



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

Case no: 2950/2024

In the matter between:

THE CONSTRUCTION COMPANY (PTY) LTD

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

THE MUNICIPAL MANAGER, CITY OF CAPE TOWN

Second Respondent

HAW & INGLIS CIVIL AND BUILDING (PTY) LTD

Third Respondent

RUWACON (PTY) LTD

Fourth Respondent

RAUBEX BUILDING (PTY) LTD

Fifth Respondent

FURIPOINT (PTY) LTD

Sixth Respondent

KHATO CIVILS (PTY) LTD / THULANDILE JV

Seventh Respondent

STEFANUTI STOCKS (PTY) LTD

Eighth Respondent

QINISA CONSTRUCTION GAUTENG (PTY) LTD

Ninth Respondent

And

Case no: 22591/2023

In the matter between:

THE CONSTRUCTION COMPANY (PTY) LTD

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

THE MUNICIPAL MANAGER, CITY OF CAPE TOWN Second Respondent

RODPAUL CONSTRUCTION (PTY) LTD

t/a RODS CONSTRUCTION

Third Respondent

BENCHMARK CARRIERS CC

t/a BENCHMARK CONSTRUCT

Fourth Respondent

ULAKHE TRADING (PTY) LTD

Fifth Respondent

EMCON WESTERN CAPE (PTY) LTD

Sixth Respondent

BAMBANA MANAGEMENT SERVICES (PTY) LTD

Seventh Respondent

MPIYAKHE 04 CONSTRUCTION AND

TRAFFIC SERVICES (PTY) LTD

Eighth Respondent

CIVIL ELEMENT (PTY) LTD

Ninth Respondent

RUWACON (PTY) LTD

Tenth Respondent

Neutral citation: *The Construction Company (Pty) Ltd v The City of Cape Town and Others* (Case No 2950/2024); *The Construction Company (Pty) Ltd v The City of Cape Town and Others* (Case No 22591/2023) [2025] ZAWCHC (26 November 2025)

Coram: Erasmus J, Da Silva Salie J and Davis AJ

Heard: 12, 13 November 2025

Delivered: 26 November 2025

Summary: *Review of decision not to award a tender on the basis that contracting with the tenderer would expose the City to reputational risk – whether decision to exclude the applicant based on reputational risk was lawful – whether the City could rely on the fact that the National Prosecuting Authority and a Magistrate had considered that there was a prima facie case to answer for purposes of initiating criminal processes – mootness – cause of action extinguished where no longer possible to give effect to the relief sought – High Court sitting as a court of first instance has no jurisdiction to entertain a matter where there is no longer a cause of action*

ORDER

- 1 The application in case number 2950/2024 is dismissed.
- 2 The application in case number 22591/2023 is dismissed.
- 3 The applicant shall pay all the first and second respondents' party and party costs incurred in case number 22591/2023 after 20 September 2024, as taxed or agreed, such costs to include the cost of two counsel, where so employed, on scale C.

JUDGMENT

Davis AJ (Erasmus and Da Silva Salie JJ concurring):

INTRODUCTION

- [1] This court is seized with two applications brought by The Construction Company (Pty) Ltd ('TCC') to review and set aside decisions pertaining to two tenders issued by the first respondent ('the City'), in terms whereof TCC was disqualified by virtue of the City's invocation of the reputational risk provision in the City's Supply Chain Management Policy ('the SCM Policy').
- [2] The first application, brought under case number 22591/2023, concerns tender number 310Q/2021/2022, for the construction of a new service building at Strandfontein West Water Works ('tender 310Q').
- [3] The second application, brought under case number 2950/2024, concerns tender number 27Q/2022/23, for building maintenance alterations and upgrades at council facilities ('tender 27Q').
- [4] The applications are referred to as 'the 310Q review application' and 'the 27Q review application' respectively. Both applications are brought in terms

of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), alternatively the principle of legality.

[5] The reputational risk provision in the SCM Policy ('the reputational risk clause') reads as follows:

'106.2 the City reserves its rights not to register a Vendor or not to make Final Award, revoke a Final Award already made or cancel a Contract already made where the implementation of the Contract may result in a reputational risk or harm to the City, which includes the Vendor's Subcontractors, (which may be linked to the main tenderer and/or any of its Subcontractor(s)), as a result of (inter alia):

106.2.1 reports of poor governance or unethical behaviour, or both;

106.2.2 association with known notorious individuals and family of notorious individuals;

106.2.3 poor performance issues, known to the City;

106.2.4 negative media reports, including negative social media reports; and

106.2.5 adverse assurance (e.g. due diligence) report outcomes.

106.2.5 Circumstances where the relevant vendor has employed, or is directed by, anyone who was previously employed in the service of the state (as defined in clause 1.48), where the person is or was negatively implicated in any SCM irregularity.'¹

¹ The reputational risk provision is currently contained in clause 106 of the 27 March 2025 version of the SCM Policy. At the time when the decisions were taken not to award the tenders to TCC, the reputational risk clause was contained in clause 101.2 of the 30 May 2019 version of the SCM Policy. It is common cause that the wording of the reputational risk clause has not been altered in the 27 March 2025 version.

[6] The relevant facts may briefly be summarised as follows:

- i. Mr Loonat, a self-styled crime fighter, and Mr Rajah, a competitor of TCC and the estranged brother-in-law of Mr Khan (a director of TCC), complained to the City that TCC had, in 2019, rendered an invoice to the City in respect of tender 243Q for work which was not performed.
- ii. Messrs Rajah and Loonat repeated their allegations in a complaint to the South African Police Service ('SAPS'), which was reported in the Cape Argus newspaper on 12 October 2020.
- iii. This resulted in a search and seizure operation by SAPS on 25 March 2021. On 15 December 2021, Mr Khan and others were arrested and appeared in the Bellville Magistrates' Court in connection with Belville CAS/255/12/2021 ('the Bellville case'), when he was granted bail.
- iv. Mr Khan was never provided with a charge sheet in the Bellville case, and, due to delay, the Magistrate removed from the roll on 25 October 2022, in terms of s 342A of the Criminal Procedure Act, Act 51 of 1977 ('the CPA'). However, the charges were not withdrawn.
- v. The City's Forensic Services investigated the allegations made by Messrs Rajah and Loonat and reached the conclusion, in a report dated 31 March 2022 ('the City forensic report'), that there was no

substance in the allegation that TCC invoiced for work which was not done in tender 243Q.

- vi. The City published tender 310Q on 29 April 2022, and tender 27Q on 15 July 2022. TCC timeously submitted bids in both tenders.
- vii. The City's Bid Evaluation Committee for tender 310Q ('the 310Q BEC') originally concluded that TCC's bid was the only responsive tender.
- viii. On 26 September 2022, the 310Q BEC considered a due diligence report prepared by Moore Stephens ('the Moore report'), which highlighted allegations of corruption against TCC and potential abuse of the SCM Policy as a result of alleged inflated pricing.
- ix. In the interim, arising out of the City forensic report, the City pursued a process² to determine whether TCC should be blacklisted by virtue of abuse of the SCM Policy. On 22 November 2022 the second respondent ('the Municipal Manager') handed down a decision in which he determined that City had not discharged the onus of proof which rested on it to establish an abuse of the SCM Policy ('the 22 November ruling').
- x. The 310Q BEC afforded TCC an opportunity to respond to the adverse allegations in the Moore report, and TCC responded on 6 December 2022, claiming that the allegations were baseless. TCC

² In terms of Regulation 38(1) of the Municipal Supply Chain Regulations and clauses 57 and 58 of the SCM Policy.

also relied on the Municipal Manager's ruling of 22 November 2022.

- xi. When the 310Q BEC met on 9 December 2022, it considered TCC's response and accepted its explanation. It concluded that there was no reason not to make an award to TCC.
- xii. In the meanwhile, the directors of TCC had been arrested and had appeared in the Cape Town Magistrate's Court on 24 November 2022, in connection with Maitland CAS 200/01/202 ('the Cape Town case'). The arrests were reported in the Cape Times, TimesLive, and Weekend Argus of 24 November 2022, News24, Cape Times and Cape Argus of 25 November 2022, and CapeTownETC of 26 November 2022.
- xiii. The 310Q BEC was apparently unaware of the recent arrests when it made its recommendation on 9 December 2022.
- xiv. The matter was then sent to the Bid Adjudication Committee for tender 310Q ('the 310Q BAC') for consideration on 12 December 2022.
- xv. At that meeting, Mr Alfonso Page, the legal advisor for the tender, raised a concern regarding reputational risk arising out of the recent arrest of TCC's directors. The 310Q BAC resolved that the bid be referred back to the 310Q BEC to consider the issue of reputational risk.

- xvi. The City addressed a letter to TCC on 30 December 2022, calling upon it to provide information with regard to the criminal proceedings in the Belville and Cape Town cases, and to deal with the reputational risk concerns.
- xvii. TCC responded to the letter in detail on 30 January 2023. It confirmed that the arrests of the directors of TCC had taken place, that the Belville matter had been removed from the roll, and that the Cape Town matter was still pending.
- xviii. A legal opinion was sought from the City's legal advisor, Mr Mark Owen on the question of reputational risk ('the Owen opinion'), which was provided to the chairperson of the 310Q BEC on 24 February 2023.
- xix. On 2 March 2023, the 27Q BEC commenced dealing with the bids submitted and recommended that TCC be awarded the tender for region 1.
- xx. On 17 March 2023, the 310Q BEC considered the Owen opinion and TCC's letter of 30 January 2023. It concluded that TCC posed a reputational risk and recommended that the tender be cancelled.
- xxi. On 28 March 2023, the 310Q BAC resolved to cancel the tender on the basis that no acceptable bids had been received, because TCC's bid had been the only responsive bidder prior to the decision that it posed a reputational risk. TCC was notified of this decision on 3 April 2023.

- xxii. On 25 March 2023, the 27Q BAC met and queried whether the 27Q BEC had considered the reputational risk policy in relation to TCC. (It so happened that one Mr Allpass, who had previously served on the 310Q BEC, now served on the 27Q BAC.)
- xxiii. On 30 March 2023, the City addressed a letter to TCC in respect of the 27Q tender, in which it was required inter alia to provide a response concerning recent allegations and negative media coverage. TCC was notified that a failure to provide a satisfactory response would entitle the City to exercise its rights in terms of clause 101.2 of the SCM Policy.
- xxiv. On 5 April 2023, TCC responded to the effect that the allegations were unfounded. TCC contended that the jurisdictional requirements for the invocation of the reputational risk clause were not present.
- xxv. On 6 April 2023, the 27Q BEC met and concluded that it could not resolve the reputational risk issue. A question was raised as to whether the City's principal legal advisor should be approached.
- xxvi. The Owen opinion was then provided to the 27Q BEC.
- xxvii. On 18 April 2023, the 27Q BEC considered the issue of reputational risk and concluded that TCC posed a reputational risk to the City. It therefore elected not to recommend TCC for the award of tender 27Q.

xxviii. On 21 April 2023, TCC lodged an internal appeal against the decision to cancel tender 310Q. The Municipal Manager dismissed the appeal on 14 July 2023.

xxix. TCC launched the 310Q review application on 11 December 2023.

xxx. On 14 August 2023, the 27Q BAC met and accepted the recommendation of the 27Q BEC that TCC not be awarded the tender, because it expose the City to the risk of reputational harm. TCC was notified of the decision on 21 August 2023.

xxxi. On 11 September 2023, TCC lodged an internal appeal against the decision, which was dismissed by the Municipal Manager on 10 November 2023.

xxxii. TCC launched the 27Q review application on 13 February 2024.

[7] At the heart of the review is TCC's complaint that, when the BECs and the Municipal Manager invoked the reputational risk clause, they failed to appreciate that the factual allegations underpinning the negative press reports and the criminal process against the directors of TCC had already been investigated and resolved by the City (in the City forensic report and the 22 November ruling).

[8] TCC maintains that it was irrational to conclude that TCC posed a reputational risk when the City forensic report and the Municipal Manager had found that there was no substance in the allegations against TCC which were being reported on in the media.

- [9] TCC contends that the reputational risk clause in the SCM Policy, properly construed, cannot be triggered by unproven statements in the media reporting on the fact of a criminal process against the directors of TCC. It argues that the mere existence of a criminal charge against a tenderer, without more, can never be sufficient for the City to determine that the conclusion of a contract with a tenderer will result in reputational risk or harm to the City. At the very least, so says TCC, the City must take steps to ascertain whether there is any veracity in the charges.
- [10] It submits that the only manner in which to save the reputational risk clause from what would otherwise be impermissible overbreadth would be for the clause to be interpreted to require *a finding that a real risk of reputational harm has been established* in order to cancel a tender or revoke an award.
- [11] The City accepts this interpretation. But it contends that this is exactly what happened. The City did find, on the facts, that a real risk of reputational harm had been established, based on the fact of the negative reports about the criminal process underway against the directors of TCC.
- [12] The sharp point of difference between TCC and the City is this: the City interprets the reputational risk clause to mean that it can legitimately conclude that a party poses a reputational risk based merely on the fact that criminal charges have been instituted and reported on in the media, regardless of the fact that the City has already investigated the very same allegations and found them to be without merit.

- [13] TCC contends that if this interpretation of the reputational risk clause is correct, then the reputational risk clause is overbroad, irrational and unlawful.
- [14] TCC's core arguments underpin the raft of review grounds advanced in both applications. They are addressed in dealing with the various grounds of review.
- [15] It is necessary to deal first, however, with the City's challenge that the 310Q review is moot, for if the application is indeed moot, it falls to be dismissed without entering into the merits.

IS THE 310Q REVIEW MOOT?

- [16] In terms of prayer 1 of the notice of motion in the 310Q review, TCC sought the review and setting aside of the decision of the City to cancel tender 310Q and the decision of the Municipal Manager to dismiss its appeal. In terms of prayer 2 of the notice of motion, TCC sought the remittal of the matter to the Municipal Manager for a fresh decision.
- [17] It is not in dispute on the papers that:
- a) following the cancellation of tender 310Q, the City put out a new tender for the same construction project under tender 078Q/2023/23 ('tender 78Q');

- b) TCC did not apply to interdict the City from advertising a new tender or making an award for a new tender in relation to the services contemplated by tender 310Q;
- c) tender 78Q was awarded to Mphathuli General Trading CC on 15 April 2024 ('Mphathuli');
- d) the budget for tender 310Q was reallocated to tender 78Q;
- e) as at 2 October 2024, when the City's answering affidavit in the 310Q review was signed, the work on the tender 78Q was already underway;
- f) the contract period for tender 78Q expired on 30 June 2025.

[18] In these circumstances, says the City, the 310Q review is moot: no practical purpose will be served by reviewing and setting aside the decision to cancel tender 310Q, since it is not possible for tender 310Q to be remitted to the City for reconsideration. The need for the services contemplated by tender 310Q has already been fulfilled by tender 78Q, and the budget for 310Q has already been spent on tender 78Q. The City argues that this Court has no jurisdiction to entertain matters which are moot.

[19] TCC, however, maintains that there remain live issues for determination, despite the award of tender 78Q. It contends that the validity of the City's action in issuing tender 78Q is wholly dependent on the validity of the decision to cancel tender 310Q, and that if the decision to cancel tender 310Q is invalid, it follows that the decision to issue tender 78Q is also invalid.

[20] Moreover, even if the decision to issue tender 78Q is valid, says TCC, there are live issues for determination in the 310Q review relating to the manner in which the City applies the reputational risk clause, which have ongoing consequences for TCC in relation to the treatment of its future bids. TCC argues that this Court, without setting aside the decision to cancel tender 310Q, can and should declare that the City acted unlawfully in finding that TCC constituted a reputational risk.

[21] In the latter regard, TCC relies on the following dictum of Jafta J in *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*:³

‘The question of relief remains for consideration. While acknowledging that there was no culpable delay on the part of the appellant to institute review proceedings, exercising its discretion the court below dismissed the application with costs. In so doing the court overlooked the provisions of s 8 of PAJA which require that any order granted in matters such as this be just and equitable. This guideline involves a process of striking a balance between the applicant’s interests, in the one hand, and the interests of the respondents on the other: It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only. Furthermore, the section lists a range of remedies from which the court may choose a suitable one upon a consideration of all relevant facts. The dismissal of the application by the court below does not constitute an appropriate and effective relief contemplated in s 38 of the Constitution.’⁴

³ 2008 (2) SA 481 (SCA).

⁴ Para 22.

[22] Reliance is also placed on the decision of *Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town and Others*⁵ in which Binns-Ward, J dismissed an application for the review and setting aside of certain tender awards, but nonetheless granted a declaratory order declaring that the disqualification of the applicant's bid on the basis of the BEC's scoring of the functionality eligibility test was unlawful.

[23] In my view, the reliance on *Millenium Waste* and *Loliwe* is misplaced.

[24] In *Millenium Waste*, the setting aside and reconsideration of the tender award had practical implications for the disappointed tenderer and the public purse, because the contract in question still had 29 months to run.⁶ The issue of mootness did not arise in *Millenium Waste*, and the above-quoted *dictum*, read in context, is not authority for the proposition that the High Court may entertain an application for the review and setting aside of a decision where the relief sought can have no practical effect.

[25] In *Loliwe*, the question of mootness likewise did not arise. The exclusion of the applicant's tender, and the award of the tender to the fourth respondent, was a live issue between the parties, there being no contention that it was too late for the setting aside of the tender award to have any practical effect. Binns-Ward, J determined that, although the applicant had succeeded in showing that the scoring of its tender with regard to functionality was irrational and unlawful, it was nonetheless not entitled to an order setting aside the tender award, for if the applicant's bid had been properly evaluated

⁵ [2012] ZAWCHC 162 (6 July 2012).

⁶ *Millenium Waste (supra)* para 29.

as it ought to have been, the BEC would have been bound to treat the applicant's tender as non-responsive.⁷ The learned Judge therefore dismissed the application to review and set aside the tender award, but made a declaratory order that the manner in which the BEC scored the functionality of the applicant's tender was unlawful – as he was entitled to do in terms of s 8(1)(d) of PAJA.

[26] It bears emphasis that Binns-Ward, J did not entertain an application for judicial review in circumstances where the matter was moot because the relief sought could have no practical effect. There was a live controversy between the parties in *Loliwe*, and the court accordingly had the requisite jurisdiction to entertain the matter.

[27] In *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality and others*,⁸ the Constitutional Court summarised the principles relating to mootness as follows:

*'The principles applicable to mootness are trite. Courts should not decide matters that are abstract or academic and which do not have any practical effect; either on the parties before the court or of the public at large. The question is a positive one, namely whether a judgment or order of the court will have a practical effect and not whether it will be of importance for a hypothetical future case. A matter is also moot and not justiciable if it no longer presents an existing or live controversy.'*⁹

⁷ *Loliwe (supra)* paras 48 and 62.

⁸ 2022 (8) BCLR 959 (CC).

⁹ Para 16.

[28] The Supreme Court of Appeal made it clear in *Minister of Justice and Others v Estate Stransham-Ford*¹⁰ and *MEC for Health: Gauteng v Dr Regan Solomons*¹¹ that the High Court sitting as a court of first instance has no jurisdiction to entertain matters where the cause of action has been extinguished before judgment because there is no longer a live controversy or *lis* on which to pronounce. In short, mootness deprives a High Court of jurisdiction to enter into the merits of a matter, unlike an appellate court which has a discretion to entertain moot matters on the basis that they involve legal issues of public importance which will affect matters in the future and on which the adjudication of the court is required.¹²

[29] Applying these principles to the common cause facts referred to above, it is clear that the relief sought by TCC in prayers 1 and 2 of the notice of motion is moot: it can have no practical effect. The services in question have already been procured by the City by way of a new tender. The budget for the services has been spent, and the contract with the new tenderer has been completed. There is no live controversy for this Court to pronounce on. It therefore has no jurisdiction to enter into the merits of the matter.

[30] TCC's argument that the manner in which the City applied the reputational risk clause in regard to the 310Q tender has practical implications for its future tenders cannot avail it for two reasons.

¹⁰ 2017 (3) SA 152 (SCA) paras 19 and 24.

¹¹ (1089/2023) [2024] ZASCA 184 (30 December 2024) paras 27 to 30.

¹² *Stransham-Ford* (*supra*) para 25; *Dr Regan Solomons* (*supra*) paras 28 and 30.

[31] First, TCC did not seek to amend its notice of motion in the 310Q review to include an alternative prayer for declaratory relief. The only relief sought was the setting aside of the impugned decisions, and the remittal of the matter for reconsideration. For the reasons already explained, that relief is now moot.

[32] Second, the argument that the City's decision with regard to the reputational risk posed by TCC will continue to have effect and will prejudice future tenders submitted by TCC fails to appreciate that any decision in terms of the reputational risk clause is fact- and time-bound. TCC cannot be precluded from submitting tenders in future because the City previously decided that it posed a reputational risk at a given point in time on a given set of facts. The City would be obliged to undertake a fresh assessment of reputational risk each time TCC submits a tender, based on the facts at that time.

[33] I therefore conclude that the 310Q review application is moot and falls to be dismissed on that ground.

THE 27Q REVIEW APPLICATION

The grounds of review

[34] In the 27Q review application, TCC challenges the impugned decisions on the grounds that:

- a) the reputational risk clause is unlawful;

- b) the City has put up an *ex post facto* justification for its decision to exclude TCC on the basis of reputational risk;
- c) the legal opinion relied on by the City in reaching its decision is biased and contains errors of fact and law;
- d) there was a failure to take into account relevant considerations;
- e) the City acted in a manner which was procedurally unfair;
- f) the Municipal Manager was functus officio when he considered TCC's internal appeal;
- g) the impugned decisions were arbitrary and capricious;
- h) the City acted under unlawful dictation;
- i) the City committed errors in respect of pricing.

The lawfulness challenge

[35] In its original notice of motion in the 27 Q review, TCC only sought the review and setting aside of the decisions of the BAC and the Municipal Manager, and the remittal of the decisions for fresh adjudication.

[36] TCC subsequently amended its notice of motion, with effect from 21 October 2024,¹³ to introduce a legality challenge to the reputational risk clause in the SCM policy. TCC seeks to review and set aside the reputational risk clause on the basis that it is unlawful, irrational or otherwise unconstitutional.

[37] In my view, the legality challenge must fail for several reasons.

[38] In the first instance, on TCC's own version, the lawfulness of the reputational risk clause turns on its construction. TCC accepts that the reputational risk clause is capable of an interpretation which would render it lawful, namely that it be interpreted to require a finding that a real risk of reputational harm has been established. Put differently, TCC accepts that if the discretion involved in the application of the reputational risk clause is properly exercised, the policy will not be unlawful.

[39] In *Van Rooyen v The State and Others*¹⁴ the Constitutional Court recognized that:

'Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should

¹³ On 3 October 2024, TCC delivered a notice of intention to amend its notice of motion by the introduction of a new prayer 2A for the review and setting aside of the reputational risk clause in the SCM Policy. The City did not object to the amendment, and the amendment was duly effected on 21 October 2024.

¹⁴ 2002 (5) SA 246 (CC).

*the power be abused the remedy lies there and not in invalidating the empowering statute.’*¹⁵

- [40] On the principle established in Van Rooyen, the legality challenge does not get out of the starting blocks given that TCC accepts that the reputational risk clause is capable of lawful application.
- [41] Secondly, the legality challenge has not been adequately ‘pleaded’ in the founding affidavit – or, for that matter, in TCC’s replying affidavit where the challenge was sought to be introduced.
- [42] Section 111 of the Municipal Finance Management Act 56 of 2003 (‘the MFMA’) enjoins the City to have and implement a supply chain management policy which gives effect to the provisions of Chapter 11, Part 1 of the MFMA. In enacting the SCM Policy, the City exercised an original legislative power.
- [43] A person who challenges the lawfulness of legislation bears the onus of establishing the absence of a legitimate governmental purpose, or the absence of a rational connection between the legislative measure and that purpose.¹⁶
- [44] No case is made out in this regard in TCC’s affidavits. TCC sought impermissibly to advance a case in its heads of argument that the City does

¹⁵ Para 37.

¹⁶ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 para 19.

not have a reputational interest to protect, so that the reputational risk clause does not advance a legitimate governmental purpose.

[45] The City did not have an opportunity to deal with this argument in its answering affidavit. However, Mr Budlender, who appeared for the City with Ms Hofmeyr, made submissions with regard to the reputational interest of the City which I accept as self-evident. He argued that the City, in order to fulfil its function, requires public confidence: it requires the confidence and co-operation of ratepayers in order to collect rates; it requires the confidence of financial institutions in order to borrow money; it requires the confidence of potential contracting parties with whom it seeks to do business. The City's ability to function would be impaired by the loss of confidence which would follow if it were to be tainted by virtue of its association with persons of questionable integrity. I agree with these submissions. In the same way that justice must be and be seen to be done, the City must have, and be seen to have, integrity. Perceptions matter. The public is entitled to expect the City to be above reproach in its dealings, and to refrain from associating with those who stand accused of criminal charges relating to procurement irregularities.

[46] There is no merit in TCC's complaint that the reputational risk clause infringes the presumption of innocence to the extent that it allows the City to disqualify a tenderer based on pending criminal proceedings. The presumption of innocence applies only in the context of criminal proceedings. It does not afford a basis for claiming an entitlement to be awarded a tender.

[47] In short, I consider that the City not only has a reputational interest to protect, but there is a clear rational link between the means chosen – the reputational risk clause – and the ends. The means selected by the City to protect its reputational interest need not be the best, the most suitable or even the least restrictive: they are only required to be rationally connected to the purpose.¹⁷

[48] For these reasons, I conclude that the lawfulness challenge is unsustainable. In the light of that conclusion, it is not necessary to deal with the arguments advanced by the City in regard to unreasonable delay, acquiescence and non-joinder of the Speaker of the Municipal Council.

Alleged ex post facto rationalisation

[49] TCC asserts that, at the time when the reputational risk clause was invoked in regard to tender 27Q, the City relied on the mere existence of negative media reporting about TCC, containing unsubstantiated allegations of wrongdoing. It complains that the City's reliance, in its answering affidavit, on the fact of criminal proceedings against TCC is not the genuine reason for its decision, but a new reason contrived by the City after the event.

[50] It contends in this regard that, *'there is absolutely no reference at all in the Rule 53 record to the decisions of the NPA and the Magistrate which the City now contends that it relied on, demonstrating unequivocally that this new reason put up in the answering affidavit for the first time is not the true reason for the City's decision, but rather an impermissible ex post facto*

¹⁷ *Fair-Trade Independent Tobacco Association V President, RSA* 2020 (6) SA 513 (GP) paras 28 and 50.

rationalisation of a bad decision. There is nothing in the Rule 53 record that supports the City's contention that it in fact had regard to anything other than the media reports. In fact, the Rule 53 record unequivocally demonstrates that all that the City relied on was the negative media reports.'
[Emphasis in the original]

[51] In other words, TCC seeks to infer that the City did not have regard to the fact that the NPA had initiated criminal charges against TCC's directors and that a Magistrate had issued warrants for their arrest, merely from the absence in the Rule 53 record of any reference to the decisions of the NPA and the Magistrate. And it asks this Court to disregard the version of Mr Alastair Graham, the chairperson of the tender 27Q BEC ('**Graham**'), who deposed to the answering affidavit on behalf of the City.

[52] However, in accordance with the well-known *Plascon-Evans* rule,¹⁸ his version must be accepted unless it is so far-fetched or clearly untenable that it may be rejected merely on the papers. Graham's evidence is summarised below.

[53] When the BEC resolved on 2 March 2023 to award tender 27Q for region 1 to TCC, it was not aware of any issues relating to reputational risk. On 25 March 2025, the BAC wrote to the BEC querying whether it had considered the City's reputational risk policy in relation to TCC.

¹⁸ *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

- [54] Pursuant to that query, Graham, as the chairperson of the BEC, made enquiries with regard to the impact of the reputational risk policy on TCC. He was furnished with the Moore report in respect of tender 310Q.
- [55] In addition, as part of the BEC's enquiry into reputational risk, the City wrote to TCC on 30 March 2023, affording it an opportunity to respond to the concerns regarding reputational risk. It was informed that, if it did not satisfactorily address the concerns, the City would be entitled to exclude it from an award in terms of clause 101.2 of the SCM policy.
- [56] TCC responded on 5 April 2023, alleging that a) the allegations of corruption against had been orchestrated by a disgruntled competitor, and were spurious and without merit; b) the Municipal Manager's ruling of 22 November 2022 exonerated TCC; c) the jurisdictional requirements for reliance on clause 101 of the SCM policy were not present; and d) clause 101 of the SCM Policy was unconstitutional.
- [57] On 6 April 2023, the BEC met to consider TCC's response of 5 April 2023. It decided that it required a legal opinion, particularly in the light of TCC's contention that the jurisdictional requirements of clause 101 had not been met. Graham's version in this regard is corroborated by the contents of the minute of the BEC meeting held on 6 April 2023, which was annexed to the founding affidavit.
- [58] The BEC was then informed that legal advice had already been obtained on the issue in relation to tender 310Q, and it was provided with a legal opinion prepared by Mark Owen, dated 24 February 2023 ('the Owen opinion'), as

well as the underlying documents. The latter included a letter to TCC in relation to tender 310Q, dated 30 December 2023, in which TCC was requested to provide clarity on aspects relating to two criminal cases and reputational risk, and TCC's two responses, dated 25 and 30 January 2023.¹⁹

[59] The BEC reconvened 18 April 2023 to decide the question whether or not TCC posed a reputational risk to the City. It considered the following documents:

- a. TCC's correspondence of 5 April 2023;
- b. the Moore report in relation to tender 310Q;
- c. the Owen opinion;
- d. the City's letter to TCC of 30 December 2022 and TCC's responses dated 25 and 30 January 2023.

[60] The correspondence from TCC dated 25 and 30 January 2023 confirmed that a director of TCC was arrested on 15 December 2021 in connection with Belville CAS 255/12/2021, that the matter was removed from the roll on 25 October 2022, and that two directors of TCC were arrested and criminally charged on 24 November 2022 in connection with Maitland CAS 200/01/2022.

¹⁹ TCC's letters of 25 and 30 January 2023 were annexed to its founding affidavit, but the City's letter dated 30 December 2022 was not. It was annexed to the City's answering affidavit.

- [61] The Owen opinion dealt with the two criminal matters. In relation to Belville CAS225/12/2021 ('the Belville case'), Owen explained that the provisional charges against the accused were fraud, contravention of the Prevention and Combatting of Corrupt Activities Act, Act 12 of 2004 ('PRECCA') and obstruction and defeating the ends of justice. Owen opined that the case docket did not disclose the specific nature of the alleged corruption, but pointed out that the neither the investigation nor the charge sheet had yet been finalised. It was pointed out that the matter had been removed from the roll in terms of s 342A of the CPA, but that the State had not agreed to withdraw the charges.
- [62] In relation to Maitland CAS 200/01/2022 ('the Cape Town case'), Owen explained that the information presently available in the charge sheet indicated that the accused had been arrested for corruption and inflation of invoices in connection with tender 243Q. The case was still under investigation. Owen pointed out that J50 warrants for the arrest of the accused had been obtained in terms of s 43 of the CPA, and that *'it must be assumed that the warrants of arrest were lawfully obtained in line with the jurisdictional requirements of section 43, insofar as a reasonable suspicion exists that the offence was committed.'*
- [63] In his assessment of the facts relevant to reputational risk, Owen made reference to the fact that *'the Director of Public Prosecutions the Director of Public Prosecutions have (sic) indicated that a prima facie case exists against the accused.'*

[64] Owen reached the following conclusion with regard to the reputational risk posed by TCC:

- '31. *After objective analysis of the media reports, there can be no dispute that TCC has been implicated in corrupt activities involving tender awards with the City.*
- 32. *It is also accepted that the issues of state capture, corruption within organs of state, maladministration and other aspects of malfeasance are, at the writing of this opinion, a focus of the mainstream media and political parties in general. Non-governmental organisations and other public interest entities have come out strongly against organs of state implicated therein, and that it is against this background that any decision ought to be considered.*
- 33. *Consideration of clause 101.2.4, it is noted that the media reports have focused on TCC and City officials in their involvement in corrupt activities. It is pointed out, however, that the media interest appears to have been fuelled by the primary protagonist in this matter, Mr Loonat.*
- 34. *TCC has also provided a response to the City, in which it briefly delineates its views on the allegations. The various correspondence from TCC does not address the negative media fall out and the implications thereof.*
- 35. *It is indisputable that TCC is now associated with negative media reporting. This, in our view, poses a potential reputational risk to the City. The ineluctable conclusion is that the association between TCC and the City, as an organ of state, could be perceived as guilt by association or a questionable relationship given past media reports.'*

[65] I mention that the Owen opinion was not included in the Rule 53 record as the City claimed privilege in respect thereof. A redacted version of it was later provided and annexed to the City's supplementary answering affidavit, in order to rebut the allegation of an *ex post facto* fabrication of reasons.

[66] It appears from the minute of the BEC meeting of 18 April 2023 that the Owen opinion was circulated and discussed. Graham alleges that the BEC specifically discussed the reputational risk to the City posed by the arrest and prosecution of TCC's directors.

- [67] The BEC concluded that TCC posed a reputational risk. In reaching that conclusion, it did not rely merely on the fact of negative media reports about TCC, but rather on what the media reported about. As Graham explained, *‘When the media reported on the matter, it reported, inter alia, that the directors of TCC had been arrested and that they were accused persons in respect of criminal offences relating to fraud and corruption. The fact that TCC denied the charges and contended that they were spurious could not displace the fact that both the NPA and a Magistrate had concluded that sufficient facts existed for the directors of TCC to be brought before the courts as accused persons.’*
- [68] The BEC accordingly resolved not to recommend TCC as the preferred bidder, as it exposed the City to potential reputational risk. The BAC accepted the BEC’s recommendations in this regard, and the tender was not awarded to TCC.
- [69] Having regard to the contents of Graham’s affidavit, it is clear that the City did indeed rely on the fact that the directors of TCC had been arrested and were facing criminal charges in reaching the conclusion that TCC posed a potential reputational risk to the City.
- [70] This was not an *ex post facto* rationalisation, as TCC contends. The inference sought to be drawn by TCC, based on the absence of documents in the Rule 53 record, is unsustainable in the light of the evidence of Graham, which can by no stretch be rejected as far-fetched or untenable.

[71] There is accordingly no merit in the contention that the City is guilty of retrofitting its reasons for the decision not to award tender 27Q to TCC. The City relied on media reports concerning the arrest and criminal prosecution of directors of TCC in connection with charges relating to procurement fraud and corruption involving City officials. It is self-evident, in my view, that such reports constituted a rational basis for the City to conclude that TCC posed a risk of potential reputational harm, which was all that was required to trigger the operation of the reputational risk clause.

Bias and errors of law in the legal opinion relied on by the City

[72] In response to the City's disclosure of the Owen opinion in its further answering affidavit, TCC asserts that the Owen opinion does not assist the City, because it demonstrates bias on the part of the City and contains material errors of fact and law.

Bias

[73] The City has not had the opportunity to respond to the allegations of bias, which were introduced in TCC's further replying affidavit. Leaving aside that difficulty, the allegations of bias are, in my view, insufficient to make out a case.

[74] Based on the fact that Mr Allpass, the chairperson of the 310Q BEC, was also a member of the 27Q BAC, and that the 27Q BAC directed the 27Q BEC to consider the question whether or not TCC constituted a reputational

risk to the City, TCC argues that *‘the ineluctable conclusion is that the 27Q BEC did not seek legal advice of its own accord.’*

[75] TCC further complains that Owen obtained irregular *‘and possibly unlawful’* access to the contents of the dockets in the Belville and Cape Town cases *‘in order to prepare a legal opinion to justify the decision of the [SCM] Department not to award any tenders to TCC.’*

[76] TCC contends that that *‘the most reasonable inference to be drawn is that the legal opinion which was procured at the behest of the Department for the express purpose of getting advice on the threat of legal action in the event that the City decided not to award Tender 310Q to TCC, was provided to the 27Q BEC for the purpose of influencing the 27Q BEC to change its recommendation that TCC be awarded tender 27Q.’*

[77] In the heads of argument filed on behalf of TCC it is submitted that the timing in regard to the preparation of the Owen opinion demonstrates that the decision regarding reputational risk was *‘a foregone conclusion’* and demonstrates *‘a clear bias against TCC.’*

[78] In my view, the inferences contended for by TCC are not borne out by the facts.

[79] In the first instance, it is clear from the Owen opinion that legal advice was not only sought for the purpose of obtaining legal advice regarding the threat of legal action of the City decided not to award tender 310Q to TCC on the strength of the reputational risk clause. Legal advice was also sought in

relation to the impact of the criminal cases against TCC's directors in regard to reputational risk.

[80] Secondly, it is clear from the minutes of the BEC meeting held on 6 April 2023 that the BEC wanted legal advice on the reputational risk issue.

[81] Third, the decision of the 27Q BEC in regard to reputational risk was not a foregone conclusion. TCC was given an opportunity to respond to the reputational risk concerns. The 27Q BEC took into account TCC's responses, and weighed them against the potential reputational risk as highlighted in the Owen opinion. It came to its own conclusion, based on the material before it, that TCC represented a potential reputational risk.

[82] Moreover, one cannot infer bias from the fact that the 27Q BAC raised the issue of reputational risk in the light of the recent decision regarding reputational risk in relation to tender 310Q. Once the City had concluded, in relation to tender 310Q, that it would expose the City to unacceptable reputational risk to contract with TCC, it would have been irrational for it not to take that fact into account in its decision-making in relation to tender 27Q. Had it not brought its conclusion on the reputational risk in the 310Q tender to bear on its decision-making in the 27Q tender, it could legitimately have been accused of inconsistency.

[83] In short, I am of the view that the complaint of bias is based on sheer conjecture and is not sustainable on the facts. I agree with the submission by counsel for the City that TCC's allegations of bias are astonishing and reckless: they should not have been made.

Errors of fact and law

- [84] The alleged errors of fact and law in the Owen opinion relate to the nature of the criminal charges and the conclusion that bail conditions are determined from the nature of the offence.
- [85] Owen is criticized for stating that the charges in the Belville case related to fraud, contravention of PRECCA and obstruction of justice, when TCC had never seen a charge sheet in the Belville matter. This criticism is misplaced, however, as the opinion specifically pointed out that the investigation and charge sheet had not yet been finalised, and that the nature of the charges might change as the investigation progressed.
- [86] Owen is also criticised for concluding that serious offences were involved, having regard to the nature of the bail conditions imposed. But this is wholly irrelevant to the present review. Whether or not Owen was correct in this regard has no bearing on the reputational risk question. If there was an error of law, it was plainly immaterial as it did not affect the outcome of the decision.

Failure to take into account relevant considerations

- [87] TCC complains that the City failed to take into account relevant considerations in that it failed to take into account the City's forensic report of March 2022, which reflected the City's own forensic investigation into the allegations underlying the negative media reports and criminal charges, and which made no adverse findings against TCC.

- [88] TCC argues that it is irrational for the City to contend that the outcome of its own forensic investigation into the allegations underpinning the media reports and the criminal charges, which cleared TCC of the allegations, is irrelevant because another organ of State has decided that TCC has a case to answer.
- [89] TCC's in effect contends that the City is bound by the results of its own forensic investigation, and must disregard the different conclusions reached by organs of State specifically tasked with law enforcement. The proposition merely has to be stated to be rejected. The City cannot be expected to second-guess decisions of the NPA and a Magistrate that sufficient evidence exists to prosecute and to issue arrest warrants. The City is entitled to defer to the expertise of these organs of State making decisions within their specialist sphere.
- [90] In addition, TCC fails to take into account that the City's forensic report predated the arrest and prosecution of TCC's directors on 24 November 2022, and the media reporting thereon, which was what triggered the invocation of the reputational risk clause.
- [91] In my view it is clear that the City's failure to consider the forensic report had no bearing on the decision regarding the reputational risk posed by TCC, which was essentially based on the media coverage of the recent arrest and prosecution of TCC's directors.

[92] There is therefore no merit in the challenge based on the failure to take into account relevant considerations.

Procedural unfairness

[93] TCC complains of procedural unfairness in two respects:

- a. it was not given a copy of the Owen opinion and afforded an opportunity to comment on the adverse information on which the opinion relied; and
- b. the opportunity afforded to TCC to make representations with regard to reputational risk was meaningless, as the result was a foregone conclusion given the City's stance that it could not ignore the findings of the NPA and the Magistrate.

[94] Regarding the failure to furnish TCC with a copy of the Owen opinion, the complaint rests on the premise that the opinion incorrectly concluded that TCC had been charged with corruption-related offences under PRECCA, when this was not the case, and that, had TCC been afforded an opportunity to deal with the Owen opinion, it would have been able to correct this erroneous conclusion.

[95] This argument is flawed, however, as it was clearly stated in the Owen opinion that the criminal investigation was still underway, and that the charges had not yet been finalised and could change. Moreover, the facts on which Owen relied to conclude that TCC posed a potential reputational risk

to the City were indisputable, and were confirmed by the contents of TCC's letters to the City²⁰ which were before the 27Q BEC on 18 April 2023. The relevant facts were that:

- a. TCC's director(s) had been implicated in, and were presently appearing in, a criminal trial which had generated media interest, and the interest of self-proclaimed political and anti-crime activists;
- b. TCC acknowledged that it had received negative media publicity in relation to its involvement in tenders with the City, and had appointed HWB Communications to manage the media perception in relation thereto;
- c. the Director of Public Prosecutions had indicated that a *prima facie* case existed against the accused.

[96] Given that Owen's conclusion with regard to reputational risk was reached on the basis of these common cause or indisputable facts, there is simply no basis for contending that there was a material error in the Owen opinion which influenced the BEC's decision, which could and would have been corrected had TCC been given an opportunity to respond to the Owen opinion.

[97] The second complaint in relation to procedural fairness, namely that the opportunity given to TCC to make representations was meaningless because there was nothing it could say to change the City's view, is not borne out by the facts.

²⁰ Dated 30 January 2023 and 5 April 2023.

- [98] TCC was given repeated opportunities to deal with the question of reputational risk arising out of the negative media coverage. The City's letter of 30 December 2022 called upon TCC to address specific questions relating to the Belville and Cape Town cases. It invited TCC to provide any other material facts pertinent to the assessment of the potential reputational risk of the City when it exercised its discretion with regard to clause 101 of the SCM Policy.
- [99] It is important to note that TCC's response of 30 January 2023 confirmed that: a) one of the directors of TCC has been arrested and charged in the Belville case on 17 December 2021, the investigation and charge sheet had not yet been finalised, and the matter had been removed from the roll; and b) the directors of TCC had been arrested and charged on 24 November 2022 in the Cape Town case, the allegations in the docket related to irregular invoicing in connection with a City tender, the criminal case was pending, and the directors of TCC were due to appear in court on 1 March 2023.
- [100] It is clear that the Owen opinion and the 27Q BEC had regard to TCC's letter of 30 January 2023. But, far from satisfying the City that TCC did not pose a reputational risk, the contents of TCC's letter, in particular the confirmation of the facts referred in the preceding paragraph, lent support to the conclusion that TCC posed a potential reputational risk to the City. Had TCC been in a position to respond that it had made representations to the NPA and that all charges had been withdrawn, the conclusion would doubtless have been different.

[101] As it was, however, the BEC duly weighed the material before it, including TCC's representations, and reached a rational conclusion that TCC posed a potential reputational risk to the City. The fact that the outcome was adverse to TCC does not mean that it was not afforded a proper hearing.

[102] There is no merit in the procedural fairness challenge. In truth, TCC's complaint is not a complaint about process, but rather an impermissible complaint about the outcome.²¹

Functus officio

[103] TCC contends that, when the Municipal Manager considered TCC's internal appeal against the decision of the BAC, he was *functus officio* because he had already made a final finding, on 22 November 2022, that TCC had not breached the City's SCM Policy, based on the same factual allegations underlying the criminal charges pending against TCC's directors.

[104] Accordingly, so TCC argues, the City was bound by its own findings in the absence of an application to review and set aside its finding in regard to these allegations. It was not open to the Municipal Manager to revisit and alter his previous decision unless there were new facts before him.

[105] To my mind this argument is fundamentally flawed. The Municipal Manager's decision of 22 November 2022 did not concern the question of *reputational risk*. There the Municipal Manager was tasked with determining, in terms of clauses 57, 58, 60 and 61 of the SCM Policy,

²¹ *Commissioner SARS v Richard Bay Coal Terminal* 2025 (5) SA 617 (CC) para 72.

whether or not TCC could be ‘blacklisted’ for City tenders on the grounds of fraud, corruption, favouritism, unfair practices, a misrepresentation in a bid submission, or a breach of contract.

[106] A decision on reputational risk, however, is governed by clause 10 of the SCM Policy, and involves a different question. An assessment of potential reputational risk is concerned with the potential for impairment of public confidence in the City arising from association with individuals or entities who are the subject of negative public attention.

[107] Moreover, it bears emphasis that the Municipal Manager’s ruling of 22 December 2022 can hardly be said to have exonerated TCC. The Municipal Manager merely concluded, on the evidence before him at the time, that there was insufficient evidence to discharge the onus resting on the City to prove abuse on the part of TCC. The NPA subsequently concluded that there was sufficient evidence to bring criminal charges against the directors of TCC, and Magistrate considered that there was sufficient evidence to justify the issue of arrest warrants for the directors of TCC. These were the new facts on which the reputational risk was based.

[108] Since the decision on reputational risk is different from a decision on abuse of the SCM Policy, the doctrine of *functus officio* does not apply.

[109] There is no merit, therefore, in the *functus officio* point.

Arbitrary and capricious decision-making

[110] TCC contends that the City's decision in regard to reputational risk is arbitrary because there is an absence of reasons for the decision, or the reasons given do not justify the risk.

[111] In the light of what has been set out above with regard to the contents of the minute of the meeting of the BEC on 18 April 2023, and the Owen opinion, that argument cannot be sustained.

[112] TCC furthermore complains that the reputational risk clause was not evenly applied, because H & I Construction was not excluded on the basis of reputational risk, despite that fact that it had been found guilty of engaging in collusive tendering in 2014, and had paid a fine of R 45.3 million. What TCC ignores, however, is the fact that there was no current negative media attention surrounding H& I Construction, and it was rational to conclude that H & I no longer posed a reputational risk to the City based on its historical conduct. The same applies to Sakhikhaya Suppliers CC, where the BAC report noted that the three matters giving rise to potential reputational risk had been resolved, and that the due diligence report opined that the matters in question no longer posed a reputational risk to the City.

[113] In my view there is no evidence of arbitrary or capricious decision-making on the part of the City in regard to reputational risk. There are rational reasons for the different treatment afforded to TCC, on the one hand, and H& I Construction and Sakhikhaya Suppliers CC, on the other hand. The fact that TCC is unhappy with the City's decision does not make it arbitrary.

Unlawful dictation

[114] TCC argues that, if it is accepted that the true reason for the City's decision is that the NPA and the Magistrate made decisions regarding the institution of criminal charges and the issue of arrest warrants, then the City blindly followed the decisions of the NPA and the Magistrate and abdicated its discretion in regard to the assessment of reputational risk. In short, TCC complains that the City '*passed the buck*' by deferring to the NPA and the Magistrate and failing to engage with the facts underlying the decisions of the NPA and the Magistrate.

[115] In my view the argument is misconceived on two scores.

[116] First, the City exercised its own discretion with regard to the reputational risk assessment. It took into account the obviously relevant *fact* that the NPA and Magistrate considered that there was sufficient evidence to warrant criminal processes, as well as the fact that there was ongoing media coverage in regard thereto.

[117] Second, as mentioned above, the City cannot be expected to second-guess the decisions of the NPA and the Magistrate. It is entitled to defer to the specialist decisions of independent organs of state specifically tasked with criminal investigations, the assessment of evidence and law enforcement. Public confidence in the City would be justifiably shaken if the City were to associate itself with persons and entities who are the subject of criminal proceedings in relation to procurement irregularities and corruption, merely because the City's internal investigations had reached a different conclusion from that reached by the NPA and the judiciary.

[118] For these reasons I conclude that there is no merit in the unlawful dictation challenge.

The pricing challenge

[119] It is not necessary to deal with the pricing challenge as TTC rightly conceded that the pricing challenge is moot. If the challenge based on reputational risk succeeds, the pricing challenge is of no practical effect, and if the reputational risk challenge fails, the pricing challenge is irrelevant as TCC is excluded on that basis.

CONCLUSION AND COSTS

[120] For all the reasons set out above, the 27Q review application and the 310Q review application fall to be dismissed.

[121] TCC submitted that, in the event of the applications being unsuccessful, there should be no order as to costs by virtue of the *Biowatch* principle that litigants seeking to vindicate constitutional rights against government should not be mulcted in costs.²² That argument holds good in respect of the 27Q review application.

²² *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) paras 20 to 23.

[122] The 310Q review application stands on a different footing, however, as the Biowatch principle is subject to an exception where an applicant's conduct is '*frivolous or vexatious, or in any other way manifestly inappropriate.*'²³

[123] Before the City delivered an answering affidavit in the 310Q review, the City's attorneys wrote to TCC's attorneys on 28 August 2024 pointing out that the application had become moot as a new tender had been put out for the services in question, and the budget for tender 310Q had already been spent. It was suggested that TCC withdraw the application, with no order as to costs.

[124] TCC's attorneys responded that the question of mootness could not be assessed without an affidavit from the City, and they insisted that the City file an answering affidavit.

[125] The City's attorneys again wrote to TCC's attorneys, on 20 September 2024, attaching proof that the tender for the same services had been awarded to Mphathuli. TCC was warned that if it insisted that the City deliver an answering affidavit, the City would ask for the dismissal of the application with costs, as an exception to the *Biowatch* principle.

[126] This notwithstanding, TCC's attorneys insisted that the City deliver an answering affidavit in the 310Q review application, and TCC persisted with the application despite the mootness challenge raised squarely in the City's answering affidavit.

²³ *Biowatch Trust v Registrar Genetic Resources and Others (supra)* para 24.

[127] Not only has the City been put to unnecessary trouble and expense in resisting the 310Q review application, but this Court has been burdened with the need to consider an application which should not have been persisted with in the light of the facts communicated to TCC's attorneys in the letters of 28 August and 20 September 2024, with proof of the new tender award attached to the latter.

[128] In my view the conduct of TCC was manifestly inappropriate in the circumstances, and it should therefore bear the City's costs of opposition incurred in the 310Q review application after 20 September 2024.

D M DAVIS
ACTING JUDGE OF THE HIGH COURT

Erasmus, ADJP (concurring)

N C ERASMUS
ACTING DEPUTY JUDGE PRESIDENT

Da Silva Salie, J (concurring)

**G DA SILVA SALIE
JUDGE OF THE HIGH COURT**

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