after the filing the record. This is understandable in a self-review application. The reasons for such delay were sufficiently set out and explained in the papers.

[7] Over and above the condonation, LME too, raises that AEM, on the common cause facts, has delayed in bringing their legality review and has failed to deal with the time it took them to bring the application in their founding papers. Conversely, AEM contends that it did not delay in bringing the self-review relief and in any event, it contends even if the Court should find there was a delay and that such delay was unreasonable, such delay should be condoned simply due to the nature of the relief AEM seeks.

[8] The aspect of delay and the review relief, warrants a look at the background facts giving rise to the purpose and reason for this application.

BACKGROUND FACTS

[9] AEM's core business is the mining of strategic assets such as coal for national government. Pursuant thereto and on 28 April 2021 it issued a request for proposals for the provision of services for mining equipment at its Vlakfontein Mine, near Ogies [the Mine] for a period of 12 months from the date of the cost award.

[10] AEM by means of its request for tender proposals [RFP] sought to appoint suitable qualified service providers for the rental of mining machinery for a period of 12 months at the Mine. Bidders were required to tender a machine rate per hour for each of the types of equipment required by AEM, namely 2 (two) excavators, 19

(nineteen) ADT's, 3 (three) track dozer and 1 (one) water bowser [collectively equipment]. The bidders had to quote for the rental of the equipment as set out in a Bill of Quantities.

[11] The Bill of Quantities also made it clear that the equipment had to be available for a specific number of hours per month and the target for use of each equipment.

[12] Unbeknown to the bidders, AEM apparently had a budget allocation of an amount of R 91 902 000.00 for the project. The RFP reflected what AEM needed in respect of quantity rather than what it had a budget for. LME in compliance with the RFP calculated a total monthly price for the rental of the equipment. The total amount, excluding value added tax [vat] over the contract term of 12 months amounted to R 119 646 000.00 and inclusive of vat this sum translates to R 137 592 900.00.

[13] Against this background and on the 2 July 2021 at a special procurement committee meeting, this committee recorded their support for LME. It recorded, at item 8.2 of the agenda that it wanted to award the business for the provision of rental of the equipment to LME reflecting an estimated value of R 137 592 900.00.

[14] Bangile Masisa, the Chairperson of the special procurement board, signed a resolution to that effect on the 9 July 2021 which stated:

- "i. The Bid Evaluation Committee (BEC) to review the internal audit report and ensure that all gaps and misalignments identified are closed out; and*
- ...*
- iii. The final approval for award of business to be granted by the board as the estimated recommended value is above the procurement committee PC threshold."*

[15] A Mr Mthombeni, the Mine manager was one of the 5 (five) members of the BEC who according to the resolution of the special procurement committee had to, inter alia, review the internal audit report. It is common cause that Mr Mthombeni

signed a declaration of his assurance that he did not have a conflict of interest, the signed declaration was 7 June 2021.

[16] According to the BEC report there were twenty-three bidders which participated in the RFT process, three of which, including LME passed through the functionary gate as being bidders who were able to perform the requirements of the tender. All the three entities scored a maximum 10 points for B-BBEE (Broad-Based Black Economic Empowerment Score) and thus, the determining factor turned on price. According to the bid prices of the three bidders, LME's quoted contract price was lower than the other two.

[17] On the 12 October 2021 Mr Mthombeni was placed on precautionary suspension pending the outcome of an investigation. He was charged for failing to ensure that AEM's machines, the subject matter of a previous contract subsequent upon an unrelated RFP, were maintained according to standard and, with failure to ensure that LME complied with mine safety standards. He was found guilty and dismissed on the 31 January 2022.

[18] AEM relies on Mr Mthombeni's suspension on 18 October 2021 and subsequent dismissal on the 31 January 2022, reasoning that the procurement process, at the BEC level was tainted. However, the thrust and reliance thereof was substantially diluted in argument when Counsel for the AEM stated that Mr Mthombeni and the facts surrounding him did not lie at the heart of the reason for the review relief.

[19] Returning to the facts, on the 5 August 2021 the EXCO resolved that a procurement oversight review should be conducted in respect of the tender assessment process. The Board assessed the report on the summary of the evaluation of the procurement committee and were satisfied with the outcome. AEM does not attack the outcome of the procurement assessment review process nor outcome thereof. The thrust or the heart of the of the review relief stated by AEM's Counsel, lies in the non-fulfilment of the conditions requirement stated in the impugned decision.

[20] On 21 October 2021, the Board *inter alia* resolved to appoint LME, the resolution of the Board stated:

“Resolution: It was resolved;

- 1. That the appointment of LME Plant Hire (Pty) Ltd for the purposes of services for rental of mining equipment at Vlakfontein for a period of 12 (twelve) months from the contract award be and is hereby approved (own emphasis).*
- 2. That management be and is hereby empowered to renegotiate the price down because the offer bid price is above AEMF’s budgeted price (own emphasis)_and to accordingly conclude the contract with the service provider should the price negotiations be favourable to AEMFC.*
- 3. That management should award contracts after outstanding tax matters have been cleared and the service provider is tax compliant.”*

[21] On 19 November 2021, the acting CEO of AEM, Mr Bongani Khumalo advised LME that its proposal was successful. He did so by stating, *inter alia*:

“After extensive evaluation of all bids received and adjudication by an independent committee, African Exploration Mining and Corporation (AEMFC) SOC Ltd takes pleasure in advising you that your company’s proposal has been successful and approved as per the confirmed value of R 133 684 170.00 Vat inclusive subject to agreeing to our contract terms”

[22] On the 22 November 2021 LME accepted the appointment letter. The contract price in the appointment letter upon which consensus was reached by written acceptance, was a vat inclusive contract price of R 133 684 170.00 not the vat inclusive amount of R 137 592 900.00.

[23] On 19 January 2022, the acting CEO of AEM, Mr Bongani Khumalo notwithstanding, signed the rental agreement on behalf of AEM for a vat inclusive amount of R 137 592 900.00.

GROUND OF REVIEW

[24] AEM's founding papers are poorly drafted, they failed to incorporate any evidence from the record relied upon. However, the following reasons for seeking the review relief are:

- 20.1 Only the Board could decide to award the Bid. AE/Vlak009/2021 to LME. No Board decision authorised the conclusion of the rental agreement.
- 20.2 The rental agreement was concluded contrary to the impugned decision as the contract price was conditional.
- 20.3 The procurement process was tainted in that the Board failed to take into account the unlawful dictates of Mr Mthombeni in the process.

[25] Before considering the weight of the reasons for the review relief, the Court considers the aspect of delay as raised by LME.

DELAY

[26] LME correctly contends that a self-review under the doctrine of legality, is to be brought without unreasonable delay. Notwithstanding the fact that the impugned decision had already been taken in October 2021 and that the rental agreement had already terminated before AEM launched their self-review, AEM failed to deal with the aspect of time in anyway in its founding papers. In fact, it was so bullish that when challenged in answer by LME it did not deem it necessary, out of an abundance of caution, to request this Court to overlook a possible delay, if any, raised by LME on the papers.

[27] AEM maintains that it launched the review relief within a reasonable time after it became aware, whilst preparing for the arbitration on 1 June 2023, that irregularities had occurred. This is somewhat 4(four) months after arbitration proceedings had been initiated and before AEM had pleaded to LME's statement of claim. This application was launched on the 23 June 2023.

[28] LME contends that the impugned decision was taken on 21 October 2021 and that it is from this date that the delay should be assessed, alternatively, in January 2022 when the rental agreement, pursuant to the impugned decision was concluded between the parties.

[29] Therefore, LME contends that the time period is 1 (one) year and 8 (eight) months from the impugned decision, alternatively 1 (one) year and 5 (five) months having regard to the conclusion of the rental agreement.

[30] It is trite that the legality review must be brought without undue delay therefore triggering an enquiry into whether there was a delay and if such delay was reasonable. The clock in a legality review does not start ticking because of the provision of a uniform rule, but rather the date on which AEM, in this case, became aware or reasonably ought to have become aware of the impugned decision alternatively date of the conclusion of the rental agreement it now seeks to challenge. No facts are set out by AEM in an attempt to explain what happened at the time the impugned decision was taken which could have prevented it from ascertaining such irregularities it now relies on. Nor for that matter, why it could not ascertain sooner and have launched this review without delay. A full and proper explanation is key/paramount in assessing whether AEM's behaviour is reasonable.

[31] AEM contends there was no delay. No particularity regarding the checks and balances which took place by AEM prior to the expiration of the impugned agreement (i.e., prior to the appointment of the new CEO with effect from 1 February 2022). If such CEO was not in a position to shed light on what transpired at the material time, then who? No explanation advanced and as such, AEM appears to have been oblivious of any irregularities, this is even during the period between Mr Mthombeni's suspension and his discharge. Had it not been for the arbitration proceedings launched by LME for payment in terms of the rental agreement, AEM it appears would have been none the wiser of an alleged irregularity and the need to launch a legality challenge. AEM taking action only when it was pressurised to fulfil its obligations in terms of the rental agreement.

[32] Against this backdrop there is no explanation why the previous CEO as discussed above did not file any papers in support of the challenge raised in LME nor for that matter, any other official who still remains in AEM's employ. Such explanation is critical to establish any reasonable behaviour. Lack thereof speaks to a lack of effective oversight. AEM's lack of effective oversight is compounded by the fact that AEM only became aware of a possible need to bring the review relief in June 2023. This is more than a year after the conclusion of the rental agreement and after it had already terminated. Applying reasonable effective oversight, it is not unreasonable to expect AEM to have reasonably become aware of the need to launch these proceedings much sooner and, to explain the facts in a proper detailed manner. None was forthcoming.

[33] This lack of explanation and oversight warrants a reminder of what Theron J, aptly stated in the Buffalo City¹ matter when she referred to an overview report by the Department of Co-Operative Governance and Traditional Affairs on the state of local government in South Africa, she quoted: *"Municipalities must have effective structures and mechanisms in place to ensure proper oversight for its serious delivery projects. This is one of the responsibilities ... A lack of effective oversight leads to dysfunctionality within municipalities by creating loopholes for fraud and corruption."* AEM is to be painted with the same brush. This is said too, having regard to its own papers and reliance on the allegations pertaining to any tainted procurement process involving Mr Mthombeni, in particular. Surely the moment that Mr Mthombeni was suspended in October 2021, a date prior to the conclusion of the rental agreement and soon after the impugned decision was made by the Board AEM should have explained in full. AEM has not take the Court into its confidence and its conduct inexcusable.

[34] The reasonableness of a delay is entirely dependent on the facts and circumstances of any case. The investigation into reasonableness of a delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. It is therefore a value judgment and not a judicial discretion.

¹ **Buffalo City Metropolitan Municipality v ASIA Construction (Pty) Ltd** [2019] ZACC 15; Overview Report (October 2009).

[35] Without sufficient facts, the delay is unreasonable.

Should the undue delay be overlooked?

[36] This Court is acutely aware that the approach to overlook an unreasonable delay in a legality review is flexible and is a legal evaluation. Bearing in mind that the delay bar serves an important rule of law function: it promotes the public interest in certainty and finality in decision-making.² This is culminated with the fact that AEM does not, at its own behest, request this Court to overlook any delay and in consequence an evaluation and need to overlook is not triggered by AEM. There is no basis.

[37] In Khumalo and Another v The Member of the Executive Council of Education: KwaZulu-Natal,³ Skweyiya J, whilst acknowledging the undisputed existence of the delay rule, observed but courts nevertheless have the discretion to overlook a delay where appropriate. He said:

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

[38] The support of the statement is section 237 of the Constitution which holds:

“... Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.”

² ***Khumalo v Member of the Executive Council for Education, KwaZulu-Natal*** [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at par 47.

³ [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

[39] However, applying the Gijima⁴ principle this Court considers whether notwithstanding an unreasonable delay and notwithstanding AEM's failure to request this Court to overlook the unreasonable delay whether it should do so. Such consideration not as a result of the nature of the relief as AEM contends but in circumstances where the unlawfulness of the impugned decision and/or conclusion of an agreement, on the facts is clear and undisputed.⁵

[40] This is not the case at first blush. In fact, as will become apparent AEM's Counsel in argument was correct to inform this Court that the not much lay in the challenge of a tainted procurement process. Not to overlook the unreasonable delay tempting for that reason alone. However, it is clear from the facts that the rental agreement was concluded for an amount higher than the awarded and agreed contract price. Although the purpose of the tender achieved, the public purse would be harmed if this Court did not overlook the unreasonableness of the delay and deal with the merits.

[41] Furthermore, any prejudice that LME may suffer as a result of this Court overlooking the delay can, in terms of section 172(1)(b) of the Constitution, be ameliorated by awarding just and equitable relief. As such, this Court overlooks the unreasonable delay and deals with the merits of the review.

MERITS

[42] As mentioned, the weight of the impugned decision being tainted by the suspension and ultimate dismissal of Mr Mthombeni the mine manager and member of the BEC was substantially watered down in argument. This too, was echoed on the papers when LME's substantial answer to the allegations in the founding allegations relating to Mr Mthombeni were not met head on. Attempts were made to taint Mr Mthombeni character but were insufficient to establish a nexus between his actions and a tainted process giving rise to the impugned decision. In fact, AEM did not even answer how his participation and presence in the BEC staged process

⁴ ***State information Technology Agency (SOC) Limited v Gijima Holdings (Pty) Ltd*** 2017 ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) at 52.

⁵ Ibid at para 41.

could have “-*gravely tainted the integrity of the process*” as alleged. Nor whether any confliction he may have had, perceived or otherwise, had any affect at all.

[43] AEM in reply states that if the Board were properly appraised of Mr Mthombeni impropriety in the tender evaluation process, the Board would have commenced the tender process *de novo*. Besides that, this statement is unsubstantiated, AEM did not even bother to deal with the tender process followed by it, nor how he as a member of the BEC wielded any undue influence and weight in the BEC’s decision, let alone, how Mr Mthombeni factual participation caused a tainted outcome. AEM’s failure to deal with LME’s substantial answer after they did consider the record in its entirety, supports the notion that the allegation was made in a vacuum although, amidst admitted concerns about Mr Mthombeni.

[44] What too, was left wanting in reply, was AEM’s allegation in their founding papers that Mr Mthombeni, after his dismissal, was employed by LME. A prejudicial accusation indeed in the circumstances. Other than making the allegation, its veracity when denied in answer was abandoned in reply. This is probably why this ground was not expanded in argument. In consequence, this ground is unconvincing as raised on the papers and appears to be a hollow complaint about procedural mischief which was not established on the material facts nor sufficiently argued.

[45] The nub of the grounds centred around the legality and rationality of the conclusion of the rental agreement. The complaints are that it was concluded in circumstances without Board authority and without the condition of resolution 2 of the impugned decision being met, namely: “2. *That management be and is hereby empowered to renegotiate the price down* (own emphasis) *because the offer bid price is above AEMF’s budgeted price and to accordingly conclude the contract with the service provider should the price negotiations be favourable to AEMFC*”

[46] Turning to the condition, resolution 2 of the impugned decision, empowers management to renegotiate a lower price. Lower than the offer bid price which, on the common cause facts was a vat inclusive amount of R 137 592 900.00. The Board does not disclose the budgeted price in the impugned decision. All that is known is that it must be a “*price down*’ from the ‘*offer bid*’ and ‘*favourable to AEMFC*’.

[47] AEM did not establish on the facts what the Board meant by 'favourable' nor what amount would constitute 'favourable.' What is clear is that management could determine what 'favourable' was in the circumstances and that it should be lower than the bid price.

[48] AEM did not establish what management decided 'favourable' was however, on the common cause facts, on the 19 November 2021, the acting CEO of AEM, Mr Bongani Khumalo advised LME that:

"After extensive evaluation of all bids received and adjudication by an independent committee, African Exploration Mining and Corporation (AEMFC) SOC Ltd takes pleasure in advising you that your company's proposal has been successful and approved as per the confirmed value of R 133 684 170.00 Vat inclusive subject to agreeing to our contract terms"

[49] AEM does not wish to review the 19 November 2021 decision. This decision is not disturbed. The amount is factually lower than the bid price. The evidence is that consensus was reached between LME and AEM in writing at a price lower than the offer bid price.

[50] In consequence the condition in resolution 2 met on the pleaded facts. However as is borne out by the facts, the rental agreement was concluded for the bid price and signed by the then acting CEO. This complaint must fail.

[51] According to AEM's Policy on Limits of Authority document reference:AE-02 version 7, approved by its Board on the 23 May 2018, the rental agreement being for an amount exceeding R 50 million rand, the CEO is authorised 'to sign a contract upon Board approval'. Upon Board approval suggests an action to be done first: 'upon the proper showing of' or 'sign on approval by the Board' or 'to sign when the Board approves'. All interpretations suggest that the rental agreement can be signed by the CEO upon approval obtained by the Board. Any decision to the contrary is in conflict with the Policy.

[52] AEM complains that no such approval was obtained from the Board which appears to be correct on the facts. This is because, as at the time the impugned decision was taken by the Board, no contract was available to approve yet and still had to be renegotiated.

[53] The agreed and approved contract price⁶ not in conflict with the rental agreement and no Board approval was obtained before signature by the CEO or acting CEO. Both suggest interference by this Court on review and as such this ground warranted.

JUST AN EQUITABLE RELIEF

[54] Having regard to the facts and outcome in this matter and that AEM too seeks this Court to consider what is just under the circumstances, this Court in terms of section 172(1)(b) of the Constitution is entitled to strike a balance, cloaking the Court with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy having regard to all the facts. In so doing to find a solution to the problem.

[55] In finding the solution this Court considers the substantial prejudice that will be suffered by LME who has performed in terms of the rental agreement and who has instituted arbitration proceedings based on the rental agreement, if the rental agreement was to be set aside. This Court too, is aware that its necessity to deal with LME's counterclaim may fall away and redress for LME is paramount under the circumstances.

[56] AEM on the other hand, has had the use of the mining equipment according to the quantities it required and for the duration. Such mining equipment assisting it with the mining of coal resources on the mine. Its business was able to continue and remained unhindered. It does not want to pay LME, after the fact. Although this

⁶ See para [21].

can't be indulged, AEM should not be forced to pay LME more than what was approved and agreed to. Public purse considerations are an important factor.

[57] This Court therefore will make an order that the rental agreement is declared invalid, but will not set the rental agreement aside as to preserve the rights LME is entitled to in terms of the rental agreement. However, with the caveat that LME is only entitled to claim from AEM amounts due and owing in line with the agreed contract price of R 133,684,170.00 vat inclusive. It should be noted that such an award is balanced and it preserve rights which have accrued up and until the contract term expired.

COUNTERCLAIM

[58] The question which then arise is whether a necessity arises for this Court to deal with LME's counter application in circumstances when both AEM and LME agreed that if the rental agreement was to be set aside there would be no need for this Court to entertain LME's counter claim. This Court is of the opinion that the position remains unchanged and it does not need to entertain the counter claim. LME declaratory relief prayer 2 cannot be granted triggering the clear necessity. Furthermore, although LME's rights, in terms of the rental agreement to claim payment are preserved, the rental agreement has been declared invalid, the basis upon which LME's counterclaim is based and the facts on the papers disturbed by the just and equitable relief.

[59] Both parties will not be prejudiced by this outcome in that, LME has already initiated and triggered the arbitration agreement, AEM has not filed its plea and the papers already filed are capable of amendment to echo the basis and order of this Court.

[60] As to the costs. It is trite that costs follow the result. In this matter all the circumstances were weighed and considered. In particular AEM's delay, the lack of affording this Court any explanation whatsoever to ameliorate a delay or perceived delay, the timing of the launching of this application. AEM appeared to have benefitted from LME's compliance of its obligations in terms of the rental agreement without payment from April 2022 to February 2023. Such claimed amounts by LME

not even disputed on these papers as raised in the counterclaim. AEM has delayed the inevitable at LME's expense. This can be corrected and as such costs are awarded to LME.

[61] The following order:

1. The Respondent is granted condonation for the late filing of its answering affidavit
2. The agreement between the Applicant and the Respondent pursuant to the award Bid No. A3/VLAK009/2021 is declared invalid but is not set -aside.
3. The Respondent's rights in terms of the agreement referred to in prayer 1 are hereby preserved and the Applicant's obligations in terms thereof is hereby limited to a contract price of R 133,684,170.00 ((inclusive of value added tax).
4. The Applicant to pay the Respondents costs on a party and party scale included the costs of Counsel taxed on scale B.



L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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Date of hearing:	02 August 2024
Date of judgment:	09 September 2024