

REPUBLIC OF SOUTH AFRICA



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

**CASE NUMBER A5051/2021
CASE NUMBER A QUO 31770/2018**

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
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In the matter between:

ARKEIN CAPITAL PARTNERS (PTY) LTD

Appellant

and

**GAUTENG PARTNERSHIP TRUST
t/a GAUTENG PARTNERSHIP FUND
AND 11 OTHERS**

First Respondent

Coram: Maier-Frawley J, Manoim J and Allen AJ

Heard: 08 May 2024

Appeal from: Gauteng Local Division of the High Court, Johannesburg (Molahlehi J sitting as a court of first instance):

Summary: Reinstatement of appeal - failure to comply with High Court Rule 46(9)(a)- whether good cause shown for condonation;

Review- application by respondent for self- review of tender, whether high court correctly granted the review.

Administrative law- whether an ancillary contract is ultra vires when the main contract is ultra vires

Administrative review – whether if contract set aside tenderer entitled to payment of invoices both paid and unpaid on grounds it is just and equitable.

ORDER

1.The appeal is dismissed.

2.The appellant is liable for the costs of the first respondent on the C scale including the costs of two counsel where used.

JUDGMENT

MANOIM J (MAIER-FRAWLEY J and ALLEN AJ concurring):

Introduction

[1] The first respondent in this matter, the Gauteng Partnership Trust, which trades as the Gauteng Partnership Fund (GPF), had successfully brought an application in the court a quo, to review and set aside a contract entered into between it and the appellant Arkein Capital Partners (Pty) Ltd (Arkein).¹ In addition, the court a quo also ordered Arkein to repay an amount of R 3

¹ The first respondent was the only one to oppose the appeal. The other eleven respondents were cited as trustees of the GPF at the relevant time of the review.

591 000.00 which had been paid to the respondent pursuant to that impugned contract. The court a quo also dismissed a counter application by the appellant (then the respondent) in which it sought payment of R8 565 150.60, plus interest, which it claimed was owing to it, pursuant to a further stage of implementation of the same contract.

- [2] This matter is before this court because the appellant seeks to overturn all these decisions of the court a quo.

Lapsing of the appeal

- [3] It is common cause that the appeal in this matter has lapsed because Arkein has not complied with the time periods laid down in Uniform Rule 49(6)(a). This rule, which deals with civil appeals from the High Court, requires an appellant to apply to the registrar for a hearing date within sixty days after delivering a notice of appeal. If the appellant fails to do so within this time period, the appeal is deemed to have lapsed. However, in terms of Rule 49(6)(b) a court may on application of the appellant, reinstate the appeal for “*good cause shown*.”
- [3] Arkein has made such an application. The basis of its case for good cause shown amounts to two issues. The bona fide but mistaken conduct of its attorney who was inexperienced in prosecuting appeals and its confidence in the prospects of success.
- [4] Counsel who appeared for Arkein argued that the failure to apply for a date in time, whilst technically causing the appeal to lapse, was not so egregious a deficiency as to not warrant condonation. Arkein’s attorney had in his affidavit

explained that he was not familiar with the appeals process and that at the relevant time when he was meant to apply for a trial date he was preoccupied with some complex litigation in another matter and hence had neglected to apply for a date. It was also argued that since the GPF had been late in filing its review application for which it had to seek condonation it had not been prejudiced by Arkein' s delay in prosecuting the appeal.

- [5] The application for a hearing date was meant to be filed by 6 September 2021 but it was only filed on 2 September 2022, thus almost a year later, and then only after prompting from the attorneys from the GPF. But the appeal had other deficiencies; the record filed was not compliant with the rules and the appellant's attorney had only rectified the problem after prompting from the registrar. It had also failed to timeously furnish security.
- [6] The delay of one year is considerable, the non-compliance with the Rules is not trivial, and the explanation for non-compliance is weak. Whilst some cases suggest that the failure of the attorney should not be held against the client, the court in *Saloojee* put the failure in proper perspective when Steyn CJ stated:²

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney 's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of

² *Saloojee and another NNO v Minister of Community Development* 1965(2) SA 135 at 141 C-E

the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity.”

[7] More recently in *Huysamen*³ the SCA stated:

*“Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellants attorney that condonation will be granted.”*⁴

[8] Counsel for the appellant argued that other factors were present that favoured condonation – the sums involved were large and since the case related to a state tender, it also implicated the public interest. But his primary argument was, he contended, the strength of Arkein’s prospects of success. But even a strong case on prospects of success does not in all cases justify condonation. As the court also held in *Huysamen*:

*“But appellant’s prospect of success is but one of the factors relevant to the exercise of the court’s discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.”*⁵

³ *Huysamen & another v Absa Bank Limited 8 others* (660/2019) [2020] ZASCA 127 (12 October 2020).

⁴ *Ibid*, paragraph 10.

⁵ *Ibid*, paragraph 10.

- [9] Whilst the explanations for the lateness of the appeal are weak, I do not think this is a case where it is so weak that it should justify not considering the prospects of success on appeal. Even in *Huysamen* the court went on to consider the prospects of success and it is to that which I now turn.⁶

The merits

- [10] This is what has become termed a ‘self-review’ meaning the body that took the decision is reviewing its own decision. Since the Constitutional Court decision in the *Gijima* case, it is now accepted that such reviews are permissible in accordance with the principle of legality. The court there held:

“The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision; it simply means that it cannot do so under PAJA.”⁷

- [11] Since the GPF’s review was brought relying on the principle of legality, there is no dispute between the parties on this aspect.
- [12] Initially in the court a quo Arkein had taken the point that the review had been brought late and should be dismissed on that ground alone. Molahlehi J found that although the GPF’s justification for bringing the review late was “weak” nevertheless it was strong on the merits, and he condoned the late filing.

⁶ Ibid, paragraph 15.

⁷ *State Information Technology Agency SOC Limited v Gjiima Holdings (Pty) Limited* 2018 (2) 23 CC paragraph 38.

[13] On appeal Arkein was more critical of the decision to grant condonation in its Notice of Appeal than it was in oral argument. This is explained by a different approach adopted by the new counsel who argued the appeal and who had not appeared in the court a quo. A condonation decision is within the discretion of the court a quo and the appeal court should not readily interfere with such a decision unless it is not made judicially. There is no basis to consider that this discretion was not exercised judicially.

[14] Further there is authority for this approach. As Francis J held in *Swifambo*:

*“In my view state institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution.”*⁸

[15] This is precisely what delayed the review in this matter. The history of the matter shows that the executive office bearers of the GPF changed over time. In the first period the executive office bearers, or at least some of them, were responsible for the conclusion of the impugned tender. In the second period, a change of personnel led to the appointment of new office bearers who were responsible for the ‘*ferreting out*’ and who ultimately were concerned enough to protect the institution by bringing the review, albeit late.

[16] The founding affidavit in the review was deposed to by Molantoa Makhubu. He represents the new executive. At the time of his affidavit, he was the acting chief

⁸ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) paragraphs 74- 79.

executive as well as a trustee of GPF. He was appointed on 23 October 2017. But at the time of these events, his predecessor as CEO and a trustee was Boni Muvevi. It is the actions that were taken by the GPF under Muvevi's stewardship as CEO that formed the subject of the review.

- [17] I now go on to consider the basis of the review. The GPF advanced several grounds for review all of which the court a quo accepted.

The ultra vires review

- [18] The GPF was founded in 2002. It now falls under the auspices of the Gauteng Provincial Government's Department of Human Settlements (the Department). It is registered as a benevolent trust in terms of the Trust Property Control Act, 57 of 1988. But more significantly for purposes of this case it is classified as a Schedule 3 (Part C) public entity in terms of the Public Finance Management Act 1, of 1999, (PFMA). This has implications for how it can raise funds.

- [19] The GPF's mandate is to provide affordable housing. One way it does so is to facilitate funding. In September 2014, the GPF produced a five-year strategic plan in which it identified the need to recapitalise in order to continue its funding programs. Part of this meant engaging with financial institutions.

- [20] In March 2015 Muvevi, who was then the CEO of the GPF, wrote a memorandum to the trustees in which he identified certain problems. One of these problems was that the GPF was always reliant on the Department for funding. But funding came through late or fell short of what was needed. The

management team had produced a five-year strategic plan. The budget implication of this plan was that the GPF required R1,7 billion rand.

[21] Muvevi explained that the Department would be unable to meet this commitment, so he proposed that GPF “*actively diversify its sources of capital.*” He sought a mandate from the Board to approach service providers. The service providers would not provide the financing themselves. Instead, they would function as market intermediaries who would identify institutions willing to provide the capital and then negotiate terms for them to do so. Given the urgent need to secure funding it was suggested that service providers be incentivised to raise capital to achieve faster results. The management proposed that service providers be given three months to come up with a proposal to raise R 1 billion. To incentivise them they would receive a 3% fee on the amount raised (exclusive of VAT). This fee would be paid in three instalments – 25% on signature of the term sheet, 50% on the first draft of the co-funding agreement, and 25% on the signature of the key agreement.

[22] On 17 March 2015, the trustees of the GPF held a meeting at which they approved Muvevi’s proposal. Pursuant to this on 2 April 2015, the GPF put out a Request for Proposal. It required bids to be submitted by the end of June that year. In terms of the legislation to which the GPF is subject a bid proposal must be prepared by a Bid Specification Committee (BSC). Here is where the first irregularity occurred according to the GPF’s founding papers in the review. The GPF contends no BSC had been constituted. Aiken alleges that there was one. On its version since the executive of the GPF, meaning its staff, had prepared the bid, they constituted the BSC.

- [23] The next anomaly was that on 25 June 2015, and thus five days before the bid period was to close on the 30 June, the GPF received a letter of interest from an international funder known as Agence Francaise de Development (AFD) expressing an interest in raising 50 million Euros in concessionary finance. Makhubo says the GPF considered this a serious breach of the tender process as Arkein anticipated the award of the tender and acted accordingly by approaching a finance institution, even though the bid had not yet been awarded.
- [24] Arkein admits that prior to submitting its bid it had approached various financiers, inter alia, the AFD, but it contended that this was not irregular as it was usual for firms like it to approach funders to ascertain their appetite for providing finance.
- [25] Bids closed on 30 June 2015, and Arkein was one of the firms that had put in a bid. A bid evaluation committee (BEC) then met to evaluate the bids. Three people were on this committee. They evaluated the bids and concluded only that four firms qualified on functionality. The names of these firms were then sent to the bid adjudication committee (BAC). This committee met in July 2015 and following a briefing to them, from the then chief financial officer, they approved the four firms. They also agreed to approve R 30 million as a fee to the firm that managed to raise the funds.
- [26] It is not explained in the affidavit whether the four firms were to be appointed simultaneously or sequentially, although it would seem more likely that it was the latter. Nevertheless, it is common cause that on 30 August 2015, the GPF

wrote to Arkein to state that it had been appointed as its transaction advisor. The terms of the appointment, the fees, and the milestones to be achieved for payment were set out in the letter.

- [27] Arkein was given three months to revert with a concrete funding proposal supported by a term sheet acceptable to the GPF. It is not clear whether it did so within the stipulated time period. But nevertheless, thereafter, there were several interactions between the staff of the GPF and a team from AFD to perform due diligence, between September 2015 and February 2016.⁹ This led to the conclusion of a service level agreement (SLA) between GPF and Arkein dated 10 February 2016. It is this agreement that Molahlehi J set aside in his judgment. The agreement is signed on behalf of the GPF by Muvevi in his capacity as the CEO.
- [28] This agreement has the same terms as set out earlier regarding remuneration, the relevant terms being to describe the three milestones that had to be accomplished by Arkein to entitle it to the respective portions of its fee. It seems nothing further happened until 13 March 2017 when AFD wrote a letter to GPF which was received again by Muvevi, then still the CEO, which is styled as a “Letter of Interest”.
- [29] Arkein considered that having procured this Letter of Interest it had achieved milestone 1 of its agreement with the GPF and so was entitled to payment for it. It invoiced the GPF for an amount of R 3 591 000,00 which the GPF paid.¹⁰

⁹ The founding affidavit refers to September 2016 but from the context this must be an error and the correct date must be to September 2015.

¹⁰ This was calculated as 25% of the rand value of the amount in Euros that AFD had agreed to fund.

It is this amount that Molahlehi J found to have been paid unlawfully and which he ordered to be repaid to the GPF.

[30] At the same time as the tender was being prepared and processed another development had taken place which was closely aligned to the tender. The GPF was considering creating a special purpose vehicle (SPV). The purpose of the SPV was so that the GPF could channel funds to it. They sought advice on whether they could do so. The advice from a law firm was that they could, provided they got permission from the provincial Treasury. In February 2016, the GPF had written to the Treasury to advise that they intended to set up the SPV. The timing is interesting because this coincides with the time period that the impugned agreement with Arkein had been signed (10 February 2016).

[31] On 26 April 2017, the Gauteng Provincial Treasury wrote back to the GPF. The letter written by the Treasury's Provincial Accounting General is marked for the attention of Muvevi. It is not clear from the papers why the Treasury took so long to respond. Nevertheless, the Treasury clearly saw the attempt to set up the SPV as a means to bypass the borrowing power restrictions on the GPF. The Treasury states in the letter:

"The GPF's intention of establishing a SPV for the purpose of being a channel for borrowing is deemed ultra vires. The GPF in effect is intending on transferring more power than it actually has, i.e. borrowing power, to the SPV. In such an instance, the GPF cannot transfer powers that it itself does not possess. To do so,

would have the effect that the GPF is acting ultra vires and any action beyond the scope of the GPF would be deemed unlawful.”

[32] The letter goes on to caution the GPF in these terms:

“For the reasons stated above, the GPT cautions the GPF in its pursuit in establishing a SPV for the purposes of borrowing.”

[33] There is nothing in the record to show how Muvevi responded to this letter. But disquiet in the ranks of the GPF eventually emerged in May 2017, first at an Audit Committee hearing, and later at a meeting of the Board. Muvevi was asked to account for the payments to Arkein. He responded that the payment was in accordance with a Board approval. The Chairperson of the Board queried why the payment structure allowed Arkein to be paid R 22 million without a final commitment from the financier. The Chair of the Fundraising Committee was asked to look into the matter and report back.

[34] This he did, and at the next board meeting in June 2017, he expressed a number of concerns both about the remuneration of Arkein and that it appeared that Arkein had been favoured in the tender process. He said it appeared that Muvevi had held discussions with Arkein before its bid had been considered. He recommended a further investigation.

[35] This led the GPF to appoint a forensic auditor to investigate. At the same time the board wrote to Arkein Capital asking for repayment of the R3 591 000,00 within 10 days, together with interest calculated from 30 March 2017 to date of payment. The basis for asking for the repayment at this stage was that the

board did not consider that Milestone 1 had been met as the term sheet had not been signed. The payment it said had been made in error. Notably the letter is not signed by Muvevi, but by Thandi Khuzwayo the Legal and Compliance Executive.

[36] The firm appointed to conduct the forensic investigation was Sizwe Ntsaluba Gobodo (SNG). They produced a final report in October 2017. That report was annexed to the founding affidavit. The report was presented to a meeting of the board which resolved to adopt its recommendations.

[37] Arkein in the meantime adopted two strategies. One was an attempt to negotiate which did not come to anything and the second was in October 2017, to claim payment for having reached the second milestone. In terms of the SLA if it reached the second milestone it was entitled to 50% of the fee which Arkein stated would amount to R 8 665 150.

[38] In November 2017, AFD wrote to the board to state that its credit committee had approved a concessional loan of Euro 30 million to a GPF special purpose vehicle

[39] New trustees were appointed to the GPF. In January 2018, the GPF's present attorneys wrote to Arkein to advise it that the new trustees had reviewed the agreements and concluded that they were void *ab initio*, and they did not consider themselves bound by them. Furthermore, they demanded repayment of the milestone 1 payment and indicated they would refuse to pay the fee for milestone 2.

- [40] Arkein wrote back denying the process was unfair and stating that the GPF was estopped from denying the contract. In March 2018 Arkein sent a further invoice wanting payment of R 4 335 080 .85 for having allegedly met Milestone 3. (At the time there was a possibility that the matter might be resolved by arbitration, but there was a dispute about this between the parties and on 14 December 2018 the arbitrator, Mpati J, upheld a special plea by the GPF that the arbitration be stayed.)
- [41] The GPF brought the present application on 28 August 2018. Arkein opposed the application and brought a counter application in which its main claim was for payment for milestone 2, i.e. R 8 665 150.00 plus interest.¹¹

Decision of the court a quo

- [42] The court a quo had to deal with two preliminary issues. First whether the late filing of the review should be condoned. Molahlehi J found that although the explanation for why the review was brought late was weak, the prospects of success were strong and hence condoned the late filing. As discussed earlier, the condonation issue, despite being a crucial issue for Arkein in its Notice of Appeal, was not persisted with in oral argument before us. The second issue was the argument by Arkein that the GPF's reliance on the two auditors' reports (that of Rakoma and SNG, constituted hearsay evidence and hence the court erred in exercising a discretion to admit the reports in terms of section 3 of the Law of Evidence Amendment Act, 45 of 1988. Again, before us this issue was

¹¹ It also sought rectification of the SLA by reference to a subsequent letter written but that is not relevant to this appeal given that the appeal is not successful.

not persisted with as Arkein sought to rely on excerpts from the reports to support its own contentions.

[43] Coming to the merits the court a quo had identified six grounds of review raised by the GPF. They are:

(a) The decision is ultra vires the powers as provided for in the PFMA because the GPF did not have the power to borrow from other entities such as the AFD;

(b) The GPF required approval to incorporate an entity to facilitate the borrowing of funds;

(c) The provisions of the National Treasury Supply Chain Management Accounting Officers/Authorities (of February 2004) were contravened in that the tender was made in respect of "capital raising incentive" when that was not budgeted;

(d) The National Treasury Regulation (paragraph 16 A6 .2 (b) of March 2004) was contravened in that there was no bid specification committee that prepared the bid;

(e) The GPF Supply Chain Management was contravened in that the evaluation criteria did not specify what the criteria/statistics were for the evaluator to assess the scores that the bidder should get for each respective criteria; and

(f) The minutes and recording of the Bid Committee and Adjudication Committee had gone missing and thus there was lack of transparency.

[44] The court a quo upheld all the grounds of review. Finding that the GPF had failed to comply with both the PFMA and its own policy. The court went on to

find that based on the reports of the auditors, the tender process had been a sham. But Molahlehi J also found that the GPF could not make payment of Arkein's fees given that there had been no budget provision for this. The court held that this amounted to an ex post facto payment. Furthermore, even if the impugned agreement was lawful the payment was not in compliance with paragraph 4.6 GPF's policy. As the court noted:

"In terms of paragraph 4.6 of the policy, payment could only be made once the goods had been delivered or work was executed, accepted as satisfactory, and the invoice authorised by the relevant person."

Analysis

- [45] Although there are six grounds of review, they can be conveniently summarised into three categories. First, that the GPF acted ultra vires the PFMA and its own policy. Second, that the tender process did not comply with section 217 of the Constitution in that it was not conducted in a manner that was fair, equitable and transparent. Third, the incentive fee payment was irrational as Arkein would in terms of the SLA be entitled to a fee even if the funding which underpinned it never eventualised.
- [46] Given that Molahlehi J had upheld all the review points, to succeed in reinstating its appeal Arkein must establish that it has prospects of success in refuting all these grounds of review.
- [47] In its initial heads of argument Arkein sought to re-argue the same points it had unsuccessfully made before Molahlehi J. However, a day before the hearing,

Arkein, having now retained the services of new counsel, filed what it termed notes for argument. Despite the name attributed to the document it constituted a further set of heads of argument which in important respects departed from the earlier heads of argument. Although he might have been entitled to request a postponement, counsel who appeared for GPF, agreed to have the matter argued, as he said his client would be prejudiced by any further delay. He and his junior were able to file a set of responsive heads of argument produced on the morning of the hearing.

Arkein' s new arguments

a. The ultra vires argument

- [48] Section 66 of the PFMA imposes restrictions on the borrowing powers of public entities. There is a specific section that applies to provincial public entities. There is no dispute that this section applies to the GPF. This section states:

66(4) "Constitutional institutions and provincial public entities not mentioned in subsection 3(d) may not borrow money nor issue a guarantee, indemnity or security nor enter into any other transaction that binds or may bind the institution or entity to any future financial commitment."

- [49] In terms of section 67(5) an entity may be granted permission to borrow if it has Ministerial permission. It is common cause that the GPF had no such permission. Two other provisions are also relevant. Section 67 provides for the same borrowing restrictions on public entities as does section 66(4) but extends it to transactions denominated in foreign currency. Section 68 provides that a

public entity is not bound by any transaction that is not in accordance with section 66.

[50] Of course, these provisions made the purported agreement with the AFD, one in contravention of both sections 66 and 67, and hence not enforceable in terms of section 68. It was not only an agreement that contemplated borrowing but also one denominated in a foreign currency. Arkein had argued before the court a quo that: (i) the GPF's borrowing powers derived from its trust deed which gave it borrowing powers and (ii) that regulation 16 of the PFMA regulations gave it these powers.

[51] However, on appeal Arkein abandoned both these points, conceding that the Trust Deed could not be relied on to circumvent legislation and that the PFMA regulation, on which it sought to place reliance, had never been promulgated. However, it argued a new defence to the ultra vires challenge that had not been argued before Molahlehi J.

[52] This argument located the relevant contract as the agreement between Arkein and the GPF, not the one with AFD. Whilst it was conceded that the AFD contract was a funding contract, it was argued that the Arkein SLA was not, and hence not of the type proscribed by the PFMA. Arkein relied for this on a decision in the Constitutional Court in *Road Traffic Management Corporation v Waymark (Pty) Limited* ¹².

¹² 2019 (5) SA 29 (CC)

[53] The question in *Waymark*, was whether a contract to provide consultancy services to the RTMC, a public entity, which extended to payments based on milestones to be achieved in the future, was in contravention of section 68 of the PFMA because it provided a “*future financial commitment*” for payments in a future financial year, which had not been budgeted. The Court interpreted the language of section 68 restrictively giving it a purposive meaning holding that:

“the phrase ‘any other transaction that binds or may bind that public entity to any future financial commitment’ as referred to in s 66, must mean a transaction that is somehow similar to a credit or security agreement”¹³

[54] It went on to hold that to interpret section 66:

“... too broadly would result in an infinite number of transactions requiring ministerial approval, thereby frustrating the efficiency of the administration of public finances and stifling the operations of the RTMC.”¹⁴

[55] Counsel for Arkein argued that the consultancy contract that Arkein had with the GPF, did not involve borrowing or the giving of a guarantee, indemnity, or security by the GPF. Nor, he argued, based on the *Waymark* decision could there be any objection to payment of the future instalments based on the milestones to be achieved. I accept these observations are correct.

¹³ Supra, at paragraph 45.

¹⁴ Supra, paragraph 57

[56] However, there is a fundamental difference between Arkein's contract with the GPF and that of Waymark with the RTMC. Arkein's SLA is an ancillary contract. Its object is to procure funding for the GPF. But the GPF is not authorised to enter into such contracts without authorisation. This means that the SLA is ancillary to a contract that is ultra vires the powers of the GPF. If a public entity such as the GPF does not have the power to enter into the main contract – the one with the ADF to procure funding – then it follows it cannot lawfully contract with a third party in which it is paid to procure such funding. Arkein made an argument based on the content of the SLA but ignores its purpose. Its purpose is to facilitate funding for the GPF. But GPF could not enter into such an agreement let alone enter into a separate contract with a third party to raise the funds for an agreement it had no legal power to conclude. The basis for the remuneration is tainted by the same consideration. Arkein was to be remunerated based on a percentage of the funding agreement after having achieved certain milestones in attempting to implement an unlawful agreement. To sum up – Arkein was being paid a percentage of the proceeds of an agreement that the GPF had with a third party that the GPF did not have the power to conclude.

b. The reliance on the audit reports

[57] The new ultra vires argument like the previous one has no reasonable prospect of success. For this reason, it is not necessary for me to consider the remaining arguments which relate to the other grounds of review. But for the sake of completeness, I mention that the approach taken in the new heads of argument, on some of these issues was again different to the argument before Molahlehi

J. There Arkein had argued that the review points dealing with the unfair process were reliant on reports of the two audit firms (Rakoma and later SNG) and hence were hearsay, since they had not been confirmed in supporting affidavits. In the new argument counsel for Arkein relied on the earlier audit report as a basis for suggesting that certain conclusions about the absence of minutes in the second report, were factually incorrect or at the very least, unreliable. It is not necessary for me to go into this given the finding of ultra vires. However, it is relevant to the nature of a just and equitable remedy, a topic I turn to later after first dealing with the prospects of success of Arkein' s counterclaim.

The counterclaim

[58] Arkein counter-claimed for payment of R8 565 150.60 plus interest thereon at the rate of 10.25% per annum from 1 December 2017 to date of payment. This amount represents what Arkein considered was due for the completion of the second milestone. Arkein argued on appeal that if it was successful in terms of the appeal in respect of the review it should for the same reason succeed in the counterclaim. By the same logic however if Arkein is unsuccessful in respect of the appeal on the review it must also be unsuccessful in respect of the counterclaim. This is because both are premised on the same underlying causa – the validity of the tender. Once the court has determined that the award of the contract was reviewable, and it has been set aside as unlawful, it follows that Arkein has no claim for payment in respect of the second milestone and hence the counterclaim is ill-founded.

Just and equitable

[59] The final question is whether Arkein has any prospects of success on appeal in being granted a different remedy because it would be just and equitable to do so in terms of section 172(1)(b) of the Constitution. That section in brief states that where a court has made an order of constitutional invalidity it may make any order that is just and equitable. In *Allpay* the Constitutional Court stated:

“Once a finding of invalidity . . . is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made”

[60] The court went on to state:

“Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity’s behalf, but on the public’s behalf. The interests of those most closely associated with the benefits of that contract must be given due weight.”

[61] Two consequential issues flowed from the court a quo’s declaration that the tender was unlawful and set aside. Arkein was ordered to repay R3 591 000.00 which it had received in respect of the first milestone. Second the counter claim for payment in respect of the second milestone was dismissed. It is clear from the facts that neither the GPF nor the public received any benefit for whatever services Arkein may have rendered. The purpose of Arkein’s services were to procure financing for the GPF’s projects. Given that this was ultra vires the

GPF's powers it was being rewarded for services in respect of a contract that could not be fulfilled and which Arkein knew or from its expertise in the area, or ought to have known, could not have been fulfilled.

[62] Arkein was aware of the need for the tender to be compliant with the legal framework of the PFMA, inter alia. This much is evident from what it stated in its tender documents where the following is stated:

“Our advisory services team with broad industry knowledge, has experience in raising capital and implementing solutions that unlock private-public participation.”

[63] In the same document Arkein goes on to state that it was involved in:

“R--- first bond issues for the Municipality of Johannesburg 2. R-- Debt Restructuring for the City of Tshwane”¹⁵

[64] In addition to this, a further criticism of Arkein's conduct made in the review concerned the fairness of the tender process. The record shows, and this fact is independent of the audit firm's findings, and thus not subject to any criticism that the court a quo should not have received them as hearsay evidence, that Arkein had acted pre-emptively in securing a funder in the form of the AFD, which had then written to GPF directly, prior not only to its appointment as an advisor, but also prior to the closing date for the submission of the bids.

¹⁵ I have not mentioned the amounts involved as they are not relevant.

[65] The GPF had itself highlighted this problem as early as June 2017 in a report to the Trustees by Mr Tim Sukazi, the chairperson of the Fund-raising committee, and one of the first to express alarm with arrangement secured with Arkein. He noted the following:

“As indicated above, Arkein presented its proposal to GPF one month ahead of the date on which all 4 qualifying bidders were recommended to the GPF Board. The approval of the 4 bidders was subject to them (sic) presented funding proposals within 3 months. Unless all bidders presented their funding proposal ahead of time the question remains as to the timing of Arkein’s funding proposal ahead of the Board approval of the appointment of Arkein and other bidders.”

[66] Moreover, as Molahlehi J noted, in November 2015, five months after the closing of the bid, another bidder, Nations Capital, had advised the GPF that the Development Bank of South Africa had expressed interest in providing funding in an amount of 1,5 billion to R2 billion rand. Molahlehi J remarked:

“There is no explanation from Mr Muvevi as to what extent the DBSA’s proposal was given attention.”

[67] Thus, pre-emption in a bidding process is serious because at a level of principle it undermines the constitutionally mandated requirements that tenders are, inter alia, fair, transparent, competitive and cost effective.¹⁶ But on the facts of this

¹⁶ Section 217(1) of the Constitution.

case, even if the tender had been given Treasury permission, and would thus have been *intra vires*, pre-emption may have led to a failure to consider another possibly superior bid.

[68] Finally, there is some doubt in respect of the payment made for milestone 1. Even on the assumption that the contract was *intra vires*, it is not clear that Arkein was entitled to the payment on a proper interpretation of the Letter of Intent. Arkein was only entitled to payment in respect of Milestone 1, which represented 25% of its fee, if it had succeeded in obtaining a signed ‘term sheet’ with the funder.

[69] I accept that in ordinary commerce a term sheet is not meant to be a binding document. Nevertheless, according to one online commercial dictionary it is meant to outline *“the basic terms and conditions under which an investment will be made.”* and to *“...cover the significant aspects of a deal without detailing every minor contingency covered by a binding contract. This helps ensure the parties in a business transaction agree on most major aspects while reducing the likelihood of a misunderstanding.”*¹⁷

[70] The document relied upon as constituting the term sheet, although it does not call itself that, is the letter from AFD dated 13 March 2017, headed *“Letter of Interest”* referred to earlier. It is signed by both AFD and by Muvevi on behalf of the GPF. Thus it at least meets the requirement of signature. Less clear, if this was meant to be understood as constituting a term sheet, was whether it should still be subject to major conditions imposed by the financier. After all, to be paid

¹⁷ *Investopedia.com* accessed on 21 June 2024.

25% of the fee, a fair interpretation of what constitutes a term sheet is a serious statement of intent. But the language of this document suggests much remained equivocal. Clearly belying the interpretation that it is the term sheet, is the following phrase. *“The possibility of AFD to provide a loan will be subject inter alia to.... (ii) the negotiation of a term sheet....”*

- [71] It is not clear why if this was the term sheet why it should still be subject to the possible negotiation of a term sheet. But further equivocation followed. The AFD goes on to state:

“Please note that the terms and conditions of this letter of intent are indicative only and do not constitute an offer or commitment of AFD to provide financing.”

- [72] In these circumstances it would not be just and equitable for Arkein to enjoy the benefit of a contract which from its expertise it knew, or ought to have known, required Treasury permission for its validity. Moreover, no benefit accrued to the GPF or the public for whatever services were rendered.

Conclusion

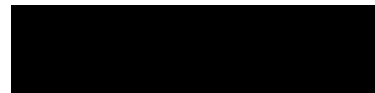
- [73] The application for reinstatement of the appeal fails as the appeal was brought inexcusably late, was otherwise not in compliance with the rules, and, for the reasons given, has no prospects of success on the merits.

[74] The appeal is sufficiently complex to justify costs in terms of the C scale. There was also justification for the first respondent to employ the services of two counsel where used.

ORDER:-

[75] In the result the following order is made:

- 1.The appeal is dismissed.
- 2.The appellant is liable for the costs of the first respondent on the C scale including the costs of two counsel where used.



**N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**



**A. MAEIR-FRAWLEY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

____pp____ 

**JP. ALLEN
ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION
JOHNANNESBURG**

This judgment was prepared by Judge Manoim. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 05 July 2024.

Date of hearing: 08 May 2024

Date of Judgment: 05 July 2024

Appearances:

For the Appellant:

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T Motau SC

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