REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

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

DATE: 28 August 2025 SIGNATURE...[redacted]

CASE NO: 4587 / 2018

7729 / 2019

In the matter between:

MEKAN ENGINEERING SERVICES (PTY) LTD Applicant / Respondent

(Registration Number: 2017/123673/07)

And

GATEWAY AIRPORT AUTHORITY (SOC) LTD Respondent / Applicant

(Registration Number : 1995/002792/06)

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **28 August 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] The two applications were heard simultaneously. The first is a monetary claim by Mekan Engineering Services (Pty) Ltd (Mekan) in which it prayed for an order to inter alia compel Gateway Airports Authority (SOC) Ltd (Gateway) to pay to it outstanding invoices or fees for services rendered. The second case is a review application brought as a collateral defence by Gateway seeking to set aside the contractual relationship with Mekan.

[2] Additionally to the order for payment of outstanding invoices, Mekan asked for rectification of its name in the contract; compensation for loss of profit; compensation for loss caused by retrenchment of employees; interest and costs.

[3] Gateway, on the other hand, wants Mekan's appointment as service provider declared *void ab initio*. Before it instituted the collateral defense, Gateway attempted through a letter to terminate the agreement. It had done so without launching a review application. This is what prompted Mekan to institute the application. It deemed Gateway's conduct to be repudiation of the agreement.

[4] Both applications are opposed. In respect of Mekan's application oral evidence was heard pursuant to a previous of Phatudi J,[1] as he was at the time, in which he ordered the parties to lead evidence on certain aspects of

[1] Issued on 03 February 2020.

the case. I will deal with the substance of the said order at a later stage of this judgment.

Summary of the facts

[5] Gateway, which is an entity of the State, after following a laborious tender process appointed Mekan as a service provider on 4 July 2016. The services that were to be rendered by Mekan were to *'provide facility management services'* at the Polokwane International Airport for a period of three (3) years. Mekan accepted the appointment. Upon the awarding of the tender, it was agreed that Mekan was to start rendering services to Gateway from 01 August 2016 to 31 July 2019. The total value of the contract was **R14,160,409.67** (ex VAT).

[6] According to the agreement, Mekan was to issue monthly invoices to Gateway. Once issued the invoices would become due, owing, and payable 30 days after presentation. In the course of the contract Mekan did issue invoices for services rendered to Gateway. The invoices included for work performed by subcontractors and for good delivered.

[7] The parties started to perform their respective obligations in accordance with the agreement from 6 July 2016. By then there was no written service level agreement between them. A written agreement was later produced by Mekan at the request of Gateway. Although the written agreement was produced, Gateway did not sign it. Mekan's enquiries with regard to when was it going to be provided with a signed copy from Gateway did not yield any positive results.

[8] The parties concluded a written service level agreement on 17 May 2017, at or near Polokwane. The salient terms and conditions of the written agreement are traversed below. For present purposes, it is common cause

between the parties that Gateway appointed Mekan to render services at the Airport. Also, that Mekan accepted its appointment as service provider. The services' are defined as the facilities management services as set out in the bid document.

[9] In terms of the agreement:

[9.1] services were to commence on the effective date of 16 August 2016. That was despite the date of the signing of the written agreement;

[9.2] the agreement was to run for a period of three years and was to continue until the expiry of the initial period ending on 15 August 2019;

[9.3] on that date, 15 August 2019, the agreement would terminate automatically without the need for Gateway to provide prior notification to Mekan;

[9.4] Gateway would pay Mekan fees set out in the bid document (plus vat).

[10] Without venturing too much into Gateway's state of affairs at the time, I have noted that one Mr. Mekgwe had attributed the challenges for the failure to sign the contract to administrative disorder within the institution. This was contained in at least one of the communications between him and Mekan that the administration state of the entity was in a state of disorder. That Gateway's internal administration and governance appeared to be in disarray, its representatives and their positions kept changing.

[11] There appears to have been an extensive "back-and-forth" between Gateway and the Department of Transport as well as the Provincial Treasury

in respect of Gateway basic administration of its internal affairs and of the project, and there was constant vague talk of "political interference" with the project. As a result of all those happenings, Gateway could not commit to settling Mekan's accounts or provide a signed agreement. Fortunately, I am not tasked with the issues of the relationship between Gateway and its shareholder(s).

[12] On 28 March 2018, almost two years since the contract started, Gateway addressed a letter to Mekan purporting to terminate the agreement. In that letter Gateway admitted having entered into facilities management agreement with Mekan, for a period of three years. Gateway's avowed reason for seeking to terminate the agreement was that the contract *'was awarded irregularly'*. Mekan contends that Gateway was not entitled to unilaterally terminate the agreement.

[13] As I indicated, this triggered the application by Mekan. Gateway opposed the application and the parties exchanged full pleadings in respect of Mekan's application. Subsequently, on 12 November 2019, Gateway instituted the review application. The application is predicated on the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000, PAJA). I will deal with the question of the applicability of the legislation at a late time below.

[14] On 03 February 2020 the application came before Court, and Phatudi J issued the order that I referred to above. The prayer for rectification was granted with costs. Then, the case was referred for oral evidence to be heard regarding quantification of the damages claimed by Mekan. The review application was consolidated to be heard at the same time with Mekan's case.

Gateway's review application [Case No: 7729/2019]

[15] I have earlier indicated that Gateway instituted a self-review application as a collateral defense for the purpose of having its decision to award the contract to Mekan declared irregular, and void *ab initio*. Gateway stated that the irregularity was discovered during the implementation of the contract. That, according to it was the reason why the tender had to be stopped in order to avoid the entity incurring irregular expenditure.

[16] A collateral challenge or defense was explained in the majority decision in *Merafong City Local Municipality v AngloGold Ashanti Limited*[2] thus:

> **"[92] A collateral challenge is raised to resist coercive compliance with a legal act or law. It is nothing else but an argument advanced in proceedings before a court, to the effect that the legal decision or law sought to be enforced is invalid and therefore the party against whom enforcement is pursued must not be ordered to comply with an invalid act or law."**

[17] The application was instituted based on the provisions of the Promotion of Administrative Justice Act, 1999. Reacting to this, Mekan raised a point in limine to the effect that Gateway is not entitled to rely on PAJA to review its own decision. Gateway was undeterred and it persisted with its reliance on the statute even when the application finally came before me.

[18] Since the advent of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[3] (Gijima) the law has become demystified. The Court held as follows in that case:

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2 Merafong City Local Municipality v AngloGold Ashanti Limited (CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (24 October 2016).

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

"[37] The Supreme Court of Appeal also makes the point that no sane applicant would submit to PAJA's definition of administrative action or to the strict procedural requirements of section 7 if he or she had a choice and that, as a result, PAJA would soon become redundant. We do not agree. The point of the matter is that no choice is available to an organ of state wanting to have its own decision reviewed; PAJA is simply not available to it. That is the conclusion we have been led to by an interpretation of, primarily, section 33 of the Constitution and, secondarily, PAJA itself. Thus there is no basis for suggesting that an organ of state seeking a review of its own decision may simply choose to avoid review under PAJA for reasons of expediency." [Emphasis added]

[19] Prior to reaching its conclusion on the applicability of PAJA the Court explained the provisions of section 6 of that statute thus:[4]

"[31] Section 6(1) of PAJA provides that "[a]ny person may institute proceedings in a court or tribunal for the judicial review of an administrative action". Section 6(2) then itemises the grounds on which a court or tribunal may undertake this review. When decreeing – in section 33(3) – that national legislation must be enacted to, *inter alia*, "provide for the review of administrative action", the reference to "administrative action" in this section must surely be a reference to the earlier "administrative action" referred to in section 33(1) and (2). The Constitution thus envisages that – in making provision for the review of administrative action – the national legislation must direct itself to the administrative action referred to in section 33(1) and (2). We have already concluded that the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)) and the right of everyone whose rights have been adversely affected to be given written reasons (section 33(2)) are enjoyed by private persons, not organs of state. Therefore, when section 33(3)(a) stipulates that national legislation which provides for the "review of administrative action" must be enacted, that can only be administrative action that relates to the rights enjoyed by private persons under section 33(1) and (2)." [Emphasis added]

[20] Gateway appears to have shot itself in the foot in its reliance on PAJA to institute the review application. Painfully, for Gateway, that is not the only problem. Mekan has raised an issue of unreasonable delay on the part of Gateway in deciding to institute the application. It will be recalled that the

[4] *Ibid*.

application was not Gateway's first attempt to bring an end to the contractual relationship with Mekan. It first attempted to terminate it through the letter dated 28 March 2018, which appears to have failed to yield the intended outcome. A period of more than a year and half passed before Gateway decided to approach the Court with the review application.

[21] A party may be non-suited from pursuing a claim based on unreasonable delay, more so when there is no explanation offered for the delay. In *German Shepherd Federation of South Africa v The Registrar of Animal Improvement: Department of Agriculture, Forestry and Fisheries and Others*[5] the Court held amongst others that:

> **"[22] In the present matter there has been an inordinate manifest delay, which the applicant has not explained satisfactorily. The applicant's conduct throughout has been to place its own interests above any other as is evident in the prompt service it demands from the officials in the office of the Registrar but it has been slow to pursue the appeal and review. ..."**

[22] In *Merafong City Local Municipality v AngloGold Ashanti Limited*[6] the Court cautioned about the potential calamitous effects of unreasonable delay in the institution of litigation of this nature. Where it is not properly explained, as in this case, a delay will likely result in a party being non-suited.[7] That much has become trite.

[23] More authoritatively, in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[8] the majority of the Court, per Theron J, found

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[5] German Shepherd Federation of South Africa v Registrar of Animal Improvement: Department of Agriculture, Forestry and Fisheries and Others (016084/2019) [2020] ZAGPJHC 121 (11 May 2020).

[6] Merafong City Local Municipality v AngloGold Ashanti Limited [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (Merafong) at para 73.

[7] Grootboom v National Prosecuting Authority and Another (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013).

[8] Buffalo City Metropolitan Municipality 2019 (4) SA 331 (CC).

the Municipality to have failed to adequately explain a delay of fourteen months for its review application. Despite that, and the fact that, being an organ of the state, the Municipality bore a higher obligation to respect the law[9] and to take the Court into its confidence by providing a full and frank explanation for its delay.

[24] Gateway's delay in instituting the application is there for anyone to observe. It is undeniable. It ought to at least have been explained. In *Tasima Department of Transport v Tasima (Pty) Ltd*[10] said the following:

> **"While a court 'should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power', it is equally a feature of the rule of law that undue delay should not be tolerated. 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."** [Emphasis added]

[25] There seems to be no point to considering the grounds relied upon for the review application. The authority in *Gijima* is already dated and one would have expected due diligence to have picked it up that reliance could not be based on PAJA when an organ of State or an entity like Gateway is pursuing a self-review application. Even if there was a legitimate review application, Gateway still faces an insurmountable difficulty which is compounded the unreasonable delay.

[26] The points in limine are upheld and the review application fails on any one of the two grounds. The costs occasioned by the failed review application shall

9 Section 195 of the Constitution.

10 Department of Transport v Tasima (Pty) Ltd [2016] ZACC 39; 2017 (2) SA 622(CC); 2017 (1) BCLR 1 (CC) (Tasima) at para 160.

follow the result. Now that the review application has been disposed off, I am left to determine the claims of Mekan for payment.

Mekan's claim in respect of unpaid invoices [Case No: 4587/2018]

[27] This is one of the claims that were referred to oral evidence, to quantify the amount of Gateway's indebtedness for fees and disbursements. Mekan, as applicant, relies on the agreement with Gateway for its claims. It bears the onus of proving the existence of the agreement as well as the material terms relied upon. This principle was espoused in Mobil Oil Southern Africa (PTY) Ltd V Mechin, where the following was held:

> **" …In the realm of a contract this means that a Plaintiff, relying on an agreement, bears the onus of alleging and establishing that it is binding and enforceable one and that what he claims is due.."**

[28] Following the decision that I made, dismissing the review application, the agreement remains alive and binding. To that extent, Mekan has discharged the onus resting on it. In any case, I was not called upon to determine the validity of the agreement but to deal with the calculations. In terms of the agreement Mekan was entitled to render services itself and to procure and conclude agreements with independent service providers. Once that is done, it would issue invoices to Gateway for the services rendered by itself and in respect of the services rendered by other independent service providers, as disbursements. This is so because Mekan was appointed and contracted to play the role of facilities management. It did not have to perform all the required services by itself.

[29] Mekan presented a statement of invoices that it issued to Gateway. The invoices were accepted and approved by the latter. Thus, apart from raising the collateral defense, Gateway has not contested the services nor the

invoices submitted to it. Not before litigation started and most notably, not in its pleadings. At the risk of repetition, Gateway's defense was merely that it was not obligated to pay for the services as the awarding of the tender was irregular.

[30] To explain the invoices, Mekan led the evidence of Mr Poka who was the person responsible for the implementation of the contract. He was the only witness who testified on its behalf. An impressive witness he was. He explained the two different bases in terms of which fees were charged to Gateway. He testified on how Mekan charged fees for services rendered by itself, and the disbursement invoices.

[31] During his oral testimony Mr. Poka first testified about how Mekan was awarded the contract. He explained the procedures that were followed when rendering services, and the reporting channels. He then confirmed and verified that the outstanding invoices amounted to **R5,352,255.58**, inclusive of value added tax. The sum comprised of the outstanding monthly fees that were invoiced by Mekan to the cumulative value of **R4,213,690.80** (incl. VAT) plus the outstanding disbursements, being amounts that were invoiced by service providers who were appointed by Mekan in terms of the agreement. The disbursements amounted to the sum of **R1,138,564.78** (incl. VAT).

[32] Mr Poka was cross-examined by Gateway's representative. He remained a willing witness who, with relative ease, was able to explain the invoices and the basis for each one of them. When pointed to mistakes, he was willing to accept them. For instance, Mr. Poka readily confirmed the arrangement that was agreed between the parties that Mekan would absorb disbursements below **R10,000** up to a total of **R60,000** on a monthly basis. While conceding the arrangement, he also verified the invoices that Mekan had absorbed

during the period July 2017 to March 2018. The value of the absorbed invoices amounted to **R498,502.12**, which Mekan has indicated that it does not seek to recover.

[33] When told about Gateway's contention that Mekan was required to absorb and pay all sub-contractor invoices below **R50,000** per month from its own resources, the witness rejected the notion. He indicated that it would not have made any business sense to do so, hence the parties agreed on a monthly capping of **R60,000-00**. Although unclear from a reading of its supplementary answering affidavit, it would seem that GAAL contends that each and every individual sub-contractor invoices below **R50,000** per month was to be paid by Mekan. His contention was that it would amount to commercial suicide to assume that responsibility, and that the contention did not make any business sense.

[34] As I have indicated, Mr Poka rejected the notion outrightly as it would in effect have implied that Mekan was responsible to pay for the airport maintenance from its own funds. To interpret the agreement in the manner proposed by Gateway is unbusinesslike[11] and it also does not make logical sense.

[35] During the hearing of oral evidence Gateway raised the contention that Mekan had overcharged it in respect of VAT. The purpose for the hearing of oral evidence was contained in the order of Phatudi J. It was to quantify Mekan's claim. The witness, Mr Poka, explained that the contractual amount of **R14,160, 409.57** did not include VAT. When VTA is added, the total value of the contract went up to **R16,142,866.26**. The fact that VAT should not come as a surprise, and for two reasons. First, because clause 5.2 of the

[11] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) at para 18.

agreement stated so and, second, because the demands of all VAT vendors to collect VAT for transactions of this nature.[12]

[36] There is another problem with the proposition advanced by Gateway. The contention offends the parol evidence rule. This is because the contention seeks to undermine contractual stipulation by introducing extrinsic evidence to the written agreement. That is not permissible.[13] This principle was re-affirmed in KPMG, that where a document that was "*intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning*".[14]

[36] Mr. Poka was shown the tender document during cross-examination, in terms of which the amount of **R14,160, 409.57** was held to be inclusive of VAT. He conceded and said that the addition of further VAT should not have occurred. Based on the concession Gateway argues that the amount claimed by Mekan should be reduced as it was charged for VAT on top of another. In this regard it included invoices that have already been paid with VAT. The value of the VAT component of the invoices that have already been paid was not pleaded and not evidence was led about it. Gateway paid all the invoices with VAT without objecting to it being charged on the invoices.

[37] It is so that the parties concluded the agreement after the tender was concluded. From the date of its conclusion and coming into effect it became the operative instrument. The agreement mentioned the above amount as excluding VAT and on which the tax was to be added. This could have been an oversight between the parties. However, I have not been asked to rectify

12 Section 7(1)(a) of the Value-Added Tax Act 89 of 1991.

13 Johnston v Leal 1980 (3) SA 927 (A).

14 KPMG Chartered Accountants (SA) v Securefin Ltd 2009 (4) SA 399 (SCA) 943B.

the contract and I accept the written instrument as the sole memorial of the parties agreement.

[38] Gateway raised the contention about the approval of the works and the invoices. Mr. Poka testified that the invoices had been authorised and approved by Gateway's representative/s especially Mr. Netshefhefhe. The gentleman was introduced to Mekan as Gateway's representative with whom Mekan had to consult when rendering services. He was the one to consult with for approval of any works that needed to be done, to the exclusion of emergency services that were to be rendered by sub-contractors, and which did not require pre-authorization.

[39] Mr. Poka's evidence to that effect was not contradicted by Gateway. One would have expected Mr Netshifhefhe to be called to testify as to his role in the management of the contract. That was not done.

[40] Gateway presented the evidence of Mr. Ramatjie who works in its supply chain management department. He was employed by Gateway with effect from 01 October 2018. The employment took effect after the contract was already terminated. He confirmed during cross-examination that he had no knowledge about the contract. further, that he could not comment on any of Mekan's invoices nor could he dispute the quantification of Mekan's claim. Calling this witness was unhelpful. He could not challenge the evidence of Mr Poka at all.

[41] Gateway's second witness was Ms Matli, the current Chief Executive Officer. She was already in the employ of Gateway during the period between June 2016 to July 2022. During that time she was employed as a senior manager in Gateway's human resources department. She testified during the hearing of oral evidence that she had no knowledge of the circumstances

surrounding the conclusion of the contract, understandably so as she was in human resources at the time.

[42] Her evidence was, just like that of Mr Ramatjie, not helpful for purposes of assailing the agreement. An important part of her testimony was that she confirmed that Gateway needed to pay for services that it has received.

[43] Further, that if there had been non-compliance with its internal systems for approvals in respect of those services, Gateway would address such non-compliances through internal consequence management. This is a sensible concession by the CEO. It should close the debate. I too can see no reason why a service provider would be deprived of payment for services rendered merely due to internal problems.

[44] It seems to me clear that Gateway has to compensate Mekan in respect of the services rendered, both in respect of fees invoiced monthly by Mekan and for the disbursements. I am prepared to make such order directing Gateway to pay the invoices submitted to it by Mekan, to the subtraction of the amount that I have mentioned above.

[45] The invoices have been long outstanding. Prior to the litigation, there was no objection nor an indication why they were not paid. This case has itself been hanging for a considerable time. This talks to the interest to be paid on the outstanding invoices.

Mekan's claim for loss of (net) income due to Gateway's cancellation of the contract

[46] Mekan claims an additional damages for loss of income arising from the contract. The claim is only for loss of net income, taking into account that

Mekan would have incurred costs in the running and administration of the contract.

[47] If the contract had run its full course, according to Mr Poka, Mekan would have claimed a further cumulative sum of **R1,234,978.26** without VAT, and which adds up to **R1,420,225.00** with VAT. Mekan contends that it is entitled to be paid for the damages in lieu of the remaining period of the contract, in the said amounts.

[48] I have already mentioned that Gateway terminated the contract through its letter of March 2018. That termination forms the basis for the damages claim, which is built up from adding the monthly fees which Mekan was contractually entitled to invoice Gateway and subtracting the expected costs. The fees are calculated as follows:

[48.1] R348,700.00 (excl. vat) per month for the first year;

[48.2] R383,570.00 (excl. vat) per month for the second year; and

[48.3] R447,764.14 (excl. vat) per month for the third year**.**

[49] Mekan's monthly budget for expenditure was forecast as follows:

[49.1] R290,311.11 (excl. vat) per month for the first year;

[49.2] R318,981.11 (excl. vat) per month for the second year; and

[49.3] R371,761.32 (excl. vat) per month for the third year.

[50] These values in [49.1] to [49.3] are to be subtracted from those in [48.1] to [48.3], respectively. Once that is done the net monthly fees or income that was to be due for Mekan would have been **R58,388.89** (excl. vat) per month

for the first year; **R64,588.89** (excl. vat) per month for the second year; and **R76,002.82** (excl. vat) per month for the third year. These amounts were relied on in the computation of Mekan's damages claim, the net value of which amounts to **R1,420,225.00** with VAT included. With this amount, there are additional damages which were incurred by Mekan in the sums of **R39,204.28** including VAT, plus **R11,125.44** including VAT. Gateway has no defences for any of these amounts, about which Mr Poka testified. His cross-examination did not impact on these amounts.

[51] Mr. Poka testified as to the quantification of the values above. His evidence was not challenged by Gateway, neither during cross-examination nor through adducing contradicting evidence. Focus for Gateway was in respect of its contention that Mekan charged VAT on top of another, which I have dealt with above.

[52] Based on the foregoing, I have no hesitation in granting the order in Mekan's favour in this regard. What now remains is the consideration of costs which I deal with below.

Consideration of costs

[53] I have invited through heads of argument to issue an order disqualifying the legal representatives of Gateway, Kgatla Inc, from collecting fees for their services. I deemed it prudent that I deal with this first. Recently, in *Choeu v The Department of Justice and Constitutional Development, Limpopo Province*[15] the Court had occasion to revisit the correct procedure for such order. It said:

15 Choeu v Department of Justice and Constitutional Development Limpopo and Others (JA124/2023) [2024] ZALAC 67; [2025] 4 BLLR 419 (LAC) (24 December 2024).

"[16] The courts have, at various points, mentioned that a practitioner cannot be saddled with an adverse finding without a hearing. The Labour Court did not meet this injunction. …"

[54] The constitutional dispensation that we live in requires of the court to uphold the values of fairness enshrined in the apex law of the Republic. Fairness requires that the legal representatives be afforded an opportunity to make their representations on why they should not forfeit their fees.[16] I do not intend to stretch this case more by asking the legal representatives to file affidavits for that purpose. It is not necessary to do so.

[55] It may be so that criticism is warranted over the handling of the case by legal representatives. I accept the notion that the court may, where such has been established, consider an adverse cost order against a party or its legal representative(s). I do not enter that discourse, having not heard the sides of the stories of all the legal representatives involved in the case. I am not persuaded to grant an adverse cost order against any of the legal representatives.

[56] Regarding the costs of the two conjoined cases, the default position that is adopted regularly by the courts is that cost should follow the result. It was almost two years into the contract when Gateway sent the letter terminating it. When doing so it ignored the jurisprudence from the Supreme Court of Appeal[17] as well as the Constitutional Court[18] that, to terminate an unlawful contract, an organ of the State should bring a review of its decision. Gateway only instituted the review application much later after it had terminated the contract, with the hope of evading the claims against it. That was not well-thought, if it was not laced with a touch of malice.

16 CB v HB 2021 (6) SA 332 (SCA) para 32.

17 Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004) at paras [37] – [38].

18 MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014).

[57] Then there are costs occasioned in respect of Mekan's main claim. The principle in respect of the awarding of costs is to indemnify the successful litigant for the litigation expenses which the party has been put through, or part of them, having been unjustly compelled to initiate or defend the litigation. A long time ago it was held in *Kruger Bros & Wasserman v Ruskin*[19] that:

> **"The rule of our law is that all costs –unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised but it cannot be challenged, taken alone and apart from the main order without his permission".**

[58] The successful party here is Mekan. Its hand was forced into instituting the application due to Gateway's refusal or reluctance to pay the invoices that it had issued. Gateway, on the other hand, relies on the concessions that were made by Mr Poka to mount a contention that Mekan must be mulcted with an order of costs, on a punitive scale. I part company with Gateway on the issue of costs. The scales are tipped heavily against it on this issue.

[59] I did mention that Gateway instituted the review application in what appeared to be a cynical attempt to avoid facing the claim. It did this after almost two years of costly litigation had been incurred by the parties in respect of the main application by Mekan. The fatal manner in which the self-review was instituted, in terms of PAJA, deserves criticism. It was defective and fatal from inception. There was no attempt to explain the delay of almost two years. The application was lodged in the lead up to hearing of Mekan's claim before Phatudi J. Mekan contends that the step was calculated to delay the finality of its application. The point is well made.

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[19] 1918 AD 63 at 69.

[60] My conclusion is that Gateway is liable for the costs occasioned by the two applications. Given the delays that it caused in the progression of the cases, I am also satisfied that the costs to be awarded must be on a punitive scale, inclusive of costs of two counsel where applicable. There is no rational basis for Gateway to have refused to pay for the services rendered. It CEO testified to that effect.

[61] Mekan, on the other hand, had been made to wait since 2018 to get paid for its services, including the services rendered by sub-contractors. I agree with counsel for Mekan that Gateway has failed to uphold the high standards demanded from it by the Constitution, which principle was explained by the Apex Court of this land.[20]

[62] There are costs which were previously reserved for attendances on 27 to 30 August 2024, 28 October 2024 to 1 November 2024, 6 and 7 November 2024, and 2 and 3 December 2024. Such costs stand to be unreserved and awarded accordingly.

Order

[63] I make the following order:

[63.1] Gateway's review application is dismissed.

[63.2] Gateway is ordered to make payment to Mekan of the following:

[a] R4,213,690.80 (incl. vat) in respect of outstanding invoices.

20 Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited supra.

[b] Interest *ex contractu* <u>*alternatively*</u> *a tempore mora* in respect of invoices paid late or that remain unpaid (as set out in annexures "D" or "E" respectively).

[c] R1,420,225.00 (incl. vat), plus R39,204.28 (incl. vat), plus R11,125.44 (incl. vat) as damages.

[d] Interest on each of the amounts of damages at 10% per annum from 31 July 2018 to date of payment.

[63.3] Gateway is ordered to pay Mekan's costs for the failed review application on an attorney-client scale, including costs of two counsel, one being senior counsel where so employed.

[63.4] Gateway is further ordered to pay the costs of Mekan's claim, including all the costs that were previously reserved, on scale C (including for the following dates: 27 to 30 August 2024, 28 October 2024 to 1 November 2024, 6 and 7 November 2024, and 2 and 3 December 2024).

[redacted]

M. Z. MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION

APPEARANCES:

FOR APPLICANT	:	**ADV H J SMITH SC**
		A MEYERS

		MEYERS INC. ATTORNEYS
		C/O CKVZ ATTORNEYS INC.
		POLOKWANE
FOR FIRST RESPONDENT	**:**	**ADV L NEMUKULA**
		KGATLA INC. ATTORNEYS
		POLOKWANE
DATE RESERVED:		**14 FEBRUARY 2025**
HEADS FINALLY RECEIVED ON:		**06 MAY 2015**
JUDGMENT DELIVERED:		**28 AUGUST 2025**