IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **AR36/2024P**

In the matter between:

NOMBELA INVESTMENTS CC **APPELLANT**

and

EZEMVELO KZN WILDLIFE **RESPONDENT**

Coram: Poyo Dlwati JP, Mossop J and Sibisi AJ

Heard: 24 January 2025

Delivered: 21 February 2025

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Radebe J sitting as court of first instance)

1. The appeal is allowed, and the order granted by Radebe J on 2 December 2022 is set aside and replaced with the following order:

'The application is dismissed with costs.'

2. The respondent shall pay the appellant's costs, including the costs consequent upon the employment of two counsel (where so employed):

(a) In the application for leave to appeal before Radebe J on 12 July 2023;

(b) In the application for leave to appeal to the Supreme Court of Appeal; and

(c) In the appeal before the full court, with the costs on appeal before the full court to be taxed on scale C.

JUDGMENT

MOSSOP J (POYO DLWATI JP and SIBISI AJ concurring):

Introduction

[1] This is an appeal against an order granted by Radebe J on 2 December 2022. The respondent, a state-owned enterprise, brought a legality review against its own decision to award a tender, identified as B[...] E[...] 2[...], to the appellant, a close corporation. The application was favourably viewed by Radebe J, who granted the following order:

'1. The Applicant's award of tender B[...] E[...] 2[...] to the Respondent is hereby declared unlawful.

2. The Applicant's award of tender B[...] E[...] 2[...] to the Respondent is hereby reviewed and set-aside (sic).

3. The Service Level Agreement concluded between the Applicant and the Respondent pursuant to bid number E[...] 2[...] is hereby declared unenforceable from the date of 3 February 2020;

4. The Respondent is ordered to pay the costs of this application including costs of Senior Counsel.'

I shall refer to this as 'the order'.

Leave to appeal

[2] The appellant, dissatisfied with the order, sought leave to appeal from the court a quo. Several grounds were cited in its application for leave to appeal, but, despite this, the appellant's application was only marginally successful. Radebe J granted it leave to appeal to the full court of this division on a single ground, namely:

'… in respect of the ground of just and equitable action, with reference to Section 172(1)(b) of the Constitution Act No. 108 of 1996.'[1]

Leave to appeal from the Supreme Court of Appeal

[3] Leave to appeal on that limited ground did not satisfy the appellant, who then approached the Supreme Court of Appeal (the SCA) in order to broaden the grounds of appeal to include the entire order granted by Radebe J. In this it was successful, for on 6 October 2023, the SCA granted an order that reads as follows:

'1. Condonation as applied for is granted. The applicant [f]or condonation is to pay the costs of the application.

2. Leave to appeal is granted to the Full Court of the KwaZulu Natal Division of the High Court, Pietermaritzburg. Leave to appeal is in respect of the whole judgment and order of the High Court.

3. The costs order of the court *a quo* in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs.'

[4] Before us, therefore, is an appeal against the full order granted by Radebe J.

Background facts

[5] Before considering the merits of the appeal, the factual context to the litigation must be considered because, as the SCA has previously remarked, '[c]ontext is paramount'.[2]

[6] The respondent owns and runs several resorts in wildlife parks that it controls. It, inter alia, provides overnight accommodation against payment of a fee to

---

[1] Section 172(1)*(b)* reads as follows:
'When deciding a constitutional matter within its power, a court-
(a) …
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[2] *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and others* [2024] ZASCA 12 para 9.

members of the public visiting those wildlife parks. Those resorts require a supply of liquid petroleum gas to permit the supply of certain basic services.

[7] On 8 September 2017, the respondent published an advertisement calling for bids for the:

'Supply and delivery [of] liquid petroleum gas (LPG), and installation of related connections to Ezemvelo KZN wildlife resorts for a period of five (5) years.'

[8] The advertisement specified that a compulsory clarification session would be conducted by the respondent on 22 September 2017 at 11h00 (the compulsory briefing). The advertisement declared that a failure to attend and sign the compulsory briefing register (the attendance register) on that date would result in any bid submitted by the defaulting party being disregarded by the respondent.

[9] There is a dispute as to how many bids were received by the respondent pursuant to the publication of the advertisement. The appellant indicates that seven were received while the respondent states that sixteen were received. Nothing, however, turns on this as it is not in dispute that the tender was ultimately awarded to the appellant and that, as a consequence, the appellant and the respondent concluded a service level agreement (the service agreement).

[10] For several years thereafter the appellant provided services to the respondent in accordance with the service agreement. Unbeknown to the appellant, during October 2019, the respondent commenced an internal audit and forensic investigation of the circumstances relating to the award of the tender to the appellant and the conclusion of the service agreement (the internal audit).

[11] On 6 February 2020, and before the internal audit was completed and a report filed (the internal audit report), the respondent cancelled the service agreement. The reasons advanced by the respondent in its letter of cancellation were that:

(a) gas cylinders were positioned by the appellant in inappropriate places;

(b) no training had been provided to the respondent's staff in terms of regulation 17(3) of the Pressure Equipment Regulations, 2009 under the Occupational Health and Safety Act 85 of 1993;[3] and

(c) certain incidents had occurred at various resorts of the respondent that had resulted in injuries to the respondent's staff and damage to its infrastructure.

[12] The basis of the cancellation of the service agreement, thus, had nothing at all to do with the awarding of the tender to the appellant but related to events that occurred after the tender had already been awarded.

[13] The appellant denied that there was any basis for the cancellation of the service agreement but, upon reflection, accepted the respondent's action as constituting an act of repudiation and decided to accept that repudiation.[4] The appellant then swiftly issued summons against the respondent out of this court on 19 March 2020,[5] in which action it claimed damages in the form of loss of profits arising from the unexpired portion of the duration of the service agreement. The respondent delivered its plea to the appellant's particulars of claim, but the action remains unresolved at present, apparently because this self-review application must first be determined.

[14] Uniform rule 37 requires a pre-trial conference to be held in action proceedings. In order to comply therewith and to progress the action, the parties held the prescribed conference on 16 August 2021. At that conference, the respondent's legal representatives mentioned for the first time that it intended to review the granting of the tender to the appellant. Exactly a month later, on 16 September 2021, the self-review application was launched.

The self-review application

---

[3] Pressure Equipment Regulations, 2009, GN R734, *GG* 32395, 15 July 2009. Regulation 17(3) reads as follows:
'An authorised person or an approved inspection authority shall issue a certificate of conformity after completion of a gas installation, modification, alteration or change of user or ownership in the form of Annexure 1.'
[4] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A) para 16; *African Zaibatsu Corporation Ltd and another v Industrial Development Corporation of South Africa Ltd* [2024] ZAGPJHC 1012; [2024] 4 All SA 739 (GJ) para 85.
[5] The relevant case number is 2283/2020P.

[15] The respondent's application sought the relief that was ultimately granted by Radebe J, and which is mentioned at the beginning of this judgment. Six grounds were
identified in the respondent's founding affidavit, namely:

(a) The appellant did not attend the compulsory briefing. Incorporated in this ground were allegations that the respondent's bid screening committee was aware of this fact and allegedly unlawfully permitted the appellant's bid to progress when it ought to have disqualified it;

(b) The respondent's then acting supply chain manager, Mr Mnembe (Mr Mnembe), chaired the screening committee and was aware that the appellant had not attended the compulsory briefing. Notwithstanding this knowledge, the screening committee did not disqualify the appellant's bid. Mr Mnembe was also part of the respondent's bid adjudication committee;

(c) The respondent's supply chain management division retained full control of the service contract after the tender had been awarded to the appellant. This meant that it, and not the end user, determined when service delivery would occur. It was alleged that the tender had a fixed value of R21 766 500 (a fact in dispute) and that within two years, payments of R17 097 482 had already been made to the appellant. In administering the service agreement, Mr Mnembe allegedly authorised payments for fictional transactions claimed by the appellant;

(d) The appellant allegedly did not satisfy the functionality requirement of the tender;

(e) The appellant allegedly did not provide the required permits for the transport of the liquid petroleum gas products that it supplied; and

(f) After the award of the tender was made, the respondent discovered that the bid screening committee had never performed any assessment of the respondent's gas infrastructure, and the respondent accordingly had no objective way of knowing whether the tender of any bidder, not just the appellant, was actually reasonable.

Basic principles of self-review

[16] It is not in dispute that the respondent is a state-owned entity and, as such, it may not review decisions taken by it in terms of the Promotion of Administrative

Justice Act 3 of 2000 (PAJA).[6] It is confined to seeking a review of its own decisions on the basis of a legality review.

[17] In *Pharmaceutical Manufacturers Association of SA and another: In re Ex Parte President of the Republic of South Africa and others,*[7] the Constitutional Court explained that the principle of legality is 'an incident of the rule of law', which is a founding value of the Constitution itself.[8] What this means is that the principle of legality 'is one of the constitutional controls through which the exercise of public power is regulated by the Constitution'.[9] It is so that the exercise of public power can only be regarded as being legitimate where it is lawfully exercised, as contemplated by the Constitution. Section 217(1) of the Constitution accordingly provides that when an organ of state, such as the respondent, contracts for the supply of goods or services to it, 'it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.

[18] Where a court determines that the conduct of an organ of state is inconsistent with the Constitution:

'… such a court is obliged to declare it invalid. It has no choice in the matter.'[10]

Mr de Wet SC, who appeared for the respondent in the court a quo and in this appeal, repeatedly emphasised this point in his argument before us.

[19] The Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* (*Asla (CC)*)[11] held that the duty to declare conduct invalid arises when the unlawfulness is clear and based upon undisputed facts[12] and stated further that this principle should:

---

[6] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).
[7] *Pharmaceutical Manufacturers Association of SA and another: In re Ex Parte President of the Republic of South Africa and others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 17.
[8] Ibid para 83.
[9] *Affordable Medicines Trust and others v Minister of Health and others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49.
[10] *Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd and others* [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) para 31.
[11] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC).
[12] Ibid para 66.

'… be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined.'[13]

The principal issues in the appeal

[20] While six grounds of review were identified in the respondent's application before the court a quo, there were two principal issues in the appeal. The first is the issue of hearsay evidence and the second is the issue of undue delay in the bringing the self-review application and I now consider each of these grounds.

Hearsay

[21] The deponent to the respondent's founding affidavit, Mr Ntsikelelo Dlulane (Mr Dlulane), was the acting chief executive officer of the respondent at the time that he deposed to the founding affidavit in the self-review application. At the commencement of his affidavit, he stated that:

'The contents of this affidavit does (sic) not fall within my personal knowledge. It is based on documents referred to hereinafter and in particular an internal audit and forensic investigation conducted by the applicant. The latter report was finalised on 15 March 2021. It is annexed hereto marked "A".'

[22] The same statement that the facts advanced are not within his knowledge is again acknowledged by him in the first replying affidavit and is repeated in the supplementary replying affidavit to which Mr Dlulane also deposed.[14]

[23] Thus, Mr Dlulane does not assert any direct knowledge of that which he sets out to explain in any of the affidavits to which he deposed. That is problematic for the respondent because Mr Dlulane is, in effect, acknowledging that the founding affidavit, a most significant document, is based virtually entirely upon hearsay.[15] That proposition is compounded when the core of the founding affidavit, the internal audit report relied upon by the respondent and referred to by Mr Dlulane in the extract

---

[13] Ibid para 71.
[14] The appellant delivered an answering affidavit and a supplementary answering affidavit to which the respondent delivered a replying affidavit and a supplementary replying affidavit.
[15] I do not lose sight of the fact that an affidavit of Mr Lawrence Mbonambi, accompanied the founding affidavit and covered a discrete aspect of the entire bid process.

mentioned above, is considered. It is the work of persons other than Mr Dlulane and was not initially confirmed under oath by any of those who compiled it.

[24] The appellant correctly took issue with this in its answering affidavit. It stated that the founding affidavit was entirely based upon hearsay. Apparently acknowledging this to be correct, two confirmatory affidavits deposed to by the authors of the internal audit report were later delivered by the respondent along with its first replying affidavit. Those confirmatory affidavits were similar. Unsatisfactorily, one of the confirmatory affidavits did not even provide the full names of the deponent but merely provided the initial of his or her forename.[16] Each confirmatory affidavit was comprised of two widely spaced pages in which the deponent confirmed the correctness of the internal audit report.

[25] This is a common approach in this division and is often adopted in motion proceedings where witnesses who bear actual knowledge of certain facts do not give that evidence personally but permit another, who has no direct knowledge of those facts, to state them. A brief confirmatory affidavit is then filed, ostensibly to regularise the hearsay nature of the evidence. The SCA has described this practice as being 'slovenly'[17] and in *Drift Supersand (Pty) Limited v Mogale City Local Municipality and another* observed that the municipality had adopted a:

'… sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called "confirmatory affidavit" by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and "confirmed the contents thereof in so far as it relates to me and any of activities". This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.'

I agree with those sentiments.

---

[16] The name provided was 'K. Nkgabutle'.

[17] *Eskom Holdings SOC Limited v Masinda* [2019] ZASCA 98; 2019 (5) SA 386 (SCA) at 387I to 388B.

[26] In addition, further allegations were thereafter made in the replying affidavit about the internal audit to which the appellant was not given the opportunity to reply. This is also not permitted.[18]

[27] All of this is entirely unsatisfactory. Where contentious facts are involved or where detailed explanations behind a significant set of facts are required, the person having such personal knowledge of those facts must depose to them. The practice of permitting uninformed persons to state facts in respect of which they have no direct or personal knowledge must cease.

[28] As regards making out a case in reply, as has been attempted in this matter, legal proceedings have an order and a sequence to them that have been developed over the centuries to permit all parties to be heard in a logical and procedurally fair way. That sequence must be adhered to, save and except where there is a sound basis for deviating from it. This does not stem from an overly technical approach to pleading but concerns fundamental fairness.[19] No basis has been advanced for such deviation in this matter, other than an acknowledgement by the respondent in its replying affidavit that it was guilty of an 'oversight' in not attaching the confirmatory affidavits of the authors of the internal audit report to the founding affidavit.

[29] It is not entirely certain what the word 'oversight' is intended to mean in this context. It may conceivably mean that the confirmatory affidavits existed but, through an administrative error, did not accompany the founding affidavit when the application was first delivered. Or it could mean that the necessity for confirmatory affidavits had been entirely overlooked. It appears the latter meaning was the true meaning intended, because both of the confirmatory affidavits were sworn to by their respective deponents on 7 March 2022, while the founding affidavit was sworn to on 15 September 2021. The 'oversight' is thus not the failure to timeously deliver

---

[18] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B; *Bayat and Others v Hansa and Others* 1955 (3) SA 547 (N) at 553C-E; *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) para 60.
[19] *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) para 61.

already existing confirmatory affidavits, it is the failure to create them for they did not exist at all when the founding affidavit was delivered.

[30] Given that Mr Dlulane admitted that he had no personal knowledge about that to which he deposed, and the internal audit report upon which he relied was the work of others, and not himself, it seems to me that no real case of any evidential value was made out on the founding papers and the self-review application could conceivably have been dismissed on that basis alone. However, the court a quo did not address this issue in its judgment.

[31] The internal audit report is a substantial document being in excess of 150 pages. It is densely drafted and refers to a plethora of facts and findings. In my view, the belated delivery of the two confirmatory affidavits did not rescue the respondent from the appellant's trenchant criticism of it using hearsay evidence.

[32] In answer to this, Mr de Wet referred us to *Asla (CC)* wherein Theron J observed that no condonation application was necessary in self-review applications and that the court could simply consider all the relevant factors before deciding whether to overlook the delay. I do not accept the argument proposed by Mr de Wet that as long as there are confirmatory affidavits delivered at some stage, all is well. As was previously stated, an applicant is required to make out its case in its founding affidavit. It follows that *Asla (CC)* is thus not authority for the fact that an applicant bringing a self-review application is not obliged to make out its case in its founding affidavit.

[33] The appellant's point which, as already mentioned, went unaddressed in the court a quo's judgment, was a good point. The respondent's case was constructed on hearsay, and it attempted to make its case in reply. The self-review application was capable of being dismissed on this point alone and should, in my view, have been so dismissed.

Delay

[34] The appellant focussed attention on the respondent's alleged delay in bringing its self-review application in paragraphs 9 and 10 of its answering affidavit, where it stated the following:

'9. Nearly four years have passed since the award of the tender, yet there is no explanation for the delay of bringing the present application to review and set aside if indeed the applicant believed it was reviewable.

10. I am advised that the current position in law is that a public body seeking to review its own decision (even if there are grounds to do so, which there are not in the present application) is duty bound to explain the delay in instituting any application for review and, absent a proper explanation, the decision can be insulated from being reviewed and set aside by virtue of the delay.'

[35] The appellant thus pertinently and clearly initially raised the issue of delay. It was, however, an obvious issue and the respondent must have, independently of the issue being raised by the appellant, appreciated that the time periods that had elapsed in the matter needed to be addressed by it in presenting its application to the court hearing its self-review application. Unsurprisingly, this was the principal issue in the appeal.

[36] The appellant alleges that the respondent failed to act upon known facts when it should have acted and consequently delayed significantly and unacceptably. In the face of this criticism, it follows that the relevant events and the material time intervals in this matter have assumed some significance. The material events and time periods are the following:

(a) The tender was awarded to the appellant on 20 October 2017, and it was cancelled by the respondent on 6 February 2020, a span of 840 days;

(b) The internal audit was commissioned by the respondent on 6 October 2019 and was concluded on 15 March 2021, a span of 527 days;

(c) The appellant issued summons against the respondent on 19 March 2020 and the Uniform rule 37 conference was held on 16 August 2021, a span of 516 days; and

(d) The self-review application was launched on 16 September 2021, which is:

(i) 186 days after the internal audit was completed;

(ii) 589 days after cancellation of the service agreement occurred; and

(iii) 1 428 days after the tender was awarded to the appellant.

[37] These are self-evidently lengthy periods. One would accordingly have expected a comprehensive explanation for the delay to be contained in the founding affidavit.

[38] There was, however, no such explanation in the founding affidavit. The issue was simply not addressed at all. Notwithstanding the prohibition against making a case in reply, there was no real attempt, bar a desultory one to which reference will shortly be made, to explain the delay in either of the two replying affidavits that the respondent delivered.

[39] But the point of delay had been taken by the appellant in its answering affidavit and the court a quo must, therefore, have been aware of it. Yet the issue was also not dealt with at all by the court a quo in its judgment. It was as if the point had never been raised by the appellant. But it had.

[40] When a material point is taken in an answering affidavit, it must be considered and fully addressed by the other party in its replying affidavit. A failure to do so may result in the court regarding the allegation as having been admitted and that may imperil the entire application, for in self-review applications an unexplained delay may lead to the dismissal of the application. It need hardly be mentioned that where raised, the issue of delay must be considered in the judgment that the court hearing the application delivers and cannot simply be overlooked.

[41] The failure to address the issue of delay at all by the court a quo in its judgment appears to me to be an unfortunate, but obvious, misdirection by it. The issue was before the court and should have enjoyed the court’s consideration. The facts raised by the appellant in this regard were succinctly presented in its answering affidavits. Those same facts are now before us as an appellate court. We have enjoyed full argument from counsel for both sides on the issue and, in my view, this is an instance where this court is in as good a position as the court a quo to

determine the thus far unexplored issue of delay. Rather than refer the issue back to the court a quo for it to be determined, this court, in my estimation, should determine the issue,[20] as I now do.

[42] I commence by cautioning myself of two things:

(a) Firstly, in a legality review there are no prescribed time periods within which such review must be commenced. This is in contrast with a review brought in terms of PAJA, where time limits do apply.[21] A legality review must simply be brought without undue delay. In *Merafong City v AngloGold Ashanti Ltd*,[22] Cameron J explained that:

'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'

Four years after *Merafong* was decided, Ponnan JA reiterated in *Altech Radio Holdings (Pty) Ltd and others v Tshwane City*,[23] that:

'It is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of an undue delay.'

(b) Secondly, as already briefly mentioned earlier in this judgment, it is not necessary in a legality review to explicitly apply for condonation in the event of the application appearing to be out of time because, as was stated by Theron J in *Asla (CC)*:

'The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required.'[24]

---

[20] *Motloi v SA Local Government Association* [2005] ZALAC 12; [2006] 3 BLLR 264 (LAC); (2006) 27 ILJ 982 (LAC) para 16.

[21] See s 7(1) of PAJA.

[22] *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) para 73.

[23] *Altech Radio Holdings (Pty) Ltd and others v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 18.

[24] *Asla (CC)* para 51.

[43] The period of delay, and its consequences, are assessed in accordance with the ubiquitous principle of reasonableness.[25] In *Asla (CC)*, the court confirmed that the test to be applied when assessing whether there had been an undue delay is the two step test initially postulated in *Gqwetha v Transkei Development Corporation Ltd and others*,[26] and reaffirmed in *Khumalo and another v MEC for Education, KwaZulu-Natal,*[27] namely that:

'Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the court's discretion should nevertheless be exercised to overlook the delay to entertain the application.'[28]

[44] It follows that where a delay is alleged to have occurred, there must be an explanation advanced for its occurrence and the explanation proffered must cover the whole period of the delay, for it would not be sufficient to only explain a portion of the period of the delay.[29] If there are sound reasons that explain the delay, then it may potentially be justifiable and be capable of being overlooked by the reviewing court. However, as Theron J found in *Asla (CC)*:

'…where there is no explanation for the delay, the delay will necessarily be unreasonable.'[30]

[45] Has there been a delay in this matter? The respondent denies that there has been, for it seems to assert that it acted with reasonable promptitude once it received the internal audit report. Accepting for a moment that the respondent only needed to act once the outcome of the internal audit was known to it, which is not the case in my view, on that version there still appears to have been an unexplained

---

[25] Ibid.

[26] *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 (SCA).

[27] *Khumalo and another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC).

[28] *Asla (CC)* para 48; see also *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC); *Department of Transport and others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC).

[29] *Asla (CC)* para 52.

[30] Ibid; see also *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* [2021] ZASCA 90; 2022 (5) SA 416 (SCA); [2021] 3 All SA 791 (SCA) para 29.

delay of some 186 days, being the period between the finalisation of the internal audit report and the launching of the self-review application.

[46] However, as was pointed out by Mr Wallis SC, who appears together with Mr Tucker for the appellant, the delay may be much longer than that. He drew attention to the previously mentioned affidavit deposed to by Mr Lawrence Mbonambi (Mr Mbonambi), a buyer employed by the respondent. This affidavit was delivered by the respondent together with the founding affidavit to establish its principal ground for seeking the review of the award of the tender, namely the alleged failure of the appellant to attend the compulsory briefing and to sign the attendance register. In this regard, Mr Mbonambi states in his affidavit that:

'5. On the bid in question I followed the normal procedure as stated above and in my initial statement. Upon screening the bid documents I learnt that one of the bidders did not appear on the Compulsory Briefing Session attendance register but their bid document was stamped, namely Nombela Investment CC.'

[47] The point now relied upon by the respondent in opposing this appeal, namely that the appellant did not attend the compulsory briefing and did not sign the attendance register, was, on the strength of Mr Mbonambi's affidavit, thus known to it immediately after the bid period closed. In *Asla (CC)* it was stated that:

'…the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken'.[31]

[48] From the affidavit of Mr Mbonambi, it is apparent, at the very least, that he was fully aware of the alleged non-attendance by the appellant's representatives and the non-signature of the attendance register immediately after the bid period ended.

[49] Can it be said that the respondent itself lacked the knowledge that Mr Mbonambi personally possessed? The answer to that question is in the negative. Mr Mbonambi was a functionary of the respondent tasked, on his own version, with screening the submitted bids. He was, thus, part of the bid assessment process. In

[31] *Asla (CC)* para 49.

Cape *Town City v Aurecon SA (Pty) Ltd,*[32] the Constitutional Court was faced with a similar argument and concluded thus:

'The distinction that the City attempts to draw between what is within its own knowledge and what is within the knowledge of its committees is superficial. It is common cause that the BEC and the BAC are committees mandated by the City for purposes of the tender-procurement process. These committees form part of an internal arrangement by the City. Accordingly, it may reasonably be expected that all information regarding the tender process which is within the knowledge of the BAC or BEC may be deemed to be within the City's knowledge. In my view that is a weak attempt by the City to deny knowledge of what it ought reasonably to have known.'

[50] It appears to me, therefore, that the point raised by Mr Wallis is well taken and that the delay is much longer than the unexplained period of 186 days between the finalisation of the internal audit and the bringing of the self-review application. It is in the region of 1 400 days, which is an exceptionally lengthy period of time.

[51] On the face of it, it therefore appears that there has been a delay. Significant periods of time passed before the respondent moved to bring its self-review application. The explanation for the delay, therefore, of necessity, would ordinarily move to the foreground and assume importance. However, as previously mentioned, the founding affidavit contained no explanation at all for the delay. Viewed charitably, there is the briefest of allusions to a statement that may be considered as being an attempt to explain the delay in the respondent's first replying affidavit. Mr Dlulane, having again disclosed that the facts that he mentions are not within his personal knowledge, states that the respondent received certain unsubstantiated allegations from undisclosed sources concerning the award of the tender to the appellant and instituted the internal audit on 6 October 2019 and the:

'… forensic investigation subsequently commenced its work and was completed on 15 March 2021 when the report marked annexure "A" became available. The applicant required time to digest the report whereafter this application followed.'

[32] *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) (*Aurecon*) para 39.

[52] That is the sum total of the respondent's explanation for the delay. With that flimsy offering, 1 428 days are brushed aside. The explanation, such as it is, is entirely unsatisfactory and offers no insight into the basis of the respondent's torpor. Why the internal audit itself took approximately two years to be finalised is simply not addressed.

[53] It is conceivable that the respondent chooses to act at a snail's pace, and this is how it always conducts itself. However, in *Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd and others*,[33] the court made the following observations when considering the conduct of a State Department:

'Whilst one must accept that the Department could have acted with more urgency than it did in unravelling the facts, given that it sought to review its own decision, sight should nevertheless not be lost of the fact that the bureaucratic machinery is notorious for moving slowly even though the exigencies of a particular case might require that matters be dealt with expeditiously. However, it must be emphasised that recognising this reality in no way seeks to excuse laxity. It is more to say that, notwithstanding the constitutional dictates of a responsive and accountable public administration, the reality is that public administration in our country has over time been allowed to slide to a quagmire of inefficiency. This is a state of affairs that is antithetical to the values underpinning our constitutional order that the citizenry holds dear.'

Sluggish conduct is therefore intolerable and is not to be accepted. Where it occurs, it must be explained.

[54] A consideration of all the affidavits delivered by the respondent reveals that no explanation of any merit is offered for any of the delays previously identified in this judgment. There are simply no facts advanced in the founding affidavit that explain why it has taken the respondent so long to seek a judicial imprimatur for its conclusion that the tender was unlawfully awarded to the appellant.

[55] It appears to be suggested that the respondent could not have acted before it received the internal audit report. However, the impugned decision was the

[33] *Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd and others* [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) para 85.

respondent's own decision, and it was taken for reasons of which it must have been aware. It follows that the reason for taking the impugned decision was thus always within its own knowledge, as admitted by Mr Mbonambi, and the respondent did not require the internal audit report to cause it to act.

[56] A similar argument was advanced in the SCA in *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality*[34] (before the matter progressed to the Constitutional Court). In referring to this matter, I am mindful of the fact that it dealt with a review brought in terms of PAJA, but I can see no reason why the logic of the judgment should not also apply to legality reviews.[35] In *Asla (SCA)*, Swain JA stated as follows:

'The contention of the respondent that the time period only commenced running once it became aware of the unlawful administrative action is untenable. The issue of whether knowledge of the reviewable irregularities in the decision sought to be reviewed was required before this period commenced running, was decided by this court in *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) ([2015] ZASCA 209) para 16, in the following terms:

> "The decision challenged by the City and the reasons therefor were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review. The plain wording of these provisions simply does not support the meaning ascribed to them by the court a quo, i.e., that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the

[34] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23; 2017 (6) SA 360 (SCA); [2017] 2 All SA 677 (SCA) (*Asla (SCA)*) para 7.
[35] See the obiter dictum by Theron J in *Asla (CC)* fn 36.

> appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions."'[36]

[57] Given the already mentioned view of Theron J in *Asla (CC)*,[37] with which I respectfully agree, that a failure to provide an explanation would render a delay unreasonable, it follows that in the absence of any explanation by the respondent for its delay, such delay must therefore be construed as being unreasonable.

[58] That, however, does not terminate the inquiry but instead results in the consideration of the second leg of the inquiry, namely whether the unreasonable delay should, nonetheless, still be overlooked by this court, for it has a discretion to do so. But for that discretion to be exercised, there must be a basis for it. Ordinarily, the basis for the exercise of that discretion would be found in the known facts and the explanation advanced by the party alleged to be responsible for the delay.[38] As already made clear in this judgment, there are no facts or explanations advanced by the respondent. Even the sprawl of time between the commissioning of the internal audit and its finalisation, a period of some 527 days, remains unexplained.

[59] In considering whether a reviewing court's discretion should be exercised in favour of the self-reviewing party, a flexible approach should be adopted that requires the evaluation of a number of factors:
(a) The potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision are obvious considerations. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may, however, in certain circumstances, be made more palatable by the court's power to grant a just and equitable remedy that is fair to all the parties.[39]
(b) The nature of the impugned decision must also be taken into consideration. This involves 'a consideration of the merits of the legal challenge against that

---

[36] *Asla (SCA)* para 7. *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA); [2016] 1 All SA 313 (SCA) para 16 was approved by the Constitutional Court in *Aurecon* paras 40-44.
[37] *Asla (CC)* para 52.
[38] Ibid para 53.
[39] Ibid para 54.

decision'.[40] In *South African National Roads Agency Ltd v Cape Town City*,[41] Navsa JA stated that the merits of the impugned decision are a critical factor in determining whether it is in the interests of justice to condone any delay found to exist. Such an inquiry would require an assessment 'of whether the non-compliance with statutory prescripts was egregious.'[42]

(c) The conduct of the party seeking the self-review is also a relevant consideration because, as was stated by Cameron J in *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*:[43]

'[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.' (Footnote omitted.)

I turn to consider each of these issues.

[60] The first point to be made is that the factual cancellation of the service agreement was not occasioned because of any perceived irregularity arising out of the award of the tender. As previously explained, there were other grounds, unrelated to the issues in this appeal, that caused the respondent to cancel the service agreement.

[61] A second point to consider is that up to the date of cancellation of the service agreement, all amounts due by the respondent to the appellant had been paid. As indicated by Mr de Wet, this is therefore not an instance where the respondent is seeking to avoid making payments to the appellant in respect of services already rendered, which, in itself, may occasion considerable prejudice to the party awaiting payment. The act of cancellation has severed the ongoing obligations between the parties. That having been accepted, it is equally so that this is not a situation where

---

[40] Ibid para 55.
[41] *South African National Roads Agency Ltd v Cape Town City* [2016] ZASCA 122; 2017 (1) SA 468 (SCA); [2016] 4 All SA 332 (SCA).
[42] Ibid para 81.
[43] *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) para 82.

the respondent alleges that it has paid for something that it never received. The issue of prejudice is accordingly a non sequitur.

[62] But what is reasonably evident from the facts is a desire by the respondent to avoid the consequences of the appellant's action wherein it claims the loss of future profits for the balance of the contract period arising out of the cancellation by it of the service agreement. An order in the terms granted by Radebe J would torpedo the appellant's action, which has already reached an advanced stage. That would seem to me to be prejudicial to the appellant and entirely beneficial to the respondent.

[63] Given the substantial delay in this matter and the tepid grounds advanced for it, it is difficult to escape the conclusion that the bringing of the review application is a deliberate attempt by the respondent to extricate itself from any consequences arising out of the appellant's pending action. In other words, it is a stratagem invoked to limit its liability and is not a true review of a repugnantly unlawful transaction. In *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and others*,[44] the court described the self-review application brought by Transnet in that matter as being 'cynical'. That description is not out of place in this matter.

[64] That brings me to the second issue, namely the nature of the decision and the degree to which there has been noncompliance with statutory precepts. When it is stripped to its basic element, the true point taken by the respondent is that the appellant's representatives did not sign the attendance register. Mr de Wet submitted in argument that the respondent could not know who attended the compulsory briefing and the only way it could know would be to peruse the attendance register. That can only mean that the respondent cannot state with any confidence who actually attended the compulsory briefing: it can only assume who attended by considering the attendance register.

[65] The bid conditions crafted and published by the respondent are before this court. They appear to be at odds with the terms of the advertisement that was published by the respondent. The advertisement stated, as previously mentioned,

[44] *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and others* [2024] ZASCA 12 para 57.

that failure to attend the compulsory briefing and failure to sign the attendance register would result in a bid being disregarded. The bid conditions, a far more substantial document than the advertisement, state the following:

'Compulsory meeting (if applicable)

Confirmation of attendance of compulsory inspection will be recorded on site. Non-attendance of compulsory site inspection/information/clarification meeting will invalidate your bid. Late entries will not be allowed. Bidder must be represented at the meeting by a person who is suitably qualified and experienced to comprehend the implications of the work.'

[66] The difference between the advertisement and the bid conditions is that the latter does not define how attendance should be recorded while the former requires a signature in the attendance register. The bid conditions are less specific and could, accordingly, be met, for example, by the respondent's employees themselves recording who attended the compulsory briefing. In other words, the bid conditions provide that attendance could be established without a signature.

[67] The appellant states that its representatives were in attendance and did sign the register but cannot explain why their signatures do not appear on the version of the attendance register put up by the respondent. That is passing strange. The appellant also states, however, that there were other ways of establishing that it did attend the compulsory briefing. It states that it was required by the respondent to sign two further registers, namely a register to enter the respondent's office park and a further register to enter the foyer of the respondent's building. Both of these registers are in the possession of the respondent. This was stated by the appellant in its answering affidavit. The respondent acknowledged that this was correct in its replying affidavit but made no attempt to put up these further registers in reply. That the appellant's representatives knew of these additional registers tends to suggest that they were, indeed, present at the compulsory briefing, as does the fact that the appellant has challenged the respondent to produce the additional registers. The respondent did not react to the challenge other than to acknowledge the existence of the additional registers.

[68] The failure by the respondent to disclose whether these registers had been signed by the appellant's representatives is to be deprecated. It further invites the conclusion that they were not put up because they would white-ant the only real point of substance raised by the respondent in seeking the self-review, for the other points taken by the respondent largely relate to events post the awarding of the tender to the appellant and relate primarily to the conduct of its own employees in administering the service agreement, or were not argued before us.[45] Reference to the other registers would not, in my view, offend the provisions of the bid conditions, which merely required the recording of attendance. The additional registers would do just that.

[69] The purpose of requiring attendance at the briefing was to ensure that all potential bidders fully understood what was required of them. That much is plain from the wording of the bid conditions referred to above. The point was not to simply acquire a disparate collection of signatures in a register. While it is so that the party issuing a tender is entitled to stipulate the peremptory components of a valid tender bid,[46] form cannot be elevated above substance. The respondent cannot dispute that the appellant's representatives were present at the compulsory briefing. The best proof of attendance would undoubtedly be demonstrated by signatures in the attendance register, as the respondent contends. The respondent infers that the appellant did not have representatives at the briefing because no signatures appear in the attendance register but it has not put up an affidavit of any of its employees that disputes the appellant's assertion that its representatives were there. Mr Dlulane was not at the compulsory briefing and cannot add any weight to the respondent's argument.

[70] At first blush, it would appear that there is an intractable dispute of fact. In truth there is not. It is a fact that the appellant's representatives' signatures are not in the attendance register. Of that there can be no dispute. There is simply an

---

[45] In this regard, the responsible official employed by the respondent, Mr Mnembe, was disciplined for his conduct in relation to the tender and was dismissed from the respondent's employment.
[46] *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) para 10.

assumption by the respondent that this means the appellant's representatives were not there. An assumption is not a fact.

[71] While the appellant has catered for a possible referral to oral evidence of this issue by way of a conditional proposed draft order, Mr Wallis, in argument, suggested a far more elegant, and simpler, resolution of the issue, namely the application of the well-known principle formulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[47] that where factual disputes arise in application proceedings, the application must be decided on the respondent's version. In this instance, the appellant was the respondent in the court a quo and thus the matter falls to be decided on its version.[48] I agree with Mr Wallis that this approach should have been adopted by the court a quo. Had that approach been applied in the court a quo, the self-review application would inevitably have failed.

[72] As regards its own conduct, the respondent's lethargy cannot be condoned. Had it truly believed that it had acted unconstitutionally in awarding the tender to the appellant, it would undoubtedly have acted with appropriate vigour and alacrity in placing the matter before the court. It did no such thing. Instead, it cancelled that which it now wants declared void and appears to have brought this application to evade the consequences of the act of cancellation.

Conclusion

[73] In *Department of Transport and others v Tasima (Pty) Ltd*,[49] the Constitutional Court reaffirmed the principle that undue delay should not be tolerated because:

'Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.' (Footnote omitted.)

---

[47] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[48] *Microsure (Pty) Ltd and others v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (N) para 4.
[49] *Department of Transport and others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) para 160.

[74] In *Altech Radio Holdings (Pty) Ltd and others v Tshwane City*,[50] Ponnan JA remarked as follows:

'Search hard enough in public procurement cases such as this, and one will surely find compliance failures along the way. There will seldom be a public procurement process entirely without flaw. But, perfection is not demanded and not every flaw is fatal. Nor does every flaw in a tender process amount to an irregularity, much less a material irregularity. Public contracts do not fall to be invalidated for immaterial or inconsequential irregularities. Indeed, as it has been put, "(n)ot every slip in the administration of tenders is necessarily to be visited with judicial sanction".'

[75] In this matter, there has been a delay in excess of 1 400 days. No explanation has been provided for this. The failure to sign the attendance register is not in my view particularly egregious, particularly when the respondent has in its possession other registers which could establish the presence of the appellant's representatives at the compulsory briefing but has consciously chosen not to disclose what is in those additional registers. The challenge of the respondent to its own decision is uninspiring and inadequate. In my view, no case has been made out for this court to exercise its discretion to overlook the delay, and the appeal should therefore succeed.

Costs

[76] The matter was not initially particularly complex but became more complex by virtue of the steps that had to be taken as a consequence of the order of the court a quo. It clearly is of importance to both parties, who both saw it fit to instruct senior counsel to represent them. Bearing this in mind, the employment of two counsel (where that occurred) was justified.

[77] In a proposed draft order presented to this court after argument had occurred, the appellant suggested that in the event of it being successful on appeal, it be awarded the costs in the court a quo to be taxed on scale C. That is an invitation that must be declined because the amendment to Uniform rules 67A and 69, being the applicable Uniform rules, came into effect on 12 April 2024 and the proceedings in

[50] *Altech Radio Holdings (Pty) Ltd and others v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 54.

the court a quo were finalised on 2 December 2022, the leave to appeal before Radebe J was finalised on 12 July 2023 and the application for leave to appeal to the Supreme Court of Appeal was finalised on 6 October 2023, all of those dates falling before the amendment took effect. The appeal before us, obviously, occurred after the effective date of the amendment and this will be reflected in the order granted.

The order

[78] I would accordingly propose the following order:

1. The appeal is allowed, and the order granted by Radebe J on 2 December 2022 is set aside and replaced with the following order:

'The application is dismissed with costs.'

2. The respondent shall pay the appellant's costs, including the costs consequent upon the employment of two counsel (where so employed):

(a) In the application for leave to appeal before Radebe J on 12 July 2023;

(b) In the application for leave to appeal to the Supreme Court of Appeal; and

(c) In the appeal before the full court, with the costs on appeal before the full court to be taxed on scale C.

MOSSOP J

I agree:

POYO DLWATI JP

I agree:

SIBISI AJ

APPEARANCES

Counsel for the appellant:	Mr P J Wallis SC and Mr M C Tucker
Instructed by:	Norton Rose Fulbright South Africa Incorporated 3 Pencarrow Crescent Pencarrow Park La Lucia Ridge Durban
	Locally represented by: Govindasamy Ndzingi and Govender 211 Burger Street Pietermaritzburg
Counsel for the respondent:	Mr A De Wet SC
Instructed by:	Austin Smith Attorneys 1 Highgate Drive 1 George MacFarlane Lane Wembley Pietermaritzburg