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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2023-027220

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

DATE: 25 July 2025

In the matter between:

JOHANNESBURG SOCIAL HOUSING COMPANY LTD Applicant

And

QUICKPROP SYSTEMS PTY LTD AND OTHERS First Respondent

SAMUKELO MATTHEW MFANELO NKOSI Second Respondent

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION OF SOUTH AFRICA** Third Respondent

JUDGMENT

Noko J

Introduction

[1] The applicant launched an application in terms of section 1(c) of the Constitution to review and set aside the award of the bid to the first respondent. The applicant seeks a further order directing the first and second respondents jointly and severally to pay the applicant an amount of R6 735 311.56 paid by the applicant in settlement of the invoices issued by the first respondent.

Parties

[2] The applicant is Johannesburg Social Housing Company Limited (“*JOSHCO*”), a juristic entity incorporated in terms of the company laws of the Republic of South Africa, with principal place of administration at 6[...] J[...] Street, Braamfontein, Johannesburg, Gauteng Province.

[3] The first respondent is Quickprop Systems (Pty) Ltd, a juristic entity incorporated in terms of the company laws of the Republic of South Africa, with principal place of business at 1[...] W[...] Street, Sandown, Sandton, Gauteng Province.

[4] The Second Respondent is Samukelo Matthew Mfanelo Nkosi, an adult person and a director of the first respondent carrying out his duties at 1[...] W[...] Street, Sandown, Sandton, Gauteng Province.

[5] The Third Respondent is Companies & Intellectual Property Commission of South Africa (“*CIPC*”), with its administration address at 7[...] M[...] Street, Sunnyside, Pretoria, Gauteng Province. The applicant seeks no order against the third respondent, and the latter is not participating in this *lis*.

Background

[6] The applicant invited bids on 23 November 2020 to develop and provide a property management system and mobile application solution (“project”) for 60

months. The first respondent's bid was successful, and the bid was awarded on 12 April 2021. The applicant and first respondent concluded a service level agreement on 17 May 2021.

[7] The agreed total costs of the project, including VAT, was R12 815 140.00. The first respondent commenced its work and submitted several invoices from 24 June 2021. The applicant settled some of the invoices to the tune of R6 735 311.56¹ and stopped further payments allegedly as the first respondent breached the service level agreement ("agreement") as it failed to deliver per the agreement.

[8] The applicant then investigated the award of the tender to the first respondent and established that the first respondent had made misrepresentations and falsehoods in its bid, and then launched these proceedings seeking to review and set aside the decision taken to award the tender to the first respondent. The applicant is further seeking, as a just and equitable remedy, an order to restore the status *quo ante* and the first respondent to refund the monies paid to the first respondent. As stated above, the applicant seeks an order that the second respondent be jointly and severally liable with the first respondent in terms of section 20(9) of the Companies Act² to pay the refund. Both first and second respondents are opposing the *lis* and are referred to jointly as respondents.

Points in limine

Condonation

[9] The respondents contend that the tender was awarded on 12 April 2021, and the applicant, armed with all the necessary information, decided only after two years to launch these proceedings. Further that the applicant has failed to apply for condonation for the late challenge, and to this end, the application should be dismissed. The respondents acknowledged that the court is endowed with the discretion to overlook the delay, but contend that since the applicant has failed to lay

¹ As will be shown below the first respondent contends that some invoices were not settled.

² Act 71 of 2008.

any factual basis for the late launching of the proceedings, the court is precluded from exercising any discretion to overlook the lateness thereof.

[10] In retort, the applicant referred to *Gijima*³ where the court held that in matters similar to this *lis*, the court may not be bound to have regard to the condonation application and proceed to adjudicate the merits of the application before it. In any event, the respondents have failed to allege and detail the nature of the prejudice they would suffer if the condonation were refused.

[11] The applicant further contended that the respondent has served its answering affidavit a month late without launching an application for the condonation of the late filing of the affidavit. Ordinarily, without an application for condonation, the said answering affidavit would not have been considered together with issues raised therein, including the respondents' point *in limine* of the applicant's failure to apply for condonation.

[12] I had regard to the judgment referred by the applicant's counsel and noted that SITA contended in *Gijima* that if the court is approached based on the principle of legality... *no explanation for the delay was needed*.⁴ That notwithstanding, the court held that the applicant had a duty to ensure that such a challenge is launched within a reasonable time, and the court has the discretion to overlook the delay. In *Gijima*, the delay was over 22 months, and since there was no explanation advanced the discretion could not be exercised in a vacuum, and the same could therefore not be granted. In other instances, the delay may be longer but condonable, as was stated in *Swifambo Rail Leasing*,⁵ that in view of the fact that the extent of the malfeasance was concealed by the Board of PRASA, the delay of three years was overlooked. The court also considered the interest of justice and public interest in overlooking the delay. It was also held in *Simeka*,⁶ that, due to the enormity of the

³ *State Information Technology Agency SOC Limited and Others v Gijima Holdings (Pty) Ltd* (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017).

⁴ *Gijima* at para [13].

⁵ *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* 2020 (1) SA 76 (SCA) (Swifambo).

⁶ *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* (610/2021) [2023] ZASCA 98 [2023] 3 All SA 323 (SCA) (14 June 2023).

task and preparation, and drafting of the papers, which was time-consuming, the delay of 29 months was overlooked.

[1] The court may, although there is an unreasonable delay, still declare, in terms of section 172(1)(a) of the Constitution, that the state's conduct is unlawful or find the conduct inconsistent with the Constitution and invalid. This may then come in handy in favour of the state where the explanation for the delay is not reasonable but reprehensible.

[13] I had regard to the conduct of the parties, the nature of the matters I am seized with, and the failure of the parties to indicate when the application should have been launched, except to state that the tender was awarded on 12 April 2021. It is noted, however, that the last payment made was in October 2022, and the proceedings were launched five months⁷ later on 23 March 2023. It is to be noted that where tenders are awarded through unquestionable means, parties from both sides would go the extra mile to conceal infractions which led to the award of the tender, and to this end, being strict with timelines may unduly benefit parties from illegal activities on the basis that the challenge was not launched urgently.

Authority

[14] The respondents contend that the authority of the deponent was brought into question and has not been properly dealt with by the applicant. At some stage, the deponent was appointed as the COO, though not having first been appointed as a director of the company.

[15] The applicant had, in retort, stated that the respondents seem to confuse the question of authority as they served Rule 7(2) notice. The authority in question should refer to the applicant as a party to a civil suit and not necessarily an individual who deposed to an affidavit in support of the application underpinning the launch of the proceedings.

⁷ It is noted that PAJA requires launching of reviews within a period of 6 months.

[16] It is trite that, as it was previously held that it is unlikely for a firm of attorneys to launch the legal proceedings on behalf of a party without proper authority, and the court should therefore be loath to readily uphold the challenge under those circumstances. The applicant has furnished the respondents with the resolutions to substantiate their position, and despite some shortcomings, I am satisfied that the attorneys have the necessary mandate to prosecute this application. To this end, I find the challenge to be unsustainable.

Mootness

[17] The respondents argued that since the agreement has been terminated, reviewing and setting aside the award has no practical effect. Though it is noted, respondents contended that the Constitutional Court stated that mootness is not a bar and the Court retains discretion to hear the matter if it is in the interest of justice to do so. In retort, it was brought to light that where the public purse is at risk, it is often in the interest of justice that finality be sought where there is malfeasance.

[18] Ordinarily, the case becomes moot or academic when the case itself no longer has a practical effect or affects the interest of the parties⁸ and in such an instance, the courts are reluctant to exert their resources to adjudicate over such cases. It was stated by the Supreme Court of Appeal in *Solidariteit*⁹ that

“The general principle is that a matter is moot when a court’s judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain from making rulings on such matters, as the court’s decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court’s purpose is to adjudicate existing legal

⁸ *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC). See also *Minister of Tourism v AfriForum NPC* 2023 ZACC 7 CC at para 23, where the Constitutional Court stated that ‘A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court’s decision or which would be resolved by a court’s decision. A case is also moot when a court’s decision would be of academic interest only.’

⁹ *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* [2023] ZASCA 35 (31 March 2023). Footnote not added.

disputes and its scarce resources should not be wasted away on abstract questions of law. In *President of the Republic of South Africa v Democratic Alliance*, the Constitutional Court cautioned that ‘courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now’.¹⁰

[19] Notwithstanding what is referred to above, mootness cannot be a bar for a court to hear a case. In this regard, it was stated in *Legal Aid South Africa*¹¹ that: “Mootness is no bar to deciding an appeal if it is in the interest of justice to do so. As this Court said in *Van Wyk*, relevant considerations are whether the order that the Court may make will have any practical effect either on the parties or on others, whether it is in the public interest for the court to exercise its discretion to resolve the issues and whether the decision will benefit the larger public or achieve legal certainty.”¹² Neither of the parties in this *lis* serving before me has advanced this argument.

[20] I had regard to the contentions advanced by both parties and the nature of issues served before me and conclude that, despite the alleged mootness, the interest of justice warrants finality in this matter, which relates to the public purse, to which the general public would appreciate the adjudication of the *lis* to finality.

Hearsay evidence.

[21] The respondents contend that the applicant sought the court to accept hearsay evidence without laying a proper factual foundation for the court to assess that the evidence so tendered falls within the province of the statutory regime as contemplated in section 3 of the Law of Evidence Amendment Act.¹³ In addition, the argument continued, the decision reviewed is based on the decision of both BEC and BAC, whose minutes were not availed to court to have regard thereto.

¹⁰ *Id* at para 12

¹¹ *Legal Aid South Africa v Magidiwana & Others* 2015(6) SA 494 (CC).see also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC).

¹² *Id* at para 58.

¹³ Act 45 of 1988.

[22] The facts which underpin the challenge relate to the documents which were submitted by the first respondent and not necessarily to a third party who should have furnished a confirmatory affidavit to support a specific version. The basis of the challenge is primarily based on the three letters of support and the competence or expertise of the first respondent and its lead soft engineer expert. The said documents were allegedly submitted as required in terms of the conditions of the bid. To this end, I find the point raised unsustainable.

Disputes of fact.

[23] The respondent contended that there are several disputes of fact which should have been foreseen, and the application should therefore be dismissed with costs. The first dispute relates to the invoices, the first invoice FA5.3, which was rescinded on 16 July 2021, and proof thereof was attached. This invoice has been referred to in the founding affidavit and appears to have been the invoice that triggered the animosity between the parties. The applicant has failed to clarify this aspect, and following *Plascon-Evans* principle, this would be decided in favour of the respondents.

[24] The respondent further referred to two invoices, identified as FA5.12 to FA5.16 were never paid and were replaced at the instance of Mr. Mathibe to be consolidated and lumped together. The applicant has failed to address this dispute in the replying affidavit. It does not appear, however, that the respondents dispute that the amount of R6million was paid.

[25] The respondent contended further that the applicant has the system, which was developed by the respondent and was deployed monthly by the first respondent. The said system was never brought to life. The contention has not been replied to by the applicant in the replying affidavit, and should therefore mean that the applicant is indeed in possession of the said system. The respondent stated further that the relationship went well until the respondent was forced to cede the contract to a third unknown party, and the said cession, the first respondent stated, was unlawful and unenforceable. It is not clear what ultimately transpired, and the first respondent

should accordingly be entitled to interdict the said cession and report associated malfeasance, if any, to the relevant authorities.

[26] The respondent lastly argued that the applicant frustrated the process by refusing to supply information on time, especially concerning the utilization of a third-party system (PANDA DOC) in the software, and the applicant took more than a month to respond. These breaches of the contract by the applicant made it impossible for the first respondent to perform its obligations. The conclusion concerning these points will be dealt with later in this judgment.

Merits

[27] The applicant contends that on a closer scrutiny of documents submitted by the first respondent, the allocation of the points was not above board. There was misrepresentation with regard to the experience of the first respondent, maintenance and support, and the lead expert's experience. In its illustration, the applicant provided the following schematic presentation of its case.

Criteria	Weight	Respondent's Score
Implementation Lead Experience	30.00	30.00
Bidder Accreditation	10.00	0.00
Bidder Experience	30.00	20.00
Maintenance and Support	30.00	20.00
TOTAL	100.00	70.00

[28] With regard to the bidder's experience, the allocation of points was based on the evidence presented by the first respondent to demonstrate that the relevant experience was acquired. In this regard, the applicant submitted three letters of support, which confirm that the first respondent has implemented a similar project. The first respondent was accordingly allocated 20 points based on the said letters. The applicant contends that, given the fact that the first respondent was incorporated only ten months before the bid, the said reference letters were considered suspicious. To this end, the respondents were challenged to prove the contrary.

[29] The respondents in retort contended that the letters annexed to the founding affidavit allegedly submitted in support as evidence of experience were not submitted by the first respondent and are unknown. Further that the application should be found wanting as it seeks to set aside the decision of the BAC but has failed to submit to the court the minutes of the said committee, which could have presented the basis for having awarded the tender despite the absence of the said reference letters. Though the respondent seems to concede that it was registered in 2019, but contends that it had 1 year and 10 months as of 23 November 2023.

[30] The applicant in reply contends that the allocation of 20 points was inaccurate if the respondent disputes that the letters of support were submitted by the first respondent. without such evidence, the allocation should have been zero. In the premises, the first respondent's bid would not have passed the functionality state and would have been disqualified.

[31] The applicant contended further that the first respondent's experience on maintenance and support was also backed up by the letters referred to above, for which an allocation of 20 points was made. Since the first respondent disavows knowledge of those letters, it follows that there was no evidence submitted to demonstrate that the first respondent had the requisite experience in maintenance and support. The first respondent would not have received any points, and the allocation would have been zero.

[32] The third point of challenge and allocation of points relates to the lead expert of the first respondent. The bid condition allocated points based on the years of experience of the lead expert of the bidder. First, the applicant argues that Mr PS Khanyile, who is alleged to have been a lead expert, was not at the time of submission of the bid in the employ of the first respondent. Secondly, the said lead expert only obtained his degree in December 2019 and could not have qualified as an expert, and his particulars are not listed on the roll of software engineers kept by the Engineering Council of South Africa. In the premises, the first respondent should not have claimed to have 8 years' experience to warrant the allocation of 20 points. To this end, the bid contained falsehoods.

[33] The respondents in retort submitted that there is no requirement that an expert should have been in the employ of a bidder or its director or shareholder. Further, that ordinarily such experts are not attached to a specific entity. Furthermore, the counsel for respondents continued, the applicant confuses experience with the qualifications and should have had regard to the experience of the expert and not necessarily his qualifications.

[34] In the premises, counsel argued, the award was vitiated by misrepresentation of fact and material error of fact and therefore unlawful and illegal, susceptible to review under section 1 (c) of the Constitution.

Remedy or relief

[35] Since the first respondent perpetrated the unlawful conduct alluded to above, the first respondent cannot be rewarded and should be denied the benefits from the contract awarded illegally, and as such, the *status quo ante* should be restored. In the same breath, the applicant should not benefit from the services provided under the tender awarded.

[36] The relief sought above is predicated on the argument that the applicant has not performed in terms of the contract, which still had more than three years remaining, and the maintenance component of the contract, forming a significant portion of the contract price, having not commenced. The applicant has in turn, tendered to return to the extent that it is possible.

[37] The first respondent contended that due to the passage of time, it would be unduly prejudicial for such an order to be made. In any event, the first respondent has executed the mandate as per the tender requirements, and the system so designed could be produced for a demonstration to the court if need be.

Section 20(9) of the Companies Act

[38] Counsel argued further that the second respondent was the brain behind the misrepresentation perpetrated as alluded to above, and to this end, his conduct makes him to be personally liable following the provisions of section 20 of the Companies Act.

[39] The second respondent, in turn, contended that the applicant has not properly formulated the claim following section 20(9) of the Companies Act and submitted that the same must be dismissed with costs.

Issues

[40] The issues for determination are (1) whether the applicant made out a case for the review and setting aside of the tender awarded to the respondent and (2) whether the second respondent should be held jointly and severally liable for the amount paid pursuant to the tainted tender awarded to the first respondent.

Legal principles and analysis.

[41] The respondent is aggrieved by the approach advanced by the applicant in pursuing its relief in terms of review rather than recourse to the provisions of the Service Level Agreement. This contention is not supported by any authority that where there are several options available to a party, such a party is restricted to one, such that a party may not be entitled to aim for a *bigger fish*. To this end, this contention is unsustainable.

[42] The contention that the applicant failed to avail the whole record is also unsustainable, as the applicant pinned its case on a specific aspect of the bids and the scoring. The question is whether the points were allocated properly or not. The respondent is unable to gainsay the submissions that the point allocated in respect of the bidders' experience was inaccurate, as the supporting letter could not have validly claimed that a ten-month company has provided a similar service over 5 years. The same argument also applies to the experience relating to the maintenance and support. The points awarded would have been based on

misinformation or misrepresentation, as alluded to by the applicant alternatively, based on lack of supporting references, as stated by the respondent. The contention that the minutes of the BEC or BAC may have explained non-compliance with the clear requirements would make the position worse for the respondent to have been awarded the bid, having been assessed by different evaluation criterion. What I find more confounding is the respondents' unwavering contention that it was not a requirement that the lead expert needs to be employed by the bidder. If this can be countenanced, then shelf or shell companies would be awarded tenders and only thereafter employ individuals to execute the work required. This will thwart the very object of the tender system, which requires that bidders with the appropriate expertise should be awarded the bid.

[43] The contention raised that there are disputes of fact is directly linked to the service level agreement, which is not the crux of the applicant's case. To the extent that such disputes relate to payment, they are sustainable and would impact the claim for the refund. Noting that the applicant has tendered to return whatever it may have benefited, it would be impossible to conclude that the total amount paid should be refunded. It is noted from the respondent that the system was delivered to the applicant, which was not categorically denied; it becomes important that proper valuation of the services and or solutions provided be conducted so that a precise amount refundable can be determined.

[44] To this end, the decision to award the tender is reviewed and declared constitutionally invalid and set aside. If not, I may find myself giving legal sanction to the very evil which section 217 of the Constitution and all other procurement-related prescripts seek to proscribe.

Just and equitable remedy.

[45] Where the contactor was not complicit or was unaware of the infractions, then the remedy would be impacted in contrast to instances where the service provider was not an active beneficiary of the infractions.

[46] The constitution provides in section 172(1)(a) that any conduct found to be inconsistent with it should be declared invalid and the contract falls to be declared as such. Section 172(1)(b), on the other hand, gives the court wide remedial powers. The court is empowered to make a just and equitable remedy. So wide is that power that it is bounded only by considerations of justice and equity. In other instances, the court may, notwithstanding findings of irregularity does not disgorge the benefit from the service provider or even unduly benefit the applicant.

[47] Regarding the claim for personal liability in respect of the second respondent, section 20(9) of the Companies Act read with section 73 provides relief to a party who suffered a loss as a result of a director having conducted himself or herself unconscionably. It is a statutory provision for the common law of piercing a corporate veil.¹⁴ It was held in *Bellini v Paulsen and Another* [2013] 2 All SA 26 (WCC) at para 19.23 that “This is a classic case of corporate identity being used as the *alter ego* of an individual, the first defendant. I find that this case demands piercing of the corporate veil. The second respondent fails to raise any good defence to resist the claim for the piercing of the corporate veil, except to state that the case has not been properly formulated for a claim in terms of section 20(9) of the Companies Act.

[48] The bare denial that the three letters of support, which, according to the applicant, were submitted in support of the bid to earn points, is insufficient. The second respondent could have at least submitted the reference that he submitted to get points for the bid to be successful. It is not denied that he populated and submitted the bid to the applicant. It can be safely concluded that he intentionally or recklessly submitted the false supporting documents for the first respondent to qualify for the bid. To this end, piercing the corporate veil is justifiable.

Conclusion

[49] I therefore conclude that the appointment of the respondent was not in accordance with the constitutional prescripts and or relevant regulatory framework. I

¹⁴ See *Kolisang v Alegrand General Dealers and Auctioneers and Another* (31301/2020) [2022] ZAGPJHB 431.

am enjoined by section 172(1)(a) of the Constitution to declare any law or conduct which is inconsistent with the Constitution invalid to the extent of its inconsistency.

[50] The dispute which was raised in respect of the invoices was not gainsaid by the applicant, and the claim relative thereto would, subject to the order below, be unsuccessful. Evidence presented before me constrains me to come to a finality as to what the respondent needs to pay back and what the applicant needs to restore to the respondent. It is therefore apt that this issue be referred to a third party to evaluate the work done and determine the amount to be refunded, if any.

Costs

[51] The costs would follow the results.

Order.

[52] In the circumstances, I make the following order:

1. The decision to award the bid under ref 002/2020 to the first respondent is declared unconstitutional, and is reviewed, and set aside.
2. It is declared that the second respondent is jointly and severally liable for any payment which may be due to the applicant by the first respondent.
3. The respondents are ordered to pay jointly and severally, the one paying the other being absolved, the costs on scale B, including costs of counsel.
4. In accordance compliance with the provisions of section 172(1)(b) I find that it would be just and equitable that a valuation of the work done by the respondent/s (if any) be made by a third party who may be appointed jointly by both the Applicant and the Respondents within 30 days failing which a person nominated by the Engineering Council of South Africa whose fees shall be jointly paid the parties.

M V Noko

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Date:

Hearing: 6 February 2025.

Judgment: 24 July 2025.

Appearances:

For the applicant: ME Manala, instructed by Mncedisi Ndlovu &
Sedumedi Attorneys

For the First and Second Respondents: HP Wessels, instructed by Van der Merwe
&
Associates.