

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 46470/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
..... SIGNATURE	 DATE

In the matter between:

ZETHU CONSULTING SERVICES (PTY) LTD

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

DR IMOGEN MASHAZI N.O.

Second Respondent

CHIDI MANYANE N.O.

Third Respondent

MABELA JONATHAN N.O.

Fourth Respondent

ADV MOEKETSI MOTSAPI N.O

Fifth Respondent

JUDGMENT

MANOIM J:

Introduction

- [1] This matter involves a payment dispute for services rendered by the applicant, Zethu Consulting Services Pty Ltd (“Zethu”), to the first respondent, the Ekurhuleni Metropolitan Municipality (“the Municipality”).¹ In the main application Zethu claims payment of several outstanding invoices which amount to R 16 891 186.85 for services it performed on three projects for the Municipality.² But in a counter application, the Municipality seeks to review Zethu’s appointment to perform these projects and to reclaim an amount of R 23 383 775.43 already paid to it.

Background

- [2] In July 2016, the Municipality issued a tender for consultants to render consulting services to the Municipality’s Real Estate Department. The successful tenderer would be appointed to the Departments Technical Resource Team (“TRT”). The bid specified that the consultant should comprise a multi-disciplinary team who would be utilised on an “... *as and when required basis.*”
- [3] Zethu is a consulting company comprising a number of professionals in a range of disciplines pertaining to the built environment. It submitted a bid in August

¹ The second to fifth respondents are all officials of the first respondent and were cited in these capacities because of their interest in the matter.

² As the Municipality has pointed out in its heads of argument, the amount claimed here is an error, and this error is perpetuated in Zethu’s draft order on Case-lines. The invoices relied on by Zethu add up to R 16 738 810.85, an amount R 152 376 less than the amount claimed. Nevertheless, I do not regard this as anything more than an arithmetical error by Zethu.

2016 and was successful because it was appointed to the TRT in November 2016. This appointment is not the subject of the review challenge by the Municipality. What is being challenged are its subsequent appointments to the three projects.

- [4] The first project Zethu performed for which it charged a fee was what is known as the asset verification project. The Municipality owns a large number of properties and needed to verify its ownership of these properties. Zethu claims to have performed this service and to have verified a large number of properties. The work was performed over a period commencing July 2017 until April 2019.
- [5] Zethu invoiced the Municipality regularly over this period. The Municipality paid Zethu a total of R18 821 207.93 for the project. This amount was paid in respect of five invoices rendered between February and November 2018. In the counter-claim the Municipality seeks repayment of this amount.
- [6] But Zethu also billed the Municipality again for services rendered on this project in April 2019. This invoice, the sixth, was for R 2 383 161.10 and remains unpaid. In the main application Zethu seeks payment of this amount. The Municipality opposes this claim.
- [7] In September 2018 Zethu was appointed to plan, organise, and carry out what is referred to as a Public Private Partnership (“PPP”) Investor Summit. This is the second challenged project. The investor summit was to be an event for one thousand delegates and was to take place at the end of the year. The summit never took place. Zethu claims it does not know why the summit was cancelled

but nevertheless at the time of the cancellation it had performed a substantial part of the work or as it describes it, '*the front-end work*.' Zethu billed the Municipality for R7.1 million for these services. The Municipality has previously paid R4 562 567,50 for this work. Zethu now seeks payment of the balance - an amount of R 2 453 367.68. The Municipality opposes the claim and claims repayment of the amount paid i.e., R4 562 567.50.

[8] On 25 November 2028 Zethu was appointed to the third challenged project, referred to as the Germiston Valuation and Scenario Analysis project. This project involved six sites in Germiston. The project was to achieve three things for the Municipality. To confirm the ownership of buildings, to perform a valuation of them, and to perform an options analysis. Zethu invoiced the Municipality R 11 million for the work it says it did on the project. Although initially invoicing in two separate invoices for this amount, Zethu was told by Ms Jonathan, an official in the Real Estate Department of the Municipality, to divide the total invoiced amount into six invoices - one for each of the six sites.

[9] It is common cause that all the invoices for which Zethu claims payment in the main application remain unpaid. However, the Municipality denies that Zethu was validly appointed to perform these projects. This is the basis for the counter-claim in which it seeks to review the award of the contracts and consequently seeks repayment of the amounts it has already paid to Zethu in respect of them. The total amount re-claimed in the counter-claim is R23 383 775.43, made up as follows:

- a. R18 821 207.93 paid to Zethu in respect of the Physical Asset Verification project; and
- b. R4,562 567.50 paid to Zethu in respect of the PPP Investor Conference.

Issues to be decided

[10] Given the counter-claim, the first issue to be decided is the Municipality's review. Zethu has vigorously contended that the review has been brought too late. Intuitively it would make sense to consider the issue of lateness first. But as Sutherland DJP has held in a recently decided case, *Transnet SOC Ltd*³ the case law suggest that the merits of the review must be dealt with before dealing with the issue of delay. Sutherland DJP usefully identifies five features that emerge from these cases, which are:

17.1 it is improper to deal with delay before giving attention to the merits of the review,

17.2 where invalidity is indeed detected, it must be declared to be so,

17.3 the merits are relevant to what to choose to do about an undue delay when that is found to exist,

17.4 whether or not to overlook undue delay is a flexible evaluation which is driven by several factors,

³ *Transnet SOC Ltd and another v CRRC ELoco Supply (Pty) Ltd (formerly CSR ELoco Supply (Pty) Ltd) and Others* [2022] JOL 25889 (GJ)

17.5 undue delay is bound up in the just and equitable remedy which may be that no consequent relief is granted; i.e., the review might succeed but the contracts are not set aside.

- [11] I will follow this approach and consider the merits of the review before I consider the delay.

Review merits

- [12] The deponent to the Municipality's affidavit is Davey Frank, the Head of its Legal Service Division. Frank does not have personal knowledge of the facts in this case but to the extent that is necessary, supporting affidavits have been filed by a Mr Thando Miti and a Ms Mabelo Jonathan, who at the relevant time were variously the divisional heads and heads of department of the Municipalities' Real Estate Development Department, which was the Department responsible for authorising the contracts that the Municipality now seeks to set aside. Jonathan is the fourth respondent in this matter. Miti is no longer employed by the Municipality.

Review

- [13] The Municipality alleges that the appointments are reviewable on several grounds.
- [14] The first ground of review concerns the validity of the appointment. The Municipality whilst conceding that Zethu was validly appointed to serve on the

TRT panel, denies that this extended to its appointment in respect of the three projects.

[15] It is common cause that Zethu, along with two other firms, was appointed subsequent to a bidding process under a contract referred to as PS-RE39-216. The contract sets out the terms of the services for which the successful tenderers were appointed.

[16] The Municipality wanted a multi-disciplinary team to assist it with procurement related activities. But it argues that none of the projects fell within this scope.

[17] I agree. On a strict construction of the tender document the Municipality is correct. The services rendered are not contemplated in the document and hence on that ground alone the appointment to perform the three projects was not properly authorised and was irregular.

[18] The next question is whether there is any justification for giving the contract a more expansive meaning so as to contemplate one or more of the projects. But it must be borne in mind that this is a contract given by an organ of state following a public tender. If the Municipality can freely adopt an expansive reading of the contract, it has two dangers.

[19] The first is that if the tender made it clear that these other services were contemplated, other firms might well have tendered. Tender terms must be transparent so that competitors know they can compete for it. If others can compete for a tender, then it is possible that lower prices can be achieved. This obligation to draft contracts in clear terms is what is required by the Constitution.

Section 217 of the Constitution requires organs of state when contracting for services to do so in a manner that is “... *fair, equitable transparent, competitive and cost effective*”. The second, and is evident in this case, is that if the terms of a contract can be interpreted more expansively than the literal terms of the text suggests, officials can expand upon the remit of a favoured firm, to include services that the firm was not appointed to perform, to the detriment of the ratepayers of the municipality because the services were not subject to a competitive tender and hence the possibility of lower prices or superior services.

- [20] The second ground of review is that the Municipality alleges that there was non-compliance with the Local Government Municipal Finance Management Act 56 of 2003 (MFMA). In terms of section 15 of the MFMA:

“15. A municipality may, except where otherwise provided in this Act, incur expenditure only—

(a) in terms of an approved budget; and

(b) within the limits of the amounts appropriated for the different votes in an approved budget.

- [21] What constitutes a vote is also a defined term:

“vote” means—

(a) one of the main segments into which a budget of a municipality is divided for the appropriation of money for the different departments or functional areas of the municipality; and

(b) which specifies the total amount that is appropriated for the purposes of the department or functional area concerned.

- [22] This statutory requirement is premised on the constitutional injunction in terms of section 215 of the Constitution which requires municipal budgetary processes to “...*promote transparency, accountability and the effective management of the economy, debt and the public sector.*”
- [23] It is the Municipality’s case that the none of the projects had been budgeted for and hence the expenditure was not made in terms of an approved budget and were in contravention of section 15 of the MFMA.
- [24] Zethu has not been able to satisfactorily refute these contentions despite its denial. A belated attempt by counsel to argue that a broad approval of funding made in terms of the budget constituted compliance with section 15 as it constituted a vote was not convincing. It is clear that the definition of what constitutes a vote requires more detail than this. To interpret it otherwise would provide a loophole for a Municipality to escape proper scrutiny of its expenditure.
- [25] The third ground of review relates to the absence of what is termed a ‘gap analysis.’ The Municipality employs a large staff with different skill sets in its various departments. This means it can provide a wide range of services which it might require from its own staff complement. If it wants to appoint outside parties to perform services, it must justify why they cannot be performed in-house. This is what is meant by a gap analysis, and it must be done before those services are outsourced. But no gap analysis was performed in respect

of any of the projects. The Municipality suggests that the finance department could have performed the asset verification services whilst its Communications Department could have organised the PPP conference.

[26] Whether or not this is so I cannot decide definitively but there was no gap analysis and since this is a necessary requirement its absence too renders the appointments irregular.

[27] The fourth ground of review is that the Municipality has adopted a Standard Operating Procedure (“SOP”) for the approval of projects. This procedure according to Frank is known to those participating in tenders and would have been known to Zethu. In terms of this SOP there are eight steps to be followed for the approval of a project and if any of them is not followed the project is not valid. Again, in the case of all three projects the SOP was not followed.

[28] There are thus four independent grounds on which the appointment of Zethu to perform the services has been effectively challenged. Zethu has argued that these have amounted to internal procedures. It could not have known there was non-compliance. This is an argument premised on estoppel. But the courts have rejected this type of argument in procurement cases involving an organ of state. Thus, in *City of Tshwane* the SCA stated:

“It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel for to do so would be to compel the defendant

to do something that the statute does not allow it to do. In effect therefore it would be compelled to commit an illegality.”⁴

[29] It is a matter of dispute in this matter whether Zethu was misled by insiders in the Municipality’s Real Estate Department (“RED”) that all formalities to authorise or regularise the projects had been observed. Again, in *City of Tshwane* the SCA says this does not alter the fact that the contracts were unlawful. As the court put it:

“The fact that the plaintiff was misled into believing that the defendant’s employees were authorised to vary an agreement that had earlier been lawfully concluded with it, can hardly operate to deprive the defendant of that power which had been bestowed upon it by the legislature. To do so would be to deprive the ultra vires doctrine of any meaningful effect.”⁵

[30] I thus conclude that the Municipality has raised cogent grounds for reviewing the validity of the award of the projects. I now go on to consider the issue of undue delay.

Undue delay

[31] Zethu argued the review should not be considered because the Municipality had only brought the review by way of a counter-claim and then only many

⁴ *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd* 2008 (3) SA 1 (SCA) paragraph 17,

⁵ *City of Tshwane*, supra, paragraph 18.

years after it had been appointed to perform the contracts. The Municipality seeks condonation for the late filing of its review.

[32] To decide whether there has been undue delay one must first determine when the clock starts running. Zethu has relied on the awarding or completion of the projects to determine when the clock starts. Set against this timeline the delay is lengthy. Thus, based on this clock, the Physical asset verification project was reviewed after a delay of 4 years eight months, the Germiston Project 3 years and 4 months and the PPP Investor summit 3 year and 5 months.⁶

[33] But Frank sets the clock to run from a much later date. His reasoning is premised on the fact that insiders had prevented the Municipality from finding out about the services. It was only when the 'outsiders' had been made aware of the irregularities that they were able to act. As he put it in his affidavit requesting condonation for the late review:

"I am advised and submit that the period for which the clock begins to run for the purposes of calculating whether there was an undue delay, starts at the moment a litigant becomes aware of the facts giving rise to the grounds of review or the moment a litigant reasonably ought to have been aware of such facts."

⁶ Here Zethu has measured the time from the date of the invitation to perform the work until the date of the filing of the Municipality's counter-application.

- [34] And he goes to say that the Municipality only became aware of the facts that gave rise to the review when it received the application on 30 September 2021. It then acted immediately as he explains:

“Not long after receipt thereof, the Municipality instructed its attorneys and, with their assistance, began to investigate the Applicant’s claims and the circumstances that led to the Applicant’s appointment to the three projects that did not fall within the type of works contemplated for the TRT consultants and in respect of which there was no budget allocation. Extensive and several consultations were conducted with officials that were directly involved in the alleged transactions, some of whom have left the employment with the Municipality, as well as some of the officials who reported to them. In that process, it became apparent that several documents would be required from the Applicant which are not provided in its founding papers, but expressly mentioned and/or alluded to therein. A rule 35(12) and (14) notice was accordingly issued calling upon the Applicant to provide certain documents listed in the notice.”

- [35] This leads him to justify when the clock should be deemed to have started running:

“Therefore, the point in time that must be used to determine whether there was undue delay in instituting the review is sometime during January 2022, when a clearer picture of the

fundamental irregularities associated with the alleged transactions emerged and became apparent to the Municipality. With all that information obtained, the answering affidavit could be prepared and finalised, and a copy thereof was served on the Applicant's attorneys on 11 February 2022. In the circumstances, it cannot be said that there was a delay in instituting the counter-application, let alone an inordinate delay.”

- [36] Neither party disputes the time calculations made by the other. What they dispute is the principle – when is it justifiable to start the clock? As Theron JA put it in *Buffalo City*:

“...the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken.”⁷

- [37] I accept that this is a case where knowledge of the irregularity was concealed by insiders in the Municipality until the present application was brought. Only then did the claims for payment become evident to those I term ‘outsiders’ i.e. persons without any involvement in the appointments or management of Zethu, and who are charged by their obligations to the Municipality, to ensure that its processes are complied with. The time from when they acquired this knowledge – was just over four months.

⁷ *Buffalo City Metropolitan Municipality v ASLA Construction Pty Ltd* 2019(4) SA 331 at paragraph 49.

[38] In terms of *Buffalo City*, the explanation for the delay must cover the entire period of the delay.⁸ But given that an investigation had to take place, before legal advisors could be briefed, including the need to get documents, I accept that this satisfactorily explains the four-month delay.

[39] Moreover, also as Keightley J held in *SABC* following the *Buffalo City* approach noted: *“Even if the delay is unreasonable the court retains a discretion to overlook it.”*⁹

[40] While in this case I do not consider the delay unreasonable, if I am wrong on this, the importance of exercising a discretion to overlook the delay is that the Municipality is taking steps to prevent the unlawful use of tenders that bypass its procedures. As Francis J held in *Swifambo*:

*“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.”*¹⁰

[41] I find that the delay in bringing the review has been justified, and further as to the merits of the review, I find that although the appointment of Zethu to the TRT panel was valid, the appointments to the three projects were not. But this does not decide the matter definitively. It is still necessary to consider in terms of section 172 of the Constitution a just and equitable remedy.

⁸ *Buffalo City*, supra paragraph 52.

⁹ *South African Broadcasting Corporation SOC Ltd and another v Mott Macdonald SA (Pty) Ltd* [2020] JOL 51538 (GJ) paragraph 61.2

¹⁰ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) paragraphs 74- 79.

Just and equitable

[42] In *Allpay* the Constitutional Court stated:

“Once a finding of invalidity . . . is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made”¹¹

[43] The court went on to state:

“Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight.”¹²

[44] The Municipality was of the view that there was no basis for considering just and equitable relief in respect of any of the projects that favoured it making any payment to Zethu, and hence all amounts paid to Zethu should be repaid, whilst the Municipality was entitled to an order that it was not required to pay any of the outstanding invoices. Zethu took the opposite view.

[45] I consider the best approach to evaluating a just and equitable order is to consider each project separately. Whilst they were all subject to invalidity on

¹¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (4) SA 179 (CC) paragraph 31

¹² *Ibid.*

the same considerations, the facts show that each had distinctive features that are relevant to a just and equitable consideration.

- [46] Nevertheless, I have had regard in doing this evaluation to the following issues: the proximity of the service provided to the terms of the original tender for which Zethu was validly retained: the extent to which the ongoing work was queried by officials of the Municipality in communications with Zethu; whether the service, where it was performed, was of value to the Municipality; any indications of impropriety in the actions of Zethu.

Germiston Project

- [47] On Zethu's version this project was initiated at great haste. The 'invitation to perform work' (IPW) was issued on 10 October 2018, and it indicated that the fees were estimated as R 53 269 500 excluding VAT. Miti was responsible for its issue. Zethu was then appointed on 25 November 2018 by way of a "... *full verbal brief*" given "*on site*". The first deliverable was to be done by 27 November i.e., two days after the verbal brief. The next deliverable was a draft inception report to be delivered on 6 December 2018 which Zethu claims it did. Ms Jonathan was apparently satisfied with this at the time.
- [48] Matters came unstuck thereafter. The narrative of the interactions between Zethu's project manager, a Mr Ndlovu, and Ms Jonathan, are strange even on Zethu's narrative. The upshot is that after querying the invoice and then asking it to be divided into six invoices – one for each site- the invoices were never paid. Zethu's last word on this is that it had to attend a meeting in April with the

Head of Real Estate, Mr Manyane. Nothing is said about what happened at this meeting or thereafter

[49] Although Zethu filed a supplementary answering affidavit it does not deal with any of the anomalies except to say that the Germiston project was an extension of an existing IPW. The verbal appointment, by which is meant an oral as opposed to written IPW, is now described as having taken place at a site meeting for conducting the next phase of an existing IPW.

[50] But according to the Municipality, when Zethu's sole director, Ms Honeli-Mdhluli, was challenged in a meeting with its officials, including Jonathan, on whether she had been authorised to perform the contract because no IPW had been issued, she became angry and implied she had outside political authority to perform the services.

[51] According to one official, Ms Naicker, it was suggested by the Municipality to Holeni-Mdhluli that the impasse could be resolved by mediation. But instead of accepting the suggestion Holeni-Mdhluli became "*rude and unruly*" and, according to Naicker:

"Holeni was not accepting this suggestion Ms. Holeni said she was just representing Zethu and that the directors of the company were from Luthuli House. Ms. Jonathan then stopped the dialogue and requested Ms, Nandi Khumalo, Mr. Sipiwe Ndlela and myself to leave the meeting. We three (3) then excused ourselves and left the meeting, From that point, I am unaware as to how and whether the meeting was resolved."

[52] The same facts are also confirmed in an affidavit made by Khumalo. Honeli-Mdhluli has denied saying this. However, she does not put up her own version of what happened at the meeting.

[53] But quite what the point of this project was is obscure. According to Frank, of the six sites, two were vacant and one was a covered parking lot. Yet Zethu employed an array of professionals to work on the project including, according to Frank, a project manager, assistant project manager, and a property valuer, while in respect of some of the sites, more professionals were added, such as a civil engineer, an economist, and a structural engineer.

[54] Frank also alleges that fees for some of the professionals were duplicated and others could not be verified. Moreover, Frank was also sceptical of the hours of work claimed. As he put it:

“The amount of working hours claimed for was excessive and simply humanly impossible. For instance, the Applicant claimed an average of 11 man-hours per 7-day week, for three (3) full months straight, for each of the 8 professional personnel. This meant that the team would have worked non-stop, every day, without any breaks. This is inconceivable and wholly unreasonable.”

[55] I consider that there is no justification for the Municipality to have to pay these fees. There are three reasons for this: the manner of appointment was irregular and should have been apparent to Zethu – this is so even if the alleged invocation of political influence is disputed; there is no evidence that the work

performed was of any value to the Municipality; and thirdly there is evidence that the invoices reflected both overcharging in the use of professional services and hours worked.

PPS conference

[56] The PPS conference never took place and Zethu, of its own accord, decided not to continue working on it.

[57] The Municipality explains why the conference never took place. This followed media allegations of “some relationship’ between Zethu, the City Manager, and Executive Mayor. But it was Zethu, not the Municipality whose decision led to the former’s withdrawal from the project, precipitated amongst other reasons by the media storm. In a letter dated 19 November 2018 Holeni-Mdhluli wrote to Jonathan and stated:

“Our good name is being dragged into question by unsolicited harassment from media. This has had a direct impact on my weakening health and my family to a point that I personally had to assess if a small company such as Zethu Consulting Services should risk all or could even survive the imminent storm. Furthermore, Zethu Consulting Services has over 30 permanent employees whose well-being are threatened by ostensible negative publicity around the summit.”

- [58] Zethu was aware that this project did not fit into the scope of what it had been retained for. This admission is made in a supplementary affidavit by Holeni-Mdhluli where she states of the PPP summit instruction:

“Understanding that this was not our core function, we turned to our Project Management Unit (PMU) and accepted this with the view to project manage and subcontract the specialist part of it to the service provider concerned, as is the case with any project.”

- [59] It is thus common cause that this project entailed work that was not part of the core skill set of Zethu's professional staff and work had to be outsourced to third parties. The fact that Zethu was sensitive enough to the media controversy to unilaterally resign the brief, indicates that it too was aware that the appointment was irregular. Moreover, the nature of the work was, out of all the three projects, the one furthest in nature of services from those for which it was appointed to the panel. It would not be just and equitable for Zethu to claim any fees for these services. Nor should it for the same reason be entitled to recover any third-party fees or disbursements for this project because it must have known it could not perform the work in-house.

- [60] Finally, I deal with whether it should have to repay the amount of R4,562 567.50 paid to Zethu in respect of this project. Given that this project was far removed from the original tender in terms of scope, that no value was gained by the Municipality because the conference was never held and Zethu resigned the brief, I consider it is just and equitable that this amount is repaid.

The Physical Asset Verification project.

- [61] Several of the invoices charged have been paid by the Municipality for this project. I set out below from the joint practice note the amounts and dates of payment.

On 2 February 2018 – R 2 707 443.00

On 14 May 2018 – R 1 267 005 .60

On 28 September 2018 – R 4 493 720.45

On 31 October 2018 – R 5 258 362 .93

On 30 November 2018 - R 5 258 362.93

- [62] A further invoice for this project of R 2 383 161.10 was rendered and remains unpaid. Zethu claims payment of this invoice whilst the Municipality refuses to pay it and claims repayment of the invoices already paid.

- [63] I deal first with the unpaid invoice. This invoice was submitted for services rendered between January to March 2019. But as Frank points out Zethu, even on its own version, had had been instructed to: *'halt with further verification of the remaining properties' "due to budgetary constraints" already in May 2018, some seven (7) months before January 2019. This factor alone, negates the validity of the Applicant's first claim.'*

- [64] Frank goes further to note discrepancies between the description of the services in the covering letter and what is contained in the narrative on the invoice. Frank's conclusion is to cast doubt on the genuineness of the invoice. I do not need to go that far. I find that given the clear instruction not to proceed

with the work Zethu should not thereafter have charged for it. Even if it incurred further costs to third parties it did so in full knowledge that the matter should not have been continued with.

- [65] But to return to the paid invoices. Frank has two issues about this work. First that it was not done procedurally nor was it contemplated in the original tender. But he goes on to state that the work on the project was a duplication of work being done internally by the Municipality's Finance Department. Zethu was told this in an email of 5 February 2019 from Jonathan. But she does say two things that may mitigate the efforts of Zethu until that date. First that:

".... we will compare their studies with our studies thereof."

- [66] She goes on to state:

"When comparing the costs with their studies your study seems to be extremely high in terms of expenditure That is not an issue though as you have worked and therefore your documents reflect the work done to date."

- [67] She then asks for all the documents to be submitted to the office of the relevant finance official for verification of the work done.

- [68] There is also some controversy over the document that purportedly appointed Zethu to carry out this project. This document is dated May 2017 and was sent to Zethu. It is signed by both Miti (in two capacities) and Jonathan). However, in a handwritten note on the document, Miti writes: *"Awaiting CIFCO and CM to*

confirm approval for the re-allocation of funds for 2016/2017 FY. IPW also subject to availability of funds for 2017/2018 and 2018/2019”

- [69] This note should have alerted Zethu, a firm with experience in dealing with organs of state, that the green light had not yet been given for the project and it should have been scrupulous to confirm that approval had been obtained. There is no documentary evidence that it did. However, on a just and equitable basis I take into account that this internal approval would not necessarily have been communicated to it, and it could assume when the first of its invoices was paid in February 2018, that by then approval had been obtained.
- [70] I find that this project, although not validly authorised, differs in important respects from the other two, in respect to the work done for which the Municipality has already paid. First, whilst the nature of the services performed was not authorised in terms of the tender specification, it is not as far removed in terms of the skill sets required, unlike the PPP conference.
- [71] Second, it is evident from the letter quoted above that Jonathan was not certain that the work was a duplication of what was being done by Finance – she suggests that this still needs to be verified. Third, it is clear that even if there was duplication with work done by Finance (which is not established on the papers), the work was necessary and was performed. Finally, the fact that the Finance Department may have been doing this work was not something known to Zethu, nor could it have reasonably been assumed.

[72] The instruction came from the Real Estate Department which is the Department responsible for managing the Municipality's property portfolio, a point that Holeni-Mdhluli makes in her supplementary answering affidavit.

[73] I therefore conclude that it would be just and equitable for Zethu to retain the fees for which it has been paid for this project, but it is not entitled to be paid for the further invoice.

Conclusion

[74] In relation to the main application, I find that it is unsuccessful and falls to be dismissed. The applicant is not entitled to any payment in respect of any outstanding invoices in respect of the three projects. In relation to the counter-application, I find that it is only partially successful. The late filing of the application is condoned. The review of the Zethu's appointment to the three projects has been successful. However, the order for repayment is confined to the repayment of R4 562 567.50, which is the claim for the repayment of the expenditure incurred for the PPP Investor Conference. The order for the repayment of the amounts paid in respect of the Physical Assets Project is dismissed.

Costs

[75] The Municipality has been successful in opposing the main application and is entitled to its costs for this, including the costs of two counsel. Given the complexity of the matter and detail, required costs on Scale C as set out in the Uniform Rule is justified. In respect of the counter application, the Municipality

has only been partially successful and was unsuccessful in reclaiming the larger portion of its claim. On this basis each party can bear its own costs for the counter-application. The award of the three contracts is found unlawful and set aside. However, on just and equitable grounds Zethu is entitled to retain its fees for the first five invoices in respect of the Asset verification project.

ORDER:-

[76] In the result the following order is made:

1. The main application is dismissed.
2. The applicant is liable for the respondents' costs in respect of the main application, including the cost of two counsel, on Scale C.
3. In respect of the counter-application:
 - a. The late filing of the counter-application is condoned;
 - b. The award of the following three projects to the applicant is reviewed and set aside:
 - i. The Physical Asset Verification project
 - ii. The Germiston Valuation Project; and
 - iii. The PPP Investor Conference.
 - c. The payments made in respect of the three projects are declared unlawful and irregular, but subject to sub-paragraph (e) below;
 - d. The applicant is to repay to the first respondent the amount of R4 562 567.50 paid to it in respect of the PPP Investor Conference, within 30 business days of date of this order;
 - e. It is just and equitable for the applicant to retain the fees paid to by the first respondent in respect of the first five invoices in respect of

the Physical Asset Verification project, as set out in paragraph 61 of this judgment, in the amount of R18 821 207.93.

- f. Each party is liable for its own costs in respect of the counter-application.


N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 02 May 2024

Date of last submission: 6 May 2024

Date of Judgment: 06 August 2024

Appearances:

Counsel for the Applicant:

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A Louw

Instructed by.

Beder-Friedland Inc.

Counsel for the First to Fourth Defendants:

PG Seleka SC

K Magan

Instructed by:

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