REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

HCA CASE NO: HCAA 40/2023

A QUO CASE NUMBER: 4482/2020

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.
....
....

DATE 25 **APRIL 2025** SIGNATURE [redacted]

In the matter between:

ML NKOSI ELECTRICAL CONTRACTORS CC **FIRST APPELLANT**

SOMA CONSTRUCTION **SECOND APPELLANT**

-and-

BA-PHALABORWA LOCAL MUNICIPALITY **RESPONDENT**

Delivered : 25 **April 2025**

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **April 2025** at **10:00 am**.

Date heard : **31 January 2025**

Coram : **Bresler AJ *et al* Naude-Odendaal J, Du Plessis AJ**

JUDGMENT

BRESLER AJ:

Introduction:

[1] The First and Second Appellant (the 'Appeallants') appeals against the judgment and order granted by the Honourable Madam Justice Semenya DJP (the 'Court *a quo')* on the 28th of August 2023, in terms whereof *inter alia* the award of Tender 06/2012 by the Respondent to the Appellants was declared to be unlawful and invalid and consequently reviewed and set aside.

[2] It is apposite to note that the Appellants apply for a setting aside of the order by the Court *a quo* upholding the legality review. In the alternative, and insofar as the award of the tender is declared to be reviewed and set aside, the Appellant applies

for an order whereby the Appellants are entitled to payment of services rendered and profit and material provided as may be proven in the action instituted under Case number: 7196/2018 currently pending in the above Court.

[3] The appeal lies against the whole of the judgment and order.

The Facts:

[4] The facts, as it appears from the record of the proceedings in the Court *a quo* and relevant for purposes hereof, are the following:

4.1 During or about 2012, the Appellants participated in a tender process in terms of which they were to install energy saving high masts within the jurisdictional area of Ba-Phalaborwa Municipality (the 'Respondent').

4.2 The Appellants' bid was for 95 high masts in a total price of R19,541,461.41 and for a period of 6 (six) months.

4.3 The Appellants were eventually appointed at a price of R18,541,461.00 and for a period of 4 (months). The appointment letter also amended the completion period to be "multi-year" without specifying the meaning of the term.

4.4 The appointment was accepted but the Appellants raised the discrepancy with the Respondent. The contract between the Appellants and the

Respondent was then concluded for an amount of R19,541,461.41. It lasted for a period in excess of 4 (four) years.

In the Court *a quo*:

[5] The argument of the Appellants in the court *a quo* is largely premised on the submission that the contract was finalised. This renders a setting aside of the agreement moot. The Appellants also argue that there was an unreasonable delay in instituting the review proceedings, prohibiting the setting aside of the impugned decisions and / or agreement at this late stage.

[6] As to the alleged procedural irregularities, the Appellants deny same, alternatively allege that the irregularities are not of such a nature that it warrants the setting aside of the agreement. The *crux* of the objection lies against the potential financial losses that will be suffered should the agreement be set aside – it is after all common cause between the parties that both parties have performed in terms of the alleged unlawful agreement.

[7] The Respondent, on the other hand, persisted in its view that the procedural irregularities render the actions of the Respondent unlawful, which has the inevitable result that the contractual relationship between the parties is rendered illegal and unlawful. As such, reviewability is evident. The Respondent furthermore pertinently prays for an order in terms whereof all profit derived from the agreement is forfeited in favour of the Respondent, and all further payments are prohibited.

[8] It follows that, had the Respondent been successful in the review application, it would have potentially rendered the pending litigation between the parties moot as no contractual relationship would be deemed to have existed entitling the Appellants to payment.

[9] The Court *a quo* correctly summarised the salient facts, the version of the Appellants and that of the Respondent. It is apposite to note that the Court *a quo* also enunciated that the review proceedings were only instituted after the Appellants served the Respondent with a summons claiming payment of the outstanding amounts allegedly owed in terms of the contract.

[10] With reference to the applicable authorities, the Court *a quo* found that in accordance with **Section 172(1)(a) of the Constitution, 1996**, a Court must declare any law or conduct that is inconsistent with it, invalid to the extent of such inconsistency. The contract concluded between the parties was done so in violation of the said section. It is therefore invalid and unlawful and stands to be set aside.[1]

[11] As to the delay in instituting the self-review proceedings, the Court *a quo* reasoned that the delay should not override the importance of the rule of law. On that basis the delay by the Respondent in instituting the self-review proceedings was overlooked.[2]

[1] See paragraph [22] of the Judgment on paginated page 316
[2] See paragraph [13] of the Judgment on paginated page 311

[12] The Court *a quo* also found that there was no evidence of fraudulent activities on behalf of any of the parties in this case. The Appellants however accepted the tender, despite the dubiousness about its validity. Amounts were changed in favour of the Appellants and they 'kept quiet' about it.[3] On this basis, the Court reasoned that the Appellants are partially to blame for the current conundrum.

[13] As to the applicability of the ***Gijima***[4] principle, the Court *a quo* found that the facts *in casu* can be distinguished as there is no evidence that the Applicant gave an assurance that the contract was compliant with the relevant statutory provisions of the Constitution. On this basis, a formula was defined by the Court that must be applied in determining the reasonable payment for the services rendered by the Applicant to the Respondent.

[14] It must be noted that the determination of the formula to remunerate the Appellants is, by its very nature, contradictory to the order that sets aside the agreement. Once the agreement is set aside due to invalidity, no contractual consequences can follow.

<u>The Applicable Legal Principles:</u>

[15] In this Court's view, the irregularity in the process in manifest. By evaluating and awarding the tender at a lower price, the Appellants received the benefit of a higher score, which potentially prejudiced the remaining tenderers. Since the tender price

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[3] See paragraph [24] of the Judgment on paginated page 317
[4] As enunciated in ***State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*** 2018 (2) SA 23 (CC)

was then increased thereafter to the amount initially tendered by the Appellants, the Appellants did not suffer any financial loss but only enjoyed the undue preference as a result of being evaluated on a lower price.

[16] Approximately nineteen months after site handover, the Municipal Manager again varied the contract by means of a letter dated the 5th of February 2015. The initial 95 masts were reduced to 70 and at the evaluated amount of R18,541,461,41. This raised the costs per mast with approximately R60,000.00, which again raises the question of fairness and transparency towards the unsuccessful bidders.

[17] The Respondents correctly argued that the variations in 2013 and 2015 were irregular in that they contravened sections 33 and 116(3) of the **Municipal Finance Management Act**, Act 56 of 2003 (the 'MFMA'). Section 33 lays down strict procedural requirements for entering into contractual obligations that exceed the three (3) year period contemplated in the municipal annual budget. This includes *inter alia* Council approval and public participation. It is common cause that this was not complied with.

[18] This Court tends to agree. It matters not that the tender process went through an internal appeal process. The question that must be answered is if a potential (theoretical) bidder might or might not have been prejudiced by the procedure. This theoretical bidder might have been enticed to bid if the price and terms were amended publicly and with due process.

[19] Regulation 24 of the **Supply Chain Management Regulations**[5] provides explicitly that a supply chain policy may allow the accounting officer to negotiate final terms of a contract identified through a competitive bidding process as preferred bidders, provided that such negotiation does not allow any preferred bidder a second or unfair opportunity, is not detrimental to any other bidder and does not lead to a higher price that the bid as submitted.

[20] Regulation 28 and 29 deals with the BEC (Bid Evaluation Committee) and BAC (Bid Adjudication Committee). No power is given to these committees to unilaterally change the terms of the bid by amending the bid prices or the period. The bid must be evaluated and adjudicated on the price, and for the period, tendered.

[21] **Section 217 of the Constitution**[6] calls on all organs of state when procuring goods and services, to do it in terms of systems which are fair, equitable transparent, competitive and cost-effective

[22] In **Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another**[7] the following was stated:

> *'[1] This appeal concerns the award of a government tender. These awards often give rise to public concern - and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that*

[5] GG Notice 868 of 2005 published in Government Gazette 27636 of 30 May 2005
[6] Act 108 of 1996
[7] 2010 (4) SA 359 (SCA)

seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders. Sometimes the unsuccessful tenderer is to be blamed for the problem but then there are cases where he is innocent. Many cases are bedevilled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant succeeds the contract may have to be stopped in its tracks with possibly devastating consequences for government or the successful tenderer or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment is issued only after completion of the contract. It is not necessary to adumbrate further. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion - a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.'

[23] In ***Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others***[8] Scott JA said (para 14):

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[8] 2008 (2) SA 638 (SCA)

'The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and cost-effective'. In other words, whether 'the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values'.

[24] In ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others** v **Chief Executive Officer, South African Social Security Agency, and Others***[9] the following was stated:

'[27] There is a further consideration. As Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.

[9] 2014 (1) SA 604 (CC)

[25] In ***Steenkamp NO v Provincial Tender Board, Eastern Cape***[10] Moseneke DCJ stated:

> *'Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in section 195(1).'*

[26] Having regard to the authorities, this Court is of the view that a basis for self-review has been established premised on the legality of the Respondent's actions. In this regard, the findings of the Court *a quo* cannot be faulted.

[27] Having found that a ground for the self-review exists, the Court is also called upon to determine if the Respondent unreasonably delayed in instituting the current proceedings before court. The proverbial horse has, after all, bolted insofar as the Appellants duly performed in terms of the contract and has finalised the works as per the tender.

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[10] 2007 (3) SA 121 (CC) par 33

[28] In ***Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd***[11] the Supreme Court of Appeal extensively dealt with the delay in instituting a self-review. It was stated:

> *'[34] I now turn to deal with the true nature of the review we are here concerned with and will then consider the question of delay in relation thereto. It is now firmly established that self-reviews by organs of state are not reviews in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), but rather legality reviews. Unlike the control period 180 days provided for in PAJA and a court's discretion in extending the period, where the interest of justice so requires, a court dealing with a legality review has no such fixed period within which an application must be brought. In Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd, the Constitutional Court, with reference to prior decisions, and comparing the discretion under PAJA to the discretion to be exercised in a legality review, said the following in relation to when the time period starts to run:*
>
>> *'(I)n both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken' [Emphasis added.]'*
>
> *[35] The Constitutional Court went on to state the following:*

[11] 2021 (4) SA 436 (SCA)

'The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to s 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.'

In para 51 the Constitutional Court explained that an assessment of the reasonableness of the delay must involve, amongst others, the explanation for the delay. The entire period of the delay must be explained. Where the delay can be explained and is justified, then it is reasonable, and the merits of the review can be considered. Where there is no explanation for the delay, the delay will necessarily be unreasonable.

[36] In Asla the Constitutional Court taught that, even if the unreasonableness of the delay has been established, it cannot be evaluated in a vacuum. The next leg of the test is to see if it ought to be overlooked. It went on to state the following:

'Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.'
[Citations omitted.]

[37] The Constitutional Court in Asla, with reference to its prior decisions, described the appropriate approach as follows:

> *'The approach to overlooking a delay in a legality review is flexible. In Tasima I, Khampepe J made reference to the "factual, multi-factor, context-sensitive framework" expounded in Khumalo. This entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this court's power to grant a just and equitable remedy and this ought to be taken into account.'*
>
> *[Citations omitted.]*

[38] Theron J in Asla set out another factor to be taken into account in considering whether to overlook delay, namely the nature of the impugned decision. She went on to state the following:

> *'This, in essence, requires a consideration of the merits of the legal challenge against that decision.'*

In the next paragraph she expounded on it as follows:

> *'This court has made plain that even within the context of PAJA, the extent and nature of the deviation from constitutional prescripts directly impacts upon an*

> *application for condonation in terms of s 7 of PAJA. In the context of legality review, in Khumalo, Skweyiya J . . . explained that "an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision" [. . .] and considering the legal challenges made against that decision".'*

Theron J went on to cite, with approval, the following dictum in the decision of this court in South African National Roads Agency Ltd v Cape Town City:

> *'It is true that in [the Supreme Court of Appeal's judgment in Opposition to Urban Tolling Alliance this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.'*
> *[Emphasis added.]*

[39] In Asla the Constitutional Court spoke thus:

> *'(T)he extent and nature of the illegality may be a crucial factor in determining the relief to be granted when faced with a delayed review. Therefore, this court may consider, as part of assessing the delay, the lawfulness of the contract under the principle of legality.'*

[29] The Supreme Court of Appeal furthermore remarked:

> *[41] Finally, with reference to its decision in State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited, where it was held that even where there was no basis to overlook an unreasonable delay the court is nevertheless compelled to declare the state's conduct unlawful, because s 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution, the Constitutional Court in Asla recognised the tension between the delay rules and the injunction to declare conduct unlawful that conflicts with the Constitution. The Constitutional Court in Asla reflected on a long line of cases that held that the state must apply timeously to courts and the implication in Gijima that time hurdles must yield to that injunction. On this aspect the Constitutional Court in Asla said the following:*
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> > *'The Gijima principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined. At the same time, this is not a matter in which the Gijima principle can be ignored and thus impliedly overruled. So the injunction it creates — to declare invalid that which is indisputably and clearly inconsistent with the Constitution — must be followed where applicable.'*

[30] Having regard to the judgment of the Court *a quo*, this Court cannot fault the reasoning of the Honourable Madam Justice Semenya DJP in finding that the

institution of the proceedings within a reasonable time must not surpass the importance of the rule of law.[12] As stated by the minority in the ***Asla*** decision referred to herein above:

'It is an opportunity for the state to demonstrate that its self-review seeks to promote open, responsive and accountable government rather than the self-interest of state officials seeking to evade the consequences of their prior decision.'

[31] Having stated the aforesaid, in this Court's view, the delay in instituting the proceedings should not hamstrung the Court's ability to scrutinise unlawful administrative actions. This must be seen against the backdrop of the powers that a Court holds in terms of **Section 172(1)(b) of the Constitution**.

[32] The Appeal therefore cannot succeed on these grounds. But it does not follow that the appeal should be dismissed as a whole.

[33] In ***Electoral Commission v Mhlope and Others***[13] the Constitutional Court stated:

'[132] Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresoluble situations. And the operative

[12] Paragraph [13] of the Judgment of the Court *a quo*
[13] 2016 (5) SA 1 (CC) at par 132

words in this section are 'any order that is just and equitable'. This means that whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in s 172(1)(b).'

[34] In ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*** *supra* the Constitutional Court aptly summarised the situation as follows:

[104] When the Municpality took the view that the Reeston contract was invalid, the implementation of the contract had commenced and was continuing. The Municipality was content for the respondent to complete the contract (building low cost houses) to the benefit of the Municipality and residents of Reeston. It was common cause that the work has been practically completed.

[105] In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.'

[35] Likewise, in ***State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd*** *supra* the Constitutional Court remarked:

> *'[54] Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, Sita must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while Sita sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which — but for the declaration of invalidity — it might have been entitled.'*

[36] The aforesaid remarks by the highest court resonate with the facts *in casu*. Justice and fairness is, after all, part of the core values that our **Constitution** seeks to uphold.

[37] In this Court's view, the Appellants should also not be deprived of any rights that they might be entitled to, but for the declaration of invalidity. In this regard the Court *a quo* erred in her finding that the Appellants should be deprived of the profit that they derived from the unlawful agreement. The Appellants correctly argued that

there were no irregularities or allegations of fraud levied against them. Nor can it be said that the Appellants failed to perform in terms of the contract.

[38] It follows that the Appellants should be partially successful in their appeal on this aspect only. Although a declaration of invalidity must follow, this Court has a discretion to set aside the agreement, and the fiscal consequences thereof.

[39] The calculation of what is due to the Appellants already forms the subject of pending litigation between the parties. It is not necessary for this Court to consider a formula for calculating such amount (if any), as it will be determined in due course at the trial of the matter.

Costs:

[40] As to the issue of costs, this Court is mindful of the fact that both the Appellants as well as the Respondent has achieved a measure of success in these proceedings. This Court is guided by the remarks of the Constitutional Court in ***Gijima*** *supra* to wit:

> *'[55] Sita achieves nominal success to the extent that there is a declaration of constitutional invalidity. Must this affect the question of costs? No. Substantially it is Gijima that succeeds. We say so because Sita's efforts were directed at avoiding the contract and Gijima, on the other hand, sought to hold on to the contract. To the extent that it is not to be divested of its entitlement*

under the contract, Gijima has managed to ward off Sita's efforts; that is the success we are referring to.'

[41] In this Court's view and having regard to both the proceedings in the Court *a quo* and the fact that there is pending litigation between the parties, it is evident that the sole object of the Respondent is to avoid performance in terms of the agreement purely on the premise that it constitutes an unlawful agreement. The Appellants, on the other hand, argued extensively in favour of enforcing the contractual obligations as they have already performed. The Appellants are therefore substantially successful as this Court, in effect, upholds the contractual consequences although the tender is set aside.

Order:

[42] **In the result the following order is made:**

42.1 The Appeal is upheld in part.

42.2 The order of the Court *a quo* is set aside and replaced with the following:

'1. The award of Tender 06/2012 by the Applicant to the Respondents on or around 19 November 2012, is declared to be unlawful and invalid.

2. **The order of invalidity above does not have the effect of divesting the respondent of any rights it would have been entitled to under the contract, but for the declaration of invalidity.**

3. **Each party shall pay its own costs.'**

42.3 The Respondent is ordered to pay the costs of the Appellants, including costs of two counsel on Scale C, pertaining to the Application for Leave to Appeal and the proceedings in this Court.

[redacted]

M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur,

[redacted]

NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur,

[redacted]

DU PLESSIS AJ

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

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DATE OF JUDGMENT	:	25 **April 2025**