REPUBLIC OF SOUTH AFRICA

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

Case Number: 2023-090528

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

3 April 2025 [redacted]

DATE SIGNATURE

In the matter between:

EKURHULENI WATER CARE COMPANY Applicant

and

MAZIYA GENERAL SERVICES CC Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 3 April 2025

JUDGMENT

PUTTER AJ:

Introduction

1. This is a self-review concerning multiple contractual extensions by Ekurhuleni Water Care Company ("**Erwat**"), a municipal entity involved in

the Vlakplaats Waste Water Care Works project. The contract, awarded to Maziya General Services CC ("**the Contractor**" or the "**Service provider**") through a lawful tender process, falls under the "General Conditions of Contract for Construction Work, 3rd Edition (2015)" ("**GCC Contract**"). The Scope of Work includes "modifications to flow diversion", final effluent collection, and maturation and retention ponds. Erwat launched the "self-review" against the contractual extensions it granted on the basis that the extensions were unlawful. The review is based on a legality review in terms of section 1(c) of the Constitution (not under PAJA) as a component of the rule of law.

2. Erwat initiated this self-review on the basis that the extensions were unlawfully granted. The review is conducted as a legality review under section 1(c) of the Constitution.

3. The parties to the review are Erwat ("**the Employer**") and Maziya General Services CC ("**the Service provider**").

4. Erwat seeks the following relief:

   4.1 that all decisions which were taken after 29 November 2018, <u>alternatively</u> 30 August 2019, under the GCC Contract be declared unconstitutional, unlawful and invalid and consequently be reviewed and set aside;

   4.2 that, in addition to the review, the "Adjudication Decision" of 26 May 2023 be stayed pending the determination of the review application;

   4.3 that condonation be granted to it for the late filing of the review application.

5. In contrast, the Service provider contends that the extensions under the Contract did not involve the exercise of public power and that Erwat found itself in the position of a contracting party. Due to the cancellation notice of 26 October 2021 by Erwat of the GCC Contract, the issues in respect of the loss of profit and termination of the Contract were referred to an adjudication process. Both Erwat and the Service provider participated

therein, whereafter an adjudication was made by the Adjudication Board.

6. The Service provider launched a counter-application wherein it seeks relief for:

"1. Payment of an amount of R8 653 384,39 plus interest;

2. Confirmation of the cancellation of the GCC Contract; ..."

7. In addition to the counter-application, the Service provider claims that the application be dismissed with costs

Delay in launching the Review

8. The review application was issued and served on 8 September 2023. There is no prescribed fixed period for the bringing of a legality review. However, the delay must be evaluated according to a two-step analysis. In the first step, the question is whether Erwat unduly delayed in bringing the review and if not, the Court must proceed on the merits and consider the interests of justice.[1] If, however, the delay was unreasonable, the Court must proceed to the second step which relates to the question of interests of justice.

9. Erwat's case is that the extensions given in terms of the contractual procedures unlawfully extended the GCC Contract duration period under the tender process. The GCC Contract commenced on 30 August 2016 for a duration of 27 months (what is referred to in the GCC Contract as "duration period") and should have been completed by 29 November 2018, which was the "completion date" in the event that there were no extensions.

10. It is not in dispute that the project executed under the GCC Contract contained contractual terms and that certain extensions could be granted for practical completion as governed therein.

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1 See *Buffalo City Metropolitan Municipality v Asla Construction* 2019 (4) SA 331 (CC) at 345 paras 49 and 50; *Transnet SOC Ltd v Tipp-Con (Pty) Limited and Others* (797/2022) [2024] ZASCA 12)31 January 2024), para [26].

11. Erwat did not raise the illegality and the non-compliance with the MFMA prior to 26 October 2021. From the stipulated date of completion, being 18 November 2018 until 26 October 2021 (the cancellation date) the Contract was executed and managed in the normal course of the context and purpose of the contract for nearly 3 years without raising the illegality issue.

12. Erwat failed to explain why it did not raise the illegality issue immediately after the completion date. The 23-month delay on which Erwat relies is factually wrong, it is in fact 4 years and 10 months. In the light thereof -

    12.1 the self-review was only brought 5 years after the termination date on which Erwat relies;

    12.2 Erwat failed to explain how the illegality issue occurred and the circumstances why and how the "illegality" became transparent to it;

13. When one studies the submissions made and the responses by National Treasury and Provincial Treasury that served before Erwat's directors it appears that both Treasury Departments contended that the extensions of the contract beyond "36 months" amounted to irregular expenditure due to non-compliance with sections 116(3) and 33 of the MFMA.

14. Erwat clearly followed this "illegality route" in order to avoid the effect of the prescribed extensions which were in fact beyond the control of the Service Provider.

15. In order to address the delay, Erwat was compelled to explain the self-review and to deal with the consequences thereof, the potential prejudice and the nature of the services which were rendered.

16. Although Erwat's Board considered the reinstatement of the contract which it had terminated (from July to September 2022) it ultimately persisted with the termination thereof. It appears that following a change in Erwat's top management structure, the GCC Contract was reviewed and found not to comply with sections 33 and 116 of the Municipal Finance Management

Act, Act 56 of 2003 ("**the MFMA**") which respectively deal with general provisions in respect of contracts that have budgetary implications and the management of contracts.

17. The real issue is whether Erwat, in these circumstances, can rely on the MFMA and a self-review in the face of its contractual obligations under the GCC Contract. That poses a further question - whether the delays should be overlooked.

Should the delay be overlooked

18. What goes to the heart of the dispute between the parties is the question whether the extensions granted in terms of the GCC Contract constituted public power.

19. The context of the extensions under the GCC Contract is paramount and will influence the outcome of the self-review. The applicant claims that the completion date of 27 months was extended and that this was unlawful.

20. The extensions granted took place in terms of GCC contractual terms.

21. The legality of the tender process and the GCC Contract that was awarded to the Service Provider is not in dispute.

22. The extensions of the GCC Contract beyond the 27 months were granted in terms of the provisions of the contract. The extensions were not related to the procurement of further goods or services. The sole purpose of the extensions was to afford the Service Provider an opportunity to complete the contract. Although the appointment was for 27 months, the extended duration for completion was done and approved lawfully. The timeframe and the purpose of the delays can be summarised as follows:

    22.1 delays in approval of the Water Use Licence application – 218 days;

    22.2 delays in delivery of material – 46 days;

    22.3 groundwater seepage affecting excavations – 36 days;

    22.4 community unrest – 35 days;

22.5 heavy rainfall and flooding on site – 75 days;

22.6 national lockdown;

22.7 delays in payment of invoices due to budgetary constraints – 120 days.

23. The various extensions were granted in line with the GCC Contract.

24. The complaint regarding illegality is, however, that no formal extensions of time were requested in accordance with the MFMA.

25. The tender and contract that followed is directly related to Erwat's water care works and to regularise the treated effluent therefrom.

26. In submissions by the managing director of Erwat, Mr Kennedy Nyasha Chihota (the deponent to the founding affidavit) explained the basis on which the tender and eventually the Contract took place as follows;

> "The water care works is currently operating at 150 millilitres per day against the regraded capacity of 55 millilitres per day, this operating conditions overloads the plant by 208%, consequently the treated effluent contravenes the acceptable discharge limit of the current Water Use Licence (WUL). The non-compliance challenge of the treated effluent deteriorates the water quality of the discharge river (i.e. Natalspruit), consequently. The Department of Water and Sanitation (DWS) has recently served Erwat with a Notice to impose a non-compliant Directive on Vlakplaats WCW.
>
> The project for modification to flow diversion at Vlakplaats WCW was initiated as a mitigation to improve the compliance of the discharge of the Works. The project is based on designing and constructing a system to divert and retain access flow during peak hours and then releasing it for treatment during low-flow hours."[2]

27. After the Service Provider lodged its final account the Notice of Termination dated 26 October 2021 was served by Erwat[3]. The relevant part of the Notice reads as follows:

> "During the contract review process contract: ERW 201602/TNDR-001 has been deemed to be in contravention of sections 10, 11, 33 and 116 of the MFMA.
>
> Therefore, Erwat is required by law to terminate the contract with immediate effect. Furthermore no further works must be performed from date of this letter."

28. Erwat appointed Virtual Consulting Engineers who were responsible for

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2 Caselines: 02-06, Founding affidavit: Caselines: 02-121, Annexure FA13.1 Submission dated 6 July 2022

3 Caselines: 02-76 Founding affidavit: annexure FA7.

the design and site supervision of the GCC Contract. The Engineers responded on 29 October 2021 to the termination notice. It denied that sections 10 and 11 had a bearing on the termination. It contended that Section 33 of the MFMA deals with contracts that will inform financial obligations on the Municipality beyond 3 years. It does, however, not prohibit such Contracts.[4]

29. Shortly thereafter, on 4 November 2021, the Service Provider's attorney denied that there was any breach of the GCC Contract and gave Erwat an opportunity to rescind the unlawful termination.

30. A dispute was thereafter declared in terms of clause 10.3 of the GCC Contract.

31. On 7 June 2022, the time limits under the GCC Contract were suspended between the parties while Erwat considered the reinstatement thereof.

32. On 3 February 2023, the Service Provider proceeded with the adjudication process.

33. In April 2023 Erwat and the Service Provider entered into an Adjudication Board meeting agreement in terms of the GCC Contract to deal with the termination of the GCC agreement and the damages relating thereto.

34. The Service Provider filed a Referral to Adjudication and Erwat responded thereto by way of a Statement of Response.

35. The Adjudication Board determined that the Service Provider was entitled to payment of damages in the amount of R8 653 384,39 VAT inclusive.

36. On 4 July 2023, Erwat issued a Notice of Dissatisfaction with the Adjudication Board's Ruling; the relevant extract thereof reads as follows:

> "2. We refer specifically to the Adjudication Award dated 26 May 2023 in terms of which the Adjudicator found as follows:
>
> 2.1 The Service Provider properly terminated the Contract on 31 May 2022;
>
> 2.2 The Service Provider is entitled to damages of R8 653 384,29 inclusive of VAT, which the Employer must pay within the

4 Caselines: 02-143; Answering affidavit, Annexure AA3 – 02-188.

payment period specified in the Contract.

3. We wish to place on record that our client is dissatisfied with the decision of the Adjudicator and will accordingly be challenging the procedure in the appropriate forum."[5]

37. Subsequently, and without an agreement to arbitrate, Erwat instituted this self-review in September 2023, as referred to hereinabove. Erwat participated in the dispute resolution process. Clause 10.6.1 of the GCC Contract makes provision that if a party is in disagreement with the Adjudication Board's decision such party is entitled to refer the matter to arbitration or court proceedings whichever is applicable in terms of the Contract.

Were extensions under the GCC Contract reviewable?

38. As stated by the Supreme Court of Appeal, there is no bright line test for determining whether administrative principles include a contract involving an organ of state and a private party[6].

39. In my view the decision of Erwat to extend the GCC Contract did not constitute "administrative action" as defined in PAJA due to the fact that –

39.1 the decision was not taken in terms of any legislation; and

39.2 the decision did not involve the exercise of a public power or public function.

40. In the *Sanparks* matter Navsa JA and Davis AJA suggested certain indicators which might be used in deciding whether administrative law should govern a contract between a private party and an organ of state. The contractual terms between the parties provide for different aspects and termination of the agreement. Erwat did not act in terms of any position of power.

41. Erwat called for tenders in order to rectify the non-compliance of its water care works. Thereafter, the consulting engineers and the Service Provider

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5 Caselines: 02-183 Answering affidavit: Annexure AA1.

6 See *Sanparks v MTO Forestry* 2018 (5) SA 177 (SCA) at para [37].

saw to the Scope of Work.

42. I refer to certain relevant definitions contained in the GCC Contract wherein "practical completion" overrides the timeframe as relied upon by Erwat.

43. The "due completion date" on which Erwat relies reads as follows:

> "1.1.1.14 "Due completion date" means the date of expiry of the time stated in the contract data for achieving practical completion of the Works, calculated from the commencement date and as adjusted by such extensions of time or acceleration as may be allowed in terms of the contract.

44. "Practical completion" reads as follows:

> "1.1.1.24 "Practical completion " means that the whole or portion of the Works has reached a state of readiness. Fit for the intended purpose, and occupation without danger or undue inconvenience to the Employer, even though some Works may be outstanding.

45. With regard to the extensions of time for practical completion, clause 5.12.1 of the GCC Contract reads as follows:

> "5.12.1. If the Contractor considers himself entitled to an extension of time for circumstances of any kind whatsoever which may occur that will actually extend Practical Completion of the Works beyond the Due Completion Date, the Contractor shall claim in accordance with clause 10.1 such extension of time as is appropriate. Such extension of time shall take into account any special non-working days and all relevant circumstances including concurrent delays or saving of time which might apply in respect of such claim."

46. The terms of the GCC Contract informs the exact ambit of the contractual relationship.

47. Erwat's reasoning that the 27-month period in the GCC Contract came automatically to an end when the 27 month of the tender conditions ran out, fails to take the principal of practical completion into account and that the scope of what had to be reached had to be “a state of readiness".

48. The GCC Contract term was adjusted through various extensions which were made by Erwat and are not in dispute. I have dealt with this aspect more fully above.

49. The delays in the project completion took place due to the events that triggered the respected extensions which were beyond the control of the

Service Provider.

50. In addition, Erwat took part in the administration and management of the GCC Contract over time.

51. The stance that Erwat's decision to grant the decisions were in fact administrative decisions and forms part of its public powers were not disclosed since August 2016, at the commencement of the GCC Contract. The first sign of this point of departure was the cancellation notice of 26 October 2021.

52. The termination of the GCC Contract did not entail the use of public power.

53. The SCA already considered the nature of the power exercised by a public authority in cancelling a contract in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) 1013 SCA at paras [18] and [22] and in *Logbro Properties CC v Bedderson and Others* 2003 (2) SA 460 (SCA) para [11].

54. The reasoning of these cases are clear. The tender contract and in this case the GCC Contract between Erwat and the Service Provider makes it clear. Erwat derived its power to cancel the GCC Contract from its terms and the common law. When concluding the Contract Erwat did not act in a position of superiority or authority.

55. As far as the Service Provider's claim for payment in respect of the adjudication amount is concerned, as reflected in the counter-application, the parties are bound by the provisions of clause 10.6.1. of the GCC Contract which provides for arbitration proceedings.

Finding:

56. In the circumstances –

    56.1 the late filing of the review application is not condoned; and

    56.2 the review application is dismissed;

    56.3 Erwat is ordered to pay the costs of the review application including the costs of counsel on the scale C;

56.4 the counter-application is postponed *sine die* in order for the parties to refer any disagreement with the Adjudication Board's Decision to arbitration within 56 days of date of this Order and within the procedures prescribed for dispute resolution in terms of the GCC Contract.

BY ORDER,

REGISTRAR

[redacted]

L PUTTER
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 20 November 2024
Judgment: 3 April 2025

Appearances:

For Applicant: BL Manetsa
R Tsalong

Instructed by: Mamatela Attorneys Inc.
E-mail: **snene@mamatelainc.co.za**
asetlhare@**mamatelainc.co.za**

For Respondent: Adv Jan Möller

Instructed by: Moller & Pienaar Attorneys
E-mail: **amarentiea@mollers.co.za**