



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION
MBOMBELA (MAIN SEAT)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
25/07/2025	_____
DATE	SIGNATURE

CASE NUMBER 5503/2023

PREMIER OF MPUMALANGA

APPLICANT

And

CAJV (PTY) LTD

FIRST RESPONDENT

THE IFIRM TRADING & PROJECTS (PTY) LTD

SECOND RESPONDENT

REVIEW JUDGMENT

SHAI AJ

Introduction

- [1] This is an opposed self-review application. It is worth noting from the outset that the second respondent did not appear to argue its case.
- [2] the application is brought on the basis of an illegality.
- [3] There is also an unopposed condonation application for the filing of a further affidavit by the applicant.

Background

- [4] A tender was advertised in October 2014 under reference PRE40/14/MP. This was in response to audit findings in the 203/14 financial year to the effect that there was an increase in the number of provincial governments with a lack of consequence management.
- [5] It should be stated from the outset that this tender required multi-disciplinary expertise including, but not limited to, litigation services. In their submitted tender, first respondent listed ENS as their litigation subcontractor. ENS was later substituted with Adendorff Theron Inc.
- [6] The respondents were among those who submitted their bids and consequently shortlisted. Shortlisted bidders made presentations to the Office of the Premier (OTP) on 8 December 2014. In this presentation the first respondent presented on a case management system (CiiMS). This system was provided through Online Intelligence (Pty) Ltd. This is the system which was selected by the OTP.
- [7] A letter of appointment was sent to the first respondent on 5 January 2015 and same was accepted on 6 January 2015 by the first respondent. A Service

Level Agreement (SLA) was concluded between the applicant and the first respondent on 13 March 2015.

- [8] At this stage, ENS had withdrawn as first respondent's sub-contractor. The first respondent enlisted the services of Adendorff Theron Inc ("Adendorff"), a firm of attorneys. Adendorff remained the litigation subcontractor to the first respondent throughout the subsistence of the tender. In rendering their services, Adendorff would first obtain a power of attorney from the DG or HOD of the relevant department. Payments for legal services rendered would then be made to the first respondent, who in turn would pay Adendorff.
- [9] The first respondent developed a system that would enable the province to conduct data analysis on cases referred to the provincial departments.
- [10] Problems started in 2016/17 when the Auditor General of South Africa (AGSA) advised that it did not make sense that the OTP were paying for a system they would not own. AGSA wanted to list the CiiMS software as an asset of the OTP.
- [11] Negotiations for the acquisition of the software started during which period OTP enlisted the services of RUBO, its software advisor. The idea was to determine a price for the acquisition of the CiiMS software.
- [12] On 30 November 2016 an agreement was reached on transfer of ownership and an amount was fixed for the transfer.
- [13] The tender contract was extended on 24 November 2017. The period for the extension was not stated but it would seem that the parties agreed on a two-year extension period.

- [14] A new Premier came to office on 20 march 2018.
- [15] It was on April 2018 that OTP requested funding from Provincial Treasury to deal with the upgrade of CiiMS, based on the recommendations from RUBO. On 18 April 2018 an addendum was signed in effect to accommodate the costing structure of the upgrade, maintenance and support of the CiiMS for a future period of 3 years. Additional funding for this was made available by Provincial Treasury.
- [16] In October 2018 Bid PRE/O40/18/MP was advertised. It is important to note that the following note was inserted in the advertisement:
- '1. This bid is an extension of the 040/14 project
 2. All service providers appointed will work on the CiiMS system
 3. The current service provider for the system [CAJV] will assist new service providers on the system"
- [17] On 18 October 2018 Acting Director General Mohlasedi attempted to unilaterally amend the terms of the SLA to a month-to month basis. This is confusing as the contract had just been extended for a period of 3 years. After resistance from the first respondent, Mohlasedi signed iFirm's extension letter under the 2014 Tender.
- [18] An appointment letter for the 2018 Tender was signed on 9 May 2019. This was for 3 years until 8 May 2022. No SLA was signed for this tender but first respondent continued to render services.

[19] An advice was sought from State Law Advisors on 29 April 2021 regarding the 040/14/MP and 040/18 MP bids.

[20] In June 2022 OTP sought advice from Adv Khoza SC on whether OTP could legally terminate the contract between applicant and first respondent. The advice was given in a form of an opinion on 29 November 2022. In that opinion, it was stated that there was a presidential proclamation to the effect that the contract be terminated and certain funds be recovered from the first respondent. As it will be shown hereunder, the funds related to the acquisition of the system.

[21] It was after this that Adendorff started withdrawing from litigation matters.

Issues

[22] The issues for determination are;

22.1 Whether the delay in filing the self-review should be condoned;

22.2 Whether the tender award should be reviewed and set aside.

22.3 If reviewed and set aside, what should happen to the services rendered by the first respondent with regard to payments.

22.4 If reviewed and set aside, what should happen to the acquired system and the monies paid by the applicant for its acquisition.

Condonation

- [23] Where there is a delay in bringing a self-review, organs of state are enjoined to explain their delay¹. There are no prescribed periods within which a self-review application should be brought. The only yardstick is that it should be brought without undue delay.
- [24] It was held by the Constitutional Court that an organ of state reviewing its own decision must be taken as knowing of the decision and the reasons for it when the organ of state takes the decision².
- [25] The question as to whether a delay is unreasonable is “a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter”³. This ‘involves a “factual, multi-factor and context-sensitive” enquiry in which a range of factors - the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits - are all considered and weighed before a discretion is exercised one way or another’⁴
- [26] In casu, the applicant initiated the self-review after a legal opinion was sought and given on the legality of the contracts.
- [27] I, after considering the issues involved, find that this is a matter wherein condonation for the delay should be granted and it is thus granted.

Evaluation

¹ See *Golden Core Trade and Invest (PTY) Ltd v Merafong City Local Municipality and Another* (338/2022)[2023] ZASCA 126; [2023] 4 All SA 589 (SCA) (29 September 2023)

² *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA)

³ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC), paragraph 48

⁴ *Valour IT v Premier, North West Province and Others* 2021 (1) SA 42 (SCA) para 30

[28] This is a self-review application. It is trite that this is allowed where there is an illegality.

[29] The contracts have run their course and all parties have performed under the contracts. The only outstanding issue is payment of the amounts due to the respondents.

[30] It should be stated from the outset that the tender was designed by the applicant after their internal need analysis. An outsider would have expected the applicant to have complied with its prescripts before going out on tender. The respondents were responding to the advertised tender. It is worth noting that no single entity could have complied with the contractual terms without entering into a joint venture' or enlisting the services of third parties. I fail to understand how an organ of state could have designed a tender/contract that invited other service providers to contract through a back door. For instance, a firm of attorneys was contracted to render services without submitting a tender for the rendering of legal services.

[31] The terms of reference for the tender were vague and this later led to the first respondent designing specifications of the tender, without an invitation for competitive tenders.

[32] The multi-disciplinary nature of the tender invite led the first respondent in particular to enlist the services of Adendorff Theron Inc, a firm of attorneys, to assist in fulfilling the first respondent's duty to render legal services under the contract. It is not in dispute that these attorneys approached each individual department and entered into contract with them before rendering their legal services. The rendering of such legal services benefited the applicant.

[33] However, what is wrong in the arrangement between the first respondent and the attorneys is the practice of the first respondent invoicing for more than what the attorneys are charging, and remitting the balance to the attorneys. This could be interpreted as attorneys sharing fees with non-legal practitioners. This is what is prohibited by the Legal Practice Act.

[34] I however, cannot find that the attorneys should not be paid for rendered legal services. Payments of rendered legal services should, however, be limited to invoices or bills provided by the attorney, not the marked-up amounts billed by the first respondent.

[35] I cannot find any wrongdoing on the part of the respondents which warrants their being penalised in anyway. They were, on the facts before court, not complicit in any of the activities that led to the design and award of the tender. They diligently delivered in accordance with the contractual terms. I, therefore, see no reason why they should forfeit all payments related to the faithfully rendered services.

[36] This is a case where there should be an exception to the notion that a party cannot benefit from an impugned contract. The respondents are innocent and the applicant has benefited from the services rendered by the respondents. The services rendered are linked to costs expended by the respondents. It would be unfair and unjust to order that all payments be forfeited.

[37] Organs of state should not be encouraged to, and cannot, avoid their contractual obligations.

Acquisition of the system

[38] The decision to acquire the system from the first respondent without going out on an open tender was irregular and amounted to an illegality as it went against procurement prescripts. Once a need for such acquisition was determined, the first respondent should have invited other entities to submit bids. This was not done. However, the acquisition was finalised and amounts determined as to how much the first respondent should be paid. The first respondent ran the risk of paying an amount that could have been higher than market-related values. It is for this reason that the services of an independent body or person should be enlisted to determine a market-related value.

[39] In the event of there having been an over-payment, the first respondent should pay back the difference to the applicant. Where it is found that there was an underpayment, the applicant should pay the difference to the first respondent.

[40] The independent body or person mentioned in 37 above should also make a determination on all amounts to be paid for rendered services.

[41] I, due to cumulative effect of what has been stated above, see no reason why the appointment of the first respondent to provide CiiMS under procurement processes PRE/040/14/MP and PRE/040/18/MP should not be reviewed and set aside. This consequently applies to any addendum, any service level agreement and extension related to this procurement process. The same fate befalls the appointment of the second respondent under the same procurement processes.

Costs

[42] It is trite that costs follow the results. However, in this self-review matter, the facts are such that there should be a deviation from this mantra.

[43] It could not be expected of the respondents not to have opposed the application as the relief sought in the notice of motion would have adversely affected their interests in the contracts. There is no other way in which they could put their side of the story to the court without opposing the application.

[44] It is the conduct of the functionaries of the applicant which brought about the illegality complained of. I see no reason why it should be the respondents who are penalised for the conduct of these functionaries, by ordering costs against them.

[45] I, therefore, find that it is the applicant that should pay the costs herein.

Conclusion

[46] Consequently, the following order is made:

46.1 The following decisions are declared unlawful and constitutionally invalid:

46.1.1 The decision to permit the first respondent to render legal services under procurement process PRE/040/14/MP;

46.1.2 The appointment of the first respondent to provide the Case Information and Investigation Management System (CiiMS) under procurement process PRE/040/14/MP, and the payment of invoice 100425 for the customisation of CiiMS;

46.1.3 The conclusion of the service level agreement with the first respondent in terms of the PRE/040/14/MP procurement process;

46.1.4 The extension of the first respondent's service level agreement, set out in a letter dated 24 November 2017;

- 46.1.5 The conclusion of a first addendum to the first respondent's service level agreement, in terms of which the Provincial Government took ownership of, and entered into, a perpetual licence agreement over CiiMS Mpumalanga version 6.0 RC43.346.11285, and in terms whereof the first respondent rendered services related to this CIIMS version.
- 46.1.6 The conclusion of a second addendum to the first respondent's service level agreement, in terms of which the Provincial Government took ownership of, and entered into, a perpetual licence agreement over CiiMS Mpumalanga version 6.7.2, and in terms whereof the first respondent rendered services related to this CIIMS version.
- 46.1.7 The appointment of the first respondent to render legal services under procurement process PRE/040/18/MP;
- 46.1.8 The appointment of the first respondent to render legal services under procurement process PRE/040/14/MP;
- 46.1.9 The service level agreement concluded with the second respondent pursuant to its appointment in terms of PRE/040/14/MP;
- 46.1.10 The extension of the second respondent's service level agreement;
- 46.1.11 The appointment of the second respondent to render legal services under procurement process PRE/040/18/MP.
- 46.2 The following are hereby reviewed and set aside:
- 46.2.1 The decision to permit the first respondent to render legal services under procurement process PRE/040/14/MP;

- 46.2.2 The appointment of the first respondent to provide the Case Information and Investigation Management System (CiiMS) under procurement process PRE/040/14/MP, and the payment of invoice 100425 for the customisation of CiiMS;
- 46.2.3 The conclusion of the service level agreement with the first respondent in terms of the PRE/040/14/MP procurement process;
- 46.2.4 The extension of the first respondent's service level agreement, set out in a letter dated 24 November 2017;
- 46.2.5 The conclusion of a first addendum to the first respondent's service level agreement, in terms of which the Provincial Government took ownership of, and entered into, a perpetual licence agreement over CiiMS Mpumalanga version 6.0 RC43.346.11285, and in terms whereof the first respondent rendered services related to this CIIMS version.
- 46.2.6 The conclusion of a second addendum to the first respondent's service level agreement, in terms of which the Provincial Government took ownership of, and entered into, a perpetual licence agreement over CiiMS Mpumalanga version 6.7.2, and in terms whereof the first respondent rendered services related to this CIIMS version.
- 46.2.7 The appointment of the first respondent to render legal services under procurement process PRE/040/18/MP;
- 46.2.8 The appointment of the first respondent to render legal services under procurement process PRE/040/14/MP;

46.2.9 The service level agreement concluded with the second respondent pursuant to its appointment in terms of PRE/040/14/MP;

46.2.10 the extension of the second respondent's service level agreement;

46.2.11 The appointment of the second respondent to render legal services under procurement process PRE/040/18/MP.

46.3 The following just and equitable relief is granted:

46.3.1 The applicant is to pay for all reasonable services rendered, including legal services in accordance with the attorneys' bills;

46.3.2 The applicant is directed to approach the independent Regulatory Board of Auditors in order to appoint a suitably qualified auditor, to prepare a report to this Court within 90 days from the date of order, indicating the profits earned by the First Respondent and the basis thereof, if any, following from:

46.3.2.1 the development of a customised version of CiiMS-in terms of which the First Respondent rendered and was paid for IN100425;

46.3.2.2 Acquiring ownership of, and entering into, a perpetual licence agreement over CiiMS Mpumalanga version 6.0 RC 43.346.11285, together with all amounts paid to the first respondent in terms of the first addendum;

46.3.2.3 Acquiring ownership of, and entering into, a perpetual licence agreement over CiiMS Mpumalanga version 6.7.2, together with all amounts paid to the first respondent in terms of the first addendum;

46.3.2.4 Any other services rendered, excluding 46.3.2.1 to 46.3.2.3.

- 46.4 The report mentioned in 18.3 above is to be provided to the applicant and first respondent, and filed in Court.
- 46.5 Upon receipt of the report, the applicant and first respondent are permitted to, within 30 days, file a further affidavit setting any representations on the findings of the report, for the consideration of the court, in order for a just and equitable finding to be made on the repayments of profits by the first respondent.
- 47.6 The person appointed in terms of 46.3 above may, through the applicant, or of their own accord, approach the Court for any ancillary relief in order to carry out their obligations.
- 46.7 The applicant is to file monthly updates on the manner in which this order is being carried out, until such time as finality on the matter has been reached.
- 46.8 The applicant's unopposed application to adduce a further affidavit is granted, and no costs order is made in this regard.
- 46.9 The applicant shall pay the costs of the main application, including the costs of two Counsel, on Scale C.



SHAI AJ

DATE OF HEARING: : 4-5 MARCH 2025

DATE OF JUDGMENT : 25 JULY 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be **11h00** on **25 JULY 2025**

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