



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: B230/2023

In the matter between:

MINISTER OF EMPLOYMENT AND LABOUR

First Applicant

DIRECTOR GENERAL: DEPARTMENT OF

Second Applicant

EMPLOYMENT AND LABOUR

and

SEKELAXABISO CA INC

Respondent

Neutral citation:

Coram: E Botha AJ

Heard: 8 & 10 September 2025

Decided: 20 October 2025

Summary:

ORDER

The application is dismissed with costs, including the costs consequent upon the employment of the advocate for the respondent on Scale C.

JUDGMENT

E BOTHA AJ:

Introduction

[1] The respondent, SekelaXabiso CA Inc, or SkX, is an incorporated firm of chartered accountants. In March 2022 it was awarded a tender intending to appoint it to a panel of service providers to render verification and support services to the Unemployment Insurance Fund for the Covid-TERS disaster benefit.

[2] The first applicant, the Minister of Employment and Labour, and the second applicant, the Director General: Department of Employment and Labour wants the court to declare the decision to award the tender unlawful, unconstitutional, and invalid.

[3] Although the Department takes some responsibility for its decision, it primarily blames SkX. It says it SkX made a misrepresentation that induced it into awarding the tender. SkX denies this. It opposes the relief and sets out to clear its name from the Department's allegations.

[4] The main questions are whether the SkX complied with the requirements of the tender at the relevant stages and the material times, and whether this application was brought in time.

The legal basis for the review

[5] Since the Department seeks to invalidate its own decision, this review falls to be dealt with under the principle of legality.¹ Section 1 of the Constitution provides that one of the values that South Africa is founded on is the supremacy of the Constitution and the rule of law. Section 2 provides that the Constitution is the supreme law and conduct that is inconsistent with it is invalid.

[6] The Department's case is that it acted contrary to Section 217 of the Constitution and the legislation giving effect thereto when it awarded the tender to SkX. The Department argued that the awarding of the tender to SkX in the circumstances of the case was unfair to other bidders. Section 217 provides:

“(1) When an organ of state in the national ... sphere of government ... contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

[7] In the right circumstances, this may found a case to set aside the awarding of a tender. Reliance was placed on *Steenkamp*,² where Moseneke DCJ said:

“There can be no doubt that in procuring ... services for the State, a tender board must act consistently with its statutory mandate. It must act fairly, impartially and independently. Equally, it may not act with negligent or reckless disregard for the protectable interests of tenderers. It must act within the legislative power conferred on it and properly and honestly exercise the discretion it may have. A tender board must in doing its work act transparently and be held accountable, when appropriate.”

¹ See, for example in this regard: *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC (Gijima) 40 para 41; and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC.

² *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16 at para 35.

[8] Section 172(1)(a) of the Constitution provides that when deciding a constitutional matter within its power a court must declare that any conduct that is inconsistent with the Constitution is invalid. In *Simeka*³ the Supreme Court of Appeal reminded:

“... once a court has found that any conduct is, as a fact, inconsistent with the Constitution, such a court is obliged to declare it invalid. It has no choice in the matter.”

[9] This is what the Department calls on the court to do.

The factual basis for the review

[10] The deponent to the Department’s founding affidavit, Mr Gumede, is the Deputy-Director: Compliance at the UIF. In it, he declares that he has personal knowledge of all the facts and that he has unlimited access to the records of the Department relating to this matter.

[11] On 6 August 2021 the Department issued and advertised a tender under number UIF7/2021. The request for proposals, or RFP, says that its purpose was to establish a panel of service providers to render verification and support services for the COVID-19 TERS disaster benefit for a period of twelve months. The bid closing date was 27 August 2021.

[12] Mr Gumede explains that the bid evaluation process had four phases. He describes phase two as follows:

“Phase two: Primary reviews of mandatory and other bid documents which documents include invitation to bid, declaration of interest, preference point form, declaration of bidder 'supply chain management, certificate of independent bid determination, registration on Central Supplier database, tax compliance status pin and UIF compliance. Non submission of the required pricing information, both SBD 3.3 will lead to immediate disqualification. Failure by

³ *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* [2023] ZASCA 98 (14 June 2023).

a bidder to be compliant with UIF contributions and declarations at the award stage will lead to disqualification.”⁴

[13] The various phases and stages of the process, as well as the portion that Mr Gumede underlined is important and will be returned to later. He goes on to explain that SkX was one of forty-one bidders. SkX’s bid document was not placed before the court, but the main source of the Department’s complaint was: a UIF compliance certificate that SkX provided to the Department when it submitted its tender. This certificate is central to the Department’s case and is referred to in this judgment as the manual certificate.

[14] Pursuant to a bid evaluation and adjudication process, SkX was awarded the tender on 31 March 2022. This, the Department says, should not have happened, because of the manual certificate. To start to appreciate the Department’s case in respect of the manual certificate it is necessary to quote paragraphs 18 to 22 of the founding affidavit in full:

- “18. *It is worth mentioning that the Bid Evaluation Committee and the Bid Adjudication Committee of the Department both believed, at the time of the evaluation and the award and mistakenly or erroneously so, that the UIF compliance certificate submitted by SkX with its bid was valid.*
19. *Later and pursuant to the award it came to the attention of the UIF that the UIF compliance certificate submitted by SkX was not valid. The UIF then conducted an investigation through its compliance Department.*
20. *The investigation revealed that SkX's UIF compliance certificate submitted with the bid was issued manually on 11 May 2021 and signed off on 27 August 2021. The Department ceased or stopped issuing manual compliance certificates with effect from 24 January 2021.*

⁴ Sic. Underlining is the deponent’s in the founding affidavit.

21. *Accordingly at the time of supposedly issue of SKX certificate, the generation of manual compliance certificate was already abolished on the 24 January 2021. Starting from 25 January 2021, UIF was generating compliance certificate electronically.*
22. *The above further pointed to the certificate having been issued fraudulently an issue that the Department is still trying to investigate. What is clear though is that the certificate submitted by SkX was invalid and SkX failed to comply with a mandatory requirement of the bid and ought not have been awarded the tender”*

[15] The founding affidavit and the argument on behalf of the Department goes further than its concern about the manual certificate. It explains that a ‘[f]ailure by a bidder to be compliant with UIF contributions and declarations at the award stage will lead to disqualification.’ However, there are two separate paragraphs in the founding affidavit where the Department alleges that SkX made contributions. For reasons that will become clearer, the Department does not elaborate on these allegations. There are also two separate paragraphs where it says that SkX was not compliant with Section 10 of the *Unemployment Insurance Contribution Act*.⁵ Section 10 concerns an employers’ duty to register as employer and to provide particulars concerning employees to the Commissioner. Like the contributions, the founding affidavit is also silent on the factual basis for the Department saying that SkX was not compliant with Section 10.

Was SkX compliant with UIF contributions and declarations?

[16] The Department says that it was a mandatory and material term of the bid that bidders like SkX must comply with the UIF requirements in terms UIF contributions and declarations. It says this because it will only award a contract to a bidder who is fully compliant in terms of UIF contributions and declarations. This estimation by the Department of the requirements of

⁵ 4 of 2002. Hereinafter referred to as the “*UIC Act*”.

the RFP is correct, and accords with Clause 14 thereof. There are at least four reasons to find that SkX was up to date with its declarations and contributions to the UIF at the material times.

[17] First, the Department does not provide any evidence that SkX was non-compliant in respect of either the submission of declarations or payment of contributions at the time that the bid was made in August 2021. One would expect that the Department's records - which Mr Gumede says he has full access to - would have made it simple to provide the necessary evidence. Ms Poswa-Lerotholi, initially argued strongly that SkX was not compliant. She was constrained to concede that the Department's papers does not provide evidence that SkX was not up to date with declarations or contributions when the bid was made or when the tender was awarded. This included that there was no merit in the Department's allegation that SkX did not comply with Section 10 - a point that was abandoned.

[18] Second, SkX alleges that it was compliant with declarations and contributions. It is not a bare denial. It goes to some trouble to explain why it says so, including providing evidence of two instances before the manual certificate was issued where it was initially informed by the Department that it was in arrears with payments and where it paid the arrears. There is no reason to reject its version, particularly under circumstances where the Department did not provide evidence to the contrary. The Department seeks to undermine SkX's allegations by pointing that out that the manual certificate was issued the day after the payment of 10 May 2021 was made, although it was indicated that reapplication could be made after seven working days. If the information on and the timing between the Department's letter of non-compliance of 7 May 2021; the payment made by SkX on 7 May; and the Department's letter of non-compliance on 10 May 2021, is considered, it is clear that the Department was indeed processing information faster than seven working days. This suspicion the Department had was elevated to a fact that SkX 'was fully aware that the certificate did not originate from the UIF'. This is not borne out

by the evidence. As suspicious as the Department may have found this, its suspicion cannot displace the evidence.

[19] Third, SkX attached to the answering affidavit an electronic compliance certificate dated 12 November 2021. This was during the evaluation phase, before the bid was awarded to SkX. The Department took no issue with its validity. During argument, Ms Poswa-Lerotholi conceded that this electronic compliance certificate is valid; then went on to submit that it does not change the fact that SkX initially filed the manual certificate. The point is that on the Department's own version the electronic compliance certificate would not have been issued unless SkX was up to date with declarations and contributions. This is compelling evidence that it was up to date at the relevant time.

[20] Fourth, Mr Gumede attempts to persuade that the submission of the manual certificate, which he says is fraudulent, is evidence that SkX was not compliant with contributions and declarations. It is an argument that rests on a contradiction. The version to which he is committed is that the manual certificate was falsified. If that is the case, he cannot rely on it as being evidence of anything other than its falsity. Just like a false certificate cannot be evidence that SkX was up to date, it also cannot be evidence that SkX was not up to date, as he argues. The conclusion Mr Gumede arrives at requires an inference that is not open for the court to draw on the evidence.

[21] It accordingly must be held that from 11 May 2021 and at all relevant times thereafter, SkX was compliant with UIF declarations and contributions within the meaning of the RFP.

Was there fraud or a fraudulent misrepresentation by SkX?

[22] Mr Gumede says that the Department was induced to award the tender to SkX because of a misrepresentation. He then goes on to typify it as a fraudulent misrepresentation. Later, he says that the timing thereof pointed to it being 'issued fraudulently'. Whilst relying on the

fact that it was issued on 11 May 2021, he says it was signed off in August 2021. The August-date was merely the date on which it was later certified to be a true copy. At the time that the application was launched in January 2023, he acknowledged that the alleged fraudulent issuing of the manual certificate was ‘an issue that the [D]epartment is still trying to investigate’.

[23] In the answering affidavit SkX dismantled the Department’s allegations of fraud by explaining how it came about that it obtained the manual certificate in a detailed, open and honest manner. It also pointed that the Department had laid a charge of fraud against SkX long before September 2022 (the date that Mr Gumede says the Department became aware). It included in its answer an affidavit and other evidence that SkX submitted to the investigating officer in that year, before the application was launched. The affidavit and the evidence attached dispels any suspicion of fraud on the part of SkX. It is no wonder that, as SkX points out, there was a finding of *nolle prosequi*. None of this was disclosed to the court by Mr Gumede. He also avoids this in the replying affidavit. What Mr Gumede says in reply requires further consideration.

[24] The impression given by the Department is that a bidder would conclude from the RFP that there was only one way of obtaining a compliance certificate, and that someone without knowledge of the inner workings of the UIF would, on the face of it, be able to distinguish between a valid certificate and an invalid one. This is not correct. Although a side-by-side comparison of the manual certificate and an electronic one shows the differences, the content of both is typewritten with a manuscript signature appearing to be that of the commissioner or acting commissioner. In addition to explaining how it came into possession of the manual certificate, SkX says that it had no way of knowing or suspecting what the Department says about the manual certificate at the time.

[25] The Departments other argument is based on ‘Annexure J’ of the RFP. Annexure J is nothing more than a user guide that explains what the so-called ‘e-Compliance certificate’ - or

‘ECC’ system is, its benefits and how one goes about applying for it through an online portal. A more complete consideration of the Department’s papers show that it missed an important part of the RFP. Paragraph 3.2 and 3.3 of the RFP outlines the relevant provisions of the *Unemployment Insurance Act*⁶ and the *UIC Act*, before it turns to the submission of a compliance certificate. It goes on to list a number of e-mail addresses and people from whom compliance certificates may be obtained. Annexure J confirms the two options when it asks ‘Why send emails when you can obtain a compliance certificate online’. This shows that compliance certificates were obtainable in more than one way, and it lends further credence to the evidence and explanation provided by SkX.

Did the submission of the manual certificate preclude the Department from awarding the tender?

[26] In the founding affidavit, Mr Gumede says:

“It was a mandatory and material term [of] the bid that bidders must comply [with] the UIF’s requirements in terms of UIF contributions and declarations. Bidders must note that the UIF will only award a contract to a bidder who is fully compliant with UIF contributions and declarations ... Furthermore, that bidders must include a compliance certificate as part of the bid proposals and that failure by a bidder to be compliant with UIF contributions and declarations at the award stage will lead to disqualification.”

[27] When it comes to the procurement of goods and services by organs of state, requirements like those in the RFP serve at least two crucial purposes. First, it informs prospective bidders what is required of them. Second, it foreshadows the terms of the contract

⁶ 63 of 2001.

that would be concluded between the organ of state and the successful bidder to be incorporated in the contract.⁷

[28] The relevant terms of the RFP and Mr Gumede's outline thereof in the founding affidavit emphasises compliance with contributions and declarations. The RFP also distinguishes between those requirements that will lead to 'immediate disqualification', and those that will lead to disqualification at 'award stage'.⁸ In the case of compliance with contributions and declarations, it requires compliance at the award stage. The relevant terms of the RFP are clear enough, but it is clarified further by the relevant part of Table 5 in the bid document that is reproduced here:

Table 5

Documents that must be submitted	Non-submission may result in disqualification	
...	...	...
UIF Compliance Certificate	**** No	Bidders must provide a UIF Compliance certificate (Refer to Annexure J for the detail)
Important note: * Non-submission of the required pricing information, ... in the bid proposal will lead to <u>immediate</u> disqualification. **Incomplete and unsigned SBD forms that still exist at the <u>Phase 2 evaluation stage</u> will lead to disqualification.		

⁷ *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* (610/2021) [2023] ZASCA 98 (14 June 2023) para 61.

⁸ It also provides for some other requirements that may lead to disqualification at some other stages in between, but that is not relevant in this instance.

***Failure by a bidder to be tax compliant at the award stage or have written proof from SARS to verify their tax compliance status, or the arrangement the bidder has made with SARS to meet outstanding tax obligations

**** Failure by a bidder to be compliant with UIF contributions and declarations at the award stage will lead to disqualification (refer to Annexure J for detail).

[29] The table confirms what the terms of the RFP provide: it is not the failure to submit the document that must lead to disqualification, but a failure to be compliant with contributions and declarations at the award stage.

[30] It is obvious that the requirement to submit a compliance certificate has a purpose that goes deeper than the mere submission of a document. It is not part of a mere tick-box exercise. Its purpose is to assist the Department in determining whether a bidder like SkX is compliant with regards to declarations and contributions as required by the relevant legislation. The fact that the evaluation whether a bidder is compliant in this regard is set to happen at the award stage is conversant with this purpose. For example, the purpose of the requirement will have been undermined if a bidder submits a valid certificate that is three months old at the time that the bid is made, but is non-compliant with declarations or payments when the award is made. What is material is that the bidder must be up to date with declarations and contributions, and that it is compliant at the award stage.

[31] As said earlier, the Department made much of the reference to ‘Annexure J’, but it makes reference to another way of obtaining a compliance certificate, through e-mail. The Department has elevated the reference to Annexure J and the submission of an electronic compliance certificate to a material requirement that, if not complied with, disqualifies a bidder during phase two of the evaluation stage. This is not borne out by the RFP.

[32] As has already been held, there is no evidence provided by the Department that SkX was non-compliant, and all the available evidence points to it that it was compliant. In the absence of fraud and in the circumstances of this case it must be found that SkX had complied with the material requirements of the RFP. The Department was not precluded from awarding the tender based on the submission of the manual certificate.

Was there any misrepresentation?

[33] Despite it being the Department's case that the submission of the manual certificate constituted a fraudulent misrepresentation, it also took another approach. It argued that, even if the submission of the manual certificate was not fraudulent, it still constituted a misrepresentation that induced the Department to award the tender that it would otherwise not have awarded. It is not necessary to decide whether such a misrepresentation would necessarily have entitled the Department to the relief it seeks, or whether any contractual remedies are open to the parties, because this approach by the Department fails on the facts.

[34] A party seeking to avoid a contract on the ground of misrepresentation must prove that: (a) the representation relied upon was made; (b) it was a representation as to a fact; (c) the representation was false; (d) it was material, in the sense that it would have influenced a reasonable person to enter into the contract; and (e) it was intended to induce the person to whom it was made to enter into the transaction.⁹ The difficulty facing the Department is requirement (c), the question whether the representation was false.

[35] To succeed, the Department had to demonstrate at least two facts: first, it would have to show that the submission of the manual certificate and the information contained therein placed it under the impression that SkX was compliant with the UIF legislation; and, second, it would

⁹ *Quartermark Inv (Pty) Ltd v Mkhwanazi* 2014 (3) SA 96 (SCA) para 14, with reference to *Novick and Another v Comair Holdings Ltd and Others* 1979 (2) SA 116 (W).

have to show that it was actually false, because SkX was non-compliant with the UIF legislation. For all the reasons already provided, it fails in respect of the second. It is the truth concerning SkX's compliance that induced the Department to award the tender, not any misrepresentation.

Was the awarding of the tender unfair to other bidders?

[36] The Department's argument is that it had contravened Section 217 and legislation giving effect to it, because the Department was unfair to other bidders when it awarded the tender. It argues that, unlike SkX, other bidders were disqualified based on their compliance certificates. However, it did not provide evidence of this in either of its affidavits.

[37] The only evidence concerning disqualification is a report from the bid evaluation committee to the bid adjudication committee of 23 March 2022, attached to SkX's answering affidavit. Although it refers to the exclusion of fifteen bidders during the evaluation process, the reasons provided there have nothing to do with compliance certificates.

[38] There is no evidence that SKX was given any advantage over any of the others bidders, particularly those that were disqualified for other reasons. All the evidence points to it that all bidders were treated equally and in accordance with the terms of the RFP.

Delay

[39] The Department submits that it became aware of the invalidity of the manual certificate in September 2022 when it received the outcome of an investigation. The application was instituted about four months later, on 30 January 2023. On this basis, the Department submits, there is no delay. It further submits that, if there is a delay, it is not unreasonable, and the court ought to overlook the delay in the interest of justice. What the Department probably meant by this is that, if the delay is found to be reasonable the merits can be considered, but if it is found

that the delay is unreasonable, the court should overlook it in the interest of justice. SkX raises the fact that Mr Gumede who was a member of the bid evaluation committee took issue with the manual certificate as early as 2 November 2021. On this basis, it submits that the delay of more than a year is unreasonable and that the Department has failed to explain the delay.

[40] SkX's view disregards the fact that the tender was only awarded in March 2022, and that Mr Gumede's views and knowledge should not necessarily be taken to be that of the Department. Despite him having an issue with the manual certificate in November 2021, the clock starts running when the Department became aware or reasonably ought to have become aware of the action taken and the reasons for it.¹⁰ The Department's view ignores the fact that the investigation was completed in May 2022 and that the Department says it withdrew the award in May 2022. It is in May 2022 that the Department became aware or reasonably ought to have become aware of the action taken and the reasons for it. The Department could have brought the application shortly after that. Yet, it took eight months to do so. Considering the facts set out above, including the fact that most of the period of delay is unexplained and, in some respects simply incorrect, the delay is unreasonable.

[41] In a legality review no explicit application for condonation is needed.¹¹ If the delay is unreasonable, the question becomes whether the court ought to overlook the delay in the interest of justice.¹² It is a discretion that must be exercised in the circumstances of case, gleaned from the facts placed before the court by the parties or objectively available facts.¹³ Although the court should be slow to allow procedural obstacles to prevent it from looking into a challenge

¹⁰ In *Buffalo City Metro Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 (*Buffalo City*) para 49 Theron J held that this was the approach in a legality review. For this, she relied on *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5 (*Aurecon*) at 41, where the Constitutional Court held, in the context of delay in a PAJA review, that 'the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.' See the discussion of these two judgments by Rogers J (as he then was) sitting in the Western Cape High Court in *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2020] ZAWCHC 164 (*Venus Rays*) para 287.

¹¹ *Buffalo City* para 51.

¹² *Buffalo City* para 51.

¹³ *Gijima* para 49.

such as this one, undue delay should not be tolerated and vigilance must be exercised.¹⁴ In *Venus Rays*¹⁵ Rogers J reminded that the approach to be followed in such a case is a flexible one, and that the various factors to be taken into account are (a) potential prejudice to the affected parties, the consequences of setting aside the impugned decision, amelioration of prejudice by granting a just and equitable remedy; (b) the nature of the impugned decision, including the consideration of the merits of the legality challenge and the extent and nature of the illegality; (c) the conduct of the applicant; and (d) the *Gijima*-principle.

[42] In this case the Department did not provide a full and honest explanation for the whole period of the delay.¹⁶ Where it gave some explanation, it does not accord with the facts. In cases where there is corruption, collusion or fraud a court may well be '[j]ustified in looking less askance in condoning the delay.'¹⁷ For the reasons given this is not such a case. In this case, the delay does not appear to have caused prejudice to SkX, but that is only because the Department withdrew the award and SkX seemingly accepted it. Even if the tender was not withdrawn, SkX would only have been appointed to the panel for a period of twelve months. There is no evidence of prejudice to the public interest or the Department if the decision to award the tender is left to stand. In the circumstances of this case, all the considerations related to prejudice weigh against overlooking the delay. Although the merits of the application is not a determinative factor, it is an important consideration. For the reasons given, the lack of merit in the Department's case militates against overlooking the delay. The *Gijima*-principle is not applicable.¹⁸

[43] It is difficult to appreciate why the Department brought this application at all. Even if it is accepted for the sake of the argument that it had good reasons for doing so, it is still difficult

¹⁴ *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39 para 160.

¹⁵ *Venus* para 290.

¹⁶ *Buffalo City* para 80.

¹⁷ *Aurecon* para 50.

¹⁸ *Gijima* para 52.

to appreciate why it took the approach it did and why Mr Gumede did what he did. In *Buffalo City* Cameron J said in a minority judgment that courts ‘[s]hould be vigilant in ensuring that state self-review is not brought by state officials with a personal interest in evading the consequences of their prior decisions.’¹⁹ He also said that the explanation for the delay ‘is an opportunity for the state to demonstrate that its self-review seeks to promote open, responsive and accountable government rather than the self-interest of state officials seeking to evade the consequences of their prior decisions.’

[44] The Department asks for the invalidation of the awarding of a tender that was withdrawn two months after it was awarded. If it had not been withdrawn, it would have lapsed two months after the application was launched. In court it was said on the Department’s behalf that it did not expect that SkX would oppose the application. Considering the lack of merit and the extent of the allegations against SkX, this was a mistake. The Department brought the application on tenuous grounds without having put all the facts and relevant documents before the court. The Department sought to make out a case that SkX was non-compliant with declarations and contributions, but was constrained to concede that it did not provide evidence of either. It accused SkX of being non-compliant with Section 10, only to abandon it as a ground at the hearing.

[45] Mr Gumede did not place the investigation report before the court, nor did he point out that there was a report that was concluded in May of 2022. In his replying affidavit he tried to explain it away with the ambiguous statement that he ‘explicitly mentioned in the founding affidavit that [SkX’s] compliance certificate was found by the investigation to be invalid in the investigative report.’ The founding affidavit does not mention the report. He did not inform the court it was he who sounded the alarm about the manual certificate and that he had done so in November 2021. He did not disclose that he was a member of the bid evaluation committee

¹⁹ *Buffalo City* para 139.

that, in March 2022 wrote to the bid adjudication committee recommending SkX's appointment. Yet, in the founding affidavit he says 'the Bid Evaluation Committee ... of the department ... believed, at the time of the evaluation and the award and mistakenly or erroneously so, the that UIF compliance certificate submitted by the respondent with its bid was valid.' He also did not tell the court that a charge of fraud was laid against SkX, that SkX had provided an affidavit and evidence in respect thereof, and that there was a finding of *nolle prosequi*. When it was raised by SkX in its answer, he did not reply to it at all.

[46] In setting out various factors for the court to consider in the exercise of its discretion, Rogers J held²⁰ as follows with regards to the conduct of an applicant like the Department:

"State actors are subject to a higher duty to respect the law, including a duty to act promptly when rectifying illegality. However, even where the public functionary has not acted as a model litigant, unreasonable delay may be overlooked if the functionary acted in good faith or with the intent to ensure clean governance. There is a difference between muddle and malice."

[47] Despite having some misgivings, this is probably a case of muddle, rather than malice. Although it cannot be found that the Department was anything but *bona fide* when it brought the application, its *bona fides* is not sufficient to displace the other factors that weigh against the court overlooking the delay.

Conclusion

[48] The Department's delay in bringing the application was unreasonable. In all the circumstances, considering the relevant factors, it is not in the interest of justice to overlook the delay.

²⁰ *Venus* para 290.

[49] In any event, for all the reasons provided earlier, the Department has not made out a case for any of the relief that it seeks.

[50] The application stands to be dismissed for both these reasons.

Costs

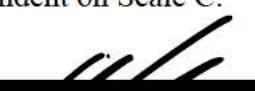
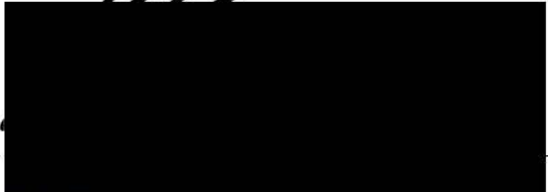
[51] The Department sought attorney and client costs based on what it says was SkX's conduct. Bearing in mind the Department and its deponent's conduct, there may have been sufficient reasons to give a punitive cost order against the Department. SkX, however, did not pursue such an order.

[52] There is no reason to deviate from the principle that the costs should follow the result. SkX moved for the costs consequent upon the employment of its advocate on Scale C. Bearing in mind the nature of the matter, its complexity, the nature of the allegations made against SkX, and there being sufficient cause to instruct senior counsel in these circumstances, such an order is justified.

Order

[53] The following order is made:

The application is dismissed with costs, including the costs consequent upon the employment of the advocate for the respondent on Scale C.

E BOTHA

ACTING JUDGE OF THE HIGH COURT

For the Applicants:

S Poswa-Lerotholi SC with M V Makamu
(heads of argument prepared by Z Matabese SC
with M V Makamu)
on instruction of State Attorney Pretoria

For the Respondent:

J O Williams SC
on instruction of Morne Coetzee Attorneys