IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 10842/2017

In the matter between:

ETHEKWINI MUNICIPALITY	**APPLICANT**
and	
MANTENGU INVESTMENTS CC	**FIRST RESPONDENT**
PINETOWN CASTING SUPPLIES CC	**SECOND RESPONDENT**
QUADRANT ENGINEERING CC	**THIRD RESPONDENT**
ASIBANGE CONTRACTING & TRADING	**FOURTH RESPONDENT**
NGIBONGA UBABA TRADING (PTY) LTD	**FIFTH RESPONDENT**
BHEKINKOSI JETHRO BUTHELEZI N. O.	**SIXTH RESPONDENT**

O R D E R

(a) The application for an adjournment is refused with costs.

(b) That contract no. S–5010 for the supply and delivery of traffic signal pole fittings-Upper and Lower Brackets (grey cast iron) for 24 months is declared to have lapsed on 22 May 2015.

(c) The extension of the tender validity period, after the lapse of the tender validity period, is declared invalid and set aside.

(d) The applicant is granted condonation for the late institution of the review application and the declaratory relief.

(e) The applicant is directed to pay the respondents' costs occasioned by its opposition to the review application.

J U D G M E N T

HENRIQUES J

Introduction

[1] This is an opposed review application arising from a tender advertised by the applicant for the supply and delivery of upper and lower cast iron brackets for traffic signal pole fittings. The first respondent is an aggrieved tenderer.

Relief Sought

[2] The applicant seeks, inter alia, declaratory relief and the review of the decision by the appeal authority, the sixth respondent, presiding in a municipal Bid Appeal Tribunal in terms of regulation 49 of the Municipal Supply Chain Regulations issued in terms of s 168 of the Local Government: Municipal Finance Management Act 56 of 2003 (the Municipal Finance Management Act). The sixth respondent upheld the appeal of the first respondent and set aside the award of the tender to the second respondent and directed that the applicant allow the first respondent to submit adjusted 'upper and lower brackets as requested'.

[3] The relief as foreshadowed in the notice of motion is the following:

'1. That Contract Number S-5010 for the supply and delivery of traffic signal pole fittings-upper and lower brackets (grey cast iron) for twenty four months ("the tender") is declared to have lapsed on the 22nd May 2015.

2. The extension of the tender validity period, after the lapse of the tender validity

period, is declared invalid and set aside.

3. The decision of the sixth respondent, dated the 6th November 2015, upholding the appeal of the first respondent and directing the applicant to allow the first respondent to submit an adjusted lower bracket; to test both the upper and the lower brackets and be evaluated and scored in terms of clause 11 of the Special Conditions of Tender, is reviewed and declared unlawful and invalid and is set aside.

4. To the extent that this is necessary the 180 day period referred to in Section 7(7) of the Promotion of Administrative Justice Act, be and is hereby extended;

5. That the applicant pay the costs of the application on an unopposed basis, if it is unopposed, but, if opposed, that the respondents who oppose pay the costs, jointly and severally, occasioned by their opposition.'

Issues

[4] The issues for determination in this application are the following:

(a) the declaratory relief sought in paragraphs 1 and 2 of the Notice of Motion;

(b) whether this is a review in terms of the Promotion of Administrative Justice Act 3 of 2000 ('the PAJA') , or a legality review;

(c) whether the applicant ought to be granted condonation for the delay in instituting the review application.

Grounds of review

[5] The basis on which the relief is sought and the grounds of review is set out in paragraphs 12 and 13 of the founding affidavit of Ashvir Harcharan (Harcharan), a senior manager employed by the applicant's transport authority as follows:

'13.1 the applicant requested an extension of the tender validity period after the tender had lapsed;

13.2 no request was made to some of the bidders for an extension of the tender validity period . . . .;

13.3 the sixth respondent did not apply his mind to the aspect of the extension of the tender validity period and the subsequent lapse of the tender;

13.4 the decision of the sixth respondent was materially influenced by an error of law;

13.5 the sixth respondent did not consider that he had a discretion to determine to convene a formal hearing and did not consider the basis of his discretion;

13.6 the sixth respondent misunderstood the case that he sought to rely on, that being the case of **Sizabonke Civils CC t/a Plascon Projects v O R Tambo District Municipality and Others**, to set aside the award of the tender;

13.7 the sixth respondent failed to take into account that the tender of the first respondent could not be evaluated any further after being rejected as being not responsive.'

[6] The applicant acknowledges that the sixth respondent, in his official capacity, made a decision on behalf of the applicant and as a consequence thereof is 'an extension of the applicant'.

[7] To decide the issues it is necessary to consider the events which led to the institution of the

The factual Matrix

[8] On 19 January 2015, the Bid Specification Committee met and approved the specifications, subject to certain amendments, under contract no. S–5010 for the supply and delivery of traffic signal pole fittings – Upper and Lower Brackets (grey cast iron) for a period of 24 months (the tender). The tender was advertised on 23 January 2015 with the closing date and time being 11h00 on 27 February 2015. A tender clarification meeting took place, at which tenderers had an opportunity to address any queries arising from the tender with the applicant.

[9] The tender document provided that the specifications would be governed by the Special Conditions of Contract and Government Procurement general conditions of contract, which were attached to the tender document.[1] The tenders would be evaluated based upon a bidders' responsiveness, price and upon the 90/10 procurement point system in accordance with the applicant's targeted procurement

[1] Index to pleadings, Volume 1 at 46 – 77.

policies. The applicant reserved the right to accept more than one technically and contractually compliant bid for part or the whole of the contract and to place orders on price and availability.

[10] Any bid received after the closing date and time, being 27 February 2015, would not be accepted for consideration. A bidder could not in any way communicate with a member of the applicant or with any official of the applicant on a question affecting any contract for the supply of goods or for any work, undertaking or services, which was the subject of a bid during the period between the closing date for receipt of bids and the dispatch of the written notification of the applicant's decision and the award of the contract.

[11] The applicant could request clarification or further information on any aspect of the tender. The tenderer was required to supply the requested information within the time specified, failing which, it would render the tender non-responsive. Persons aggrieved by decisions or actions taken by the applicant in relation to the tender could lodge an appeal in writing to the applicant in terms of Regulation 49 of the applicant's Supply Chain Management Regulations within 14 days of the decision or action.

[12] Tenderers were required to submit samples before the closing date of the tender to the eThekwini Transport Authority and Installation and Works-Traffic Signals. The failure to submit samples prior to the closing date of the tender, 27 February 2015 at 11h00 would result in the tenderer not being considered. The evaluation by the applicant of the tender would be based on the most responsive tender i.e. all items tendered on must comply with the Department's relevant specifications and drawings. Sample pole fittings, being both the Upper and Lower Brackets, would be inspected as per the drawings and only samples which had passed the testing process would be recommended for evaluation.

[13] On the closing date, being 27 February 2015, five bids were received in response to the tender and a team set up to evaluate the bids. An evaluation team of the Supply Chain Management Unit produced a report dated 13 April 2015 for the

Bid Evaluation Committee (BEC) of the applicant.[2] Such report from the Supply Chain Management Unit referred to the tenders being valid until 19 June 2015 and that the failure to submit samples prior to the closing date of the tender would result in a tenderer being excluded, and only samples which passed the testing process would be recommended for evaluation. These were the tenders received from the first to fifth respondents.

[14] Of the five tenders submitted, Quadrant Engineering CC (third respondent) did not submit a sample, and the first respondent's (Mantengu Investments CC) tender diverged materially in that it did not fit into the pole. As a result, neither would be considered for recommendation. The fourth respondent's samples complied with the tender specifications but the rate at which they tendered was more than the responsive tenderer. The fifth respondent did not submit a sample and would not be considered. The second respondent, Pinetown Casting Supplies CC's samples were to specifications and it was the most responsive tenderer and would be recommended to the BEC.

[15] On 6 July 2015, the report of the Supply Chain Management Unit was tabled before the BEC. On 13 July 2015, the BEC met and noted that the tender validity period had expired on 19 June 2015 and that there was no pricing on the form of offer by the five tenderers. The BEC resolved to recommend the second respondent on condition that the tender validity period was extended.[3]

[16] This tender served before the Bid Adjudication Committee (BAC) on 27 July 2015. It noted that the tender validity period had been extended to 31 August 2015. It recommended that the tender be awarded to the second respondent. On 26 August 2015, the first respondent lodged an objection against the award of the tender to the second respondent, and the basis for such objections were recorded in annexure "D".[4]

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[2] Index to pleadings, Volume 1, Annexure B at 78-80.
[3] Index to pleadings, Volume 1, Annexure C at 81-82.
[4] Index to pleadings, Volume 1, Annexure D at 83.

[17] The letter of objection recorded the lodging of an appeal and requested reasons for the decision to award the tender to the second respondent. Reference was made to a visit by employees of the first respondent to the employees of the applicant on 2 July 2015 querying the status of the contract. More importantly, the first respondent recorded that samples which it had delivered on 13 February 2015 had been in compliance with the tender document. Further, that an email had been submitted to the applicant on 2 March 2015[5] in which this was recorded and was not disputed by the applicant's employees. In addition, the letter of objection noted that its tender was fully compliant and recorded that it did not receive any notice or letter informing it that it did not meet the requirements of the tender.

[18] The email of 2 March 2015 referred to a delivery note received by Chris Smith, a represent

> '. . . we are pleased with your acceptance of our samples, and the fact that the samples conform to the dimensional and quality requirements in accordance with Ethekwini Transport standards and drawing number 5179D.
>
> We appreciate your feedback on the Upper Bracket and Cap fitting perfectly on your Robot Pole. We take note of your concerns regarding the Lower Bracket. Our engineers have counterchecked the dimensions and they are within the tolerance parameters. Our feeling is that the Robot pole dimensions are inconsistent on the circumference hence the original oval design of the Lower Bracket. My suggestion is for you to supply us with a sample pole as a quality check and if the variance of the various pole circumferences can be measured we can adjust the Lower Bracket dimension tolerances to suit this discrepancy.'

[19] The applicant responded to the first respondent's letter of objection by way of annexure "F"[7] on 8 September 2015. Subsequently, the first respondent indicated that it intended proceeding with the appeal lodged. The applicant did not respond to such email and it appears that the first respondent was contacted the day before the closing date of the tender, 27 February 2015, regarding the fact that the Lower Bracket was 'a bit tight'.

[20] Annexure "F" records the following

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[5] Index of record, Annexure C4 at 25.
[6] Index of record, Annexure C3 at 24.
[7] Index to pleadings, Volume 1, Annexure F at 84-85.

'The appellant's (Mantengu Investments) sample did not comply. The supplier was aware that the bottom bracket did not fit as per mail to the line department. There were no further attempts made to bring a new sample to ensure compliance. The line department does not liaise with suppliers to ensure they adhere to deadlines to submit samples on time – the responsibility is on the tenderer. There was no attempt made by the tenderer to pickup a traffic signal pole to adjust their sample.'

[21] On 21 September 2015, having regard to annexure "F" and the reasons provided, the first respondent addressed another letter to the applicant indicating it intended proceeding with the appeal it had lodged.[8] This recorded the following:
'Mantengu Investments submitted the Upper Bracket, Lower Bracket and Dome sample on the 13th February 2015 (Annexure A). We were lead to believe that the sample did not have any problems and was of a good standard up until just before the close of tender by Mr Chris Smith, eThekwini Transport Authority representative.

. . . Early submission of the sample was done to ensure sufficient time for possible changes . . . Feedback with regard to the lower bracket was only conveyed by Mr Chris Smith a day or two before tender closing via telephonic communication. The message relayed by Mr Chris Smith was that the lower bracket was 'a bit tight' and at no point did he directly/indirectly mention that the sample had failed the evaluation.

. . .

We were given insufficient time to submit a 2nd sample for the lower bracket or to correct the lower bracket sample to meet the requirements of Mr Chris Smith, as feedback was done almost at date of closure thus making it impossible to make adjustments/replace the sample.'

[22] The remainder of the contents of the appeal are not relevant for purposes of this application. The applicant did not respond to the email of 2 March 2015. The matter was served before the applicant's Bid Appeal Authority in terms of Regulation 49 presided over by the sixth respondent. The judgment of the sixth respondent is annexed to the papers as Annexure "G".[9]

[8] Index of record, Annexures C1 to C5 at 22-26.
[9] Index to pleadings, Volume 1, Annexure G at 86-104.

[23] The sixth respondent found:

(a) That the first respondent's appeal should be upheld and the award of the tender to the second respondent be set aside;
(b) the Line Department should allow the first respondent to submit an adjusted Lower Bracket as requested;
(c) that the applicant had failed to comply with the terms of the tender and did not evaluate the Upper Brackets which it had accepted and score the first respondent. He thus ruled that both the Upper and Lower Brackets from the first respondent were to be tested and if they passed the test, be evaluated and scored in terms of Clause 11 of the Special Conditions of Tender;
(d) that scores obtained should be compared with those of the preferred bidder to determine the final winner of the tender.

[24] The sixth respondent decided the appeal based on the written submissions of the parties and from the record which served before him, it does not appear that a request was made for oral submissions to be considered by him. (This was conceded by the applicant during the course of argument at the hearing.) He set aside the award of the tender to the second respondent and directed that the first respondent be allowed to submit an adjusted lower bracket for consideration. The crux of the findings of the sixth respondent suggest that the applicant did not follow a fair process in the adjudication of the tender of the first respondent, and erred procedurally in contravention of its own tender document and special conditions of tender.

[25] The decision of the sixth respondent was delivered on 6 November 2015. Pursuant to such ruling, the applicant allowed the first respondent to submit further samples and this was done on 1 December 2015. On 7January 2016, the Supply Chain Management Unit once again prepared a report for the BEC. The report recorded that both the first and second respondents' samples were to specification but found that the most responsive tender was that of the first respondent, which would be recommended for approval.

[26] On 11 February 2016, the BEC met and decided to defer its decision to enable the line department to meet with the Supply Chain Department to discuss the judgment of the sixth respondent. On 15 February 2016, the Bid Adjudication Committee of the applicant met and took note of the decision of the BEC. Subsequently, on 25 February 2016, Ms Rajoo of the Legal Department of the applicant contacted Harcharan and arranged to meet on 8 March 2016. The meeting took place between them whereat Rajoo was briefed relating to the background to the contract.

[27] It was resolved that a further meeting was necessary with the Head of the applicant's Supply Chain Management Unit. Although a meeting was arranged for 1 June 2016, such meeting did not take place. Rajoo was advised by the Supply Chain Management Unit that the tender validity period had been extended until 7 June 2016.
Subsequently, and on 13 June 2016, the BEC met and resolved to defer making a decision on the award of the tender and refer the matter to the Head of Legal Services for an opinion.

[28] On 5 September 2016, Harcharan followed up with the Legal Department on any developments in the matter. A representative from the Legal Department of the applicant contacted him on 5 December 2016 and referred the matter to the present legal advisor. He was advised that counsel had been briefed to provide an opinion. A consultation took place with counsel on 9 February 2017[10] with representatives of the applicant. A follow up consultation took place on 28 February 2017 and counsel undertook to provide an opinion. In the interim, bidders were requested to consent to the extension of the tender validity period to the end of December 2016.

[29] It was only on 30 March 2017, on receipt of counsel's opinion, the BEC and the line department of the applicant became aware of the unlawfulness of the decision of the sixth respondent. The review application was instituted on 15 September 2017.

[10] 2015 must be a typographical error in the affidavit.

[30] Turning now to the issues for determination. I propose to deal with the issues set out in paragraph 4 (b) and (c) first before dealing with the declaratory relief as set out in 4(a). The relief sought in paras one and two of the notice of motion is decisive of the review application in my view. This was conceded by Mr *Kuboni*, who appeared for the applicant, after much argument. Ms *Sponneck*, who appeared for the respondent, likewise acknowledged this during the course of the argument should the court determine that condonation ought to be granted.

Does the PAJA apply to these proceedings

[31] The applicant seeks to review the decision of the sixth respondent in terms of PAJA. The sixth respondent presided in the appeal proceedings as an extension of the applicant and he is entitled to do so in terms of the applicant's Supply Chain Management Regulation, 2017 and the regulations to the Municipal Finance Management Act. This is acknowledged by the applicant.

[32] It is apparent that, at the time these proceedings were instituted in 2017, the applicant was entitled to seek review in terms of PAJA. It is common cause that the applicant is an organ of state. In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (Gijima)*[11] the constitutional court acknowledged that *PAJA* is only available to private parties and that an organ of state is not entitled to use *PAJA* to review its own decision.

[33] The review proceedings were instituted prior to the handing down of the decision in *Gijima* however, by the time of hearing of the application in February 2019, the decision in *Gijima* had been handed down. The first respondent had pertinently raised the validity of the proceedings in light of this decision in its answering affidavit and heads of argument, and sought the dismissal of the review application on the basis that a review in terms of PAJA was impermissible.

[34] Although being alerted to this, the applicant did not file a supplementary affidavit either amending the relief to bring it in terms of the principle of legality nor

[11] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paras 29-37.

supplementing the grounds of review. Although a further opportunity was provided to the applicant to address this issue prior to the hearing of the matter, it filed supplementary heads of argument which did not pertinently address the issue.

[35] However, at the hearing of the matter Mr *Kuboni* was constrained to concede that the applicant would not be entitled to rely on the provisions of PAJA but rather would have to deal with the facts of the matter and proceed on a basis of a legality review. In the supplementary heads, Mr *Kuboni* acknowledged that the principal of legality is a safety net when PAJA does not apply. Consequently, the court had to deal with the review as a legality one.

Application for adjournment

[36] The failure by the applicant to take up the invitation to amend its papers, was highlighted at the hearing of the matter when the applicant now sought an adjournment to amend its papers. This formed one of the reasons why the application for an adjournment was refused with costs. The applicant was represented by fairly senior counsel who often appears in such tender matters on behalf of, not only the applicant, but also other various government departments which are involved in procurement in terms of s 217 of the Constitution.

[37] Given the fact that the *Gijima* decision is a 2018 decision and was handed down in the early part of 2018, I would have expected that counsel would have knowledge of the *Gijima* decision and would have considered this when preparing the heads of argument of the applicant. There was no indication as to why only when argument commenced that the issue of a postponement in order to supplement the papers and bring the review application within the ambit of the principle of legality was raised. There was no satisfactory explanation as to why it was only done after argument had commenced and despite the applicant being invited, prior to the hearing of the matter to deal with this in supplementary heads of argument, they failed to do so.

[38] The applicant, during the course of argument through its legal representative Mr *Kuboni* requested an adjournment of the application and tendered costs. During

the course of argument in dealing with the basis upon which the judgment of the sixth respondent was reviewable, submitted that a further ground of review needed to be added. He acknowledged that this had not been pertinently raised in the founding affidavit and was raised for the first time during the course of argument. Although a tender for costs accompanied the request for an adjournment, the first respondent opposed such application on the grounds that such application was not made timeously and would serve no purpose.

[39] It is trite that in seeking an adjournment an applicant must explain the reason for the delay and there must be some prospects of success. There was no explanation by the applicant as to why this ground of review was never raised earlier even though according to Mr *Kuboni* this was alluded to, albeit obliquely, amongst the grounds of review. He submitted that although no proper explanation was tendered for the delay, it was in the interests of justice that an adjournment be granted to enable the applicant to properly ventilate the issues and place its case before the court.

[40] The reasons for refusing an adjournment with costs was based, apart from the conduct of the applicant and its failure to place a satisfactory explanation, was in addition informed by the principles enunciated by Mahomed AJ, writing for a full court in *Myburgh Transport v Botha t/a S A Truck Bodies.*[12] They are the following:

'(1) The trial Judge has a discretion as to whether an application for a postponement should be granted or refused . . . .

(2) That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons . . . .

(3) An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.

(4) An appeal Court is, however, entitled to, and will in an appropriate case, set aside the

[12] *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmS) at 314-315.

decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.

(5) A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case . . . .

(6) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement even if the application was not so timeously made . . . .

(7) An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(8) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant can fairly be compensated by an appropriate order for costs or any other ancillary mechanisms . . . .

(9) The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

(10) Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be

directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. . . .'

[41] Apart from the dilatoriness of the applicant and its failure to satisfactorily explain the delay, no purpose would have been served in adjourning the matter to introduce a further ground of review, as the declaratory relief in paragraphs 1 and 2 was decisive of the matter.

The delay in instituting these proceedings

[42] The court deciding on the declaratory relief is however dependent on this court, considering the delay involved in instituting these proceedings. Paragraph four of the notice of motion seeks an order extending the 180-day period referred to in s 7 (7) of the PAJA on the basis that this was a PAJA review.

[43] The factual matrix to a large extent sets out the time line in these proceedings. I have had regard to this when considering whether to condone the delay in instituting these proceedings. The decision of the sixth respondent was taken on 6 November 2015, this much is common cause. The review application was only instituted on 15 September 2017 some 22 months and eight days after the decision was taken. Both the applicant and the first respondent have submitted a chronology in relation to the events and the institution of the review application.

[44] The applicant acknowledges that the delay is substantial but submits that a reasonable and compelling explanation has been provided. The first respondent takes the view that the delay is substantial and no compelling or reasonable explanation has been provided by the applicant.

[45] In terms of s 7 of PAJA, a period of 180 days is prescribed to institute review proceedings. Once such period of time has elapsed, then the delay is per say unreasonable. Our courts have held that in such event, the decision to be reviewed has been validated by the delay.[13]

[13] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 JDR 2297 (SCA) para 26; *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) paras 46 and 47.

[46] Mr *Kuboni* submits that a reasonable and compelling explanation has been provided for the delay by the first applicant. He alludes to the chronology and the founding affidavit of Harcharan in this regard. I have considered same and having regard to the chronology, the sum total of the explanation provided by the applicant is the following: That the BAC deferred its decisions and submitted it to its legal department; Several meetings were held with the legal department and after such meetings the applicant deferred making a decision in relation to the bid.

[47] This culminated in the legal department instructing attorneys to obtain an opinion from counsel. There was a delay in the opinion being obtained as it took some time to co-ordinate the documents necessary for counsel to provide an opinion. Counsel's opinion was provided on 30 March 2017. On receipt of the opinion, no immediate action was taken and the review proceedings were instituted approximately six months later on 15 September 2017.

[48] It is trite that when applying for condonation, an applicant must provide a full explanation for the delay which explanation must cover the entire period of the delay and such explanation must be reasonable.[14] Although a court has a discretion to overlook a delay, the discretion must not be exercised lightly.[15]

[49] Ms *Sponneck,* submits that what is contained in the founding affidavit does not amount to an explanation, is not reasonable and there has been an inordinate delay. Consequently, this court should refuse to entertain the application on this basis alone and ought to dismiss the application.

[50] It is trite that courts have held that where review proceedings are instituted outside of the 180 day period, the delay is presumed to be unreasonable. The Constitutional Court has considered the delay by an organ of state in bringing a review of its own decision on the grounds of legality in *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd.*[16] The Constitutional Court felt it

[14] *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 CC para 22.
[15] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para 43-50; *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 160.
[16] *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

necessary to consider the principles emerging from decisions like *Tasima, Khumalo & another v MEC for Education, KwaZulu-Natal,* [17] *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute,*[18] *Cape Town City v Aurecon SA (Pty) Ltd,* [19] and *Gijima* to the extent that the principles emerging from these decisions apply to legality reviews. Unsurprisingly, such decision is not a unanimous one.

[51] The Constitutional Court was of the view that assessing a delay under the PAJA and legality differed in two respects even though both enquiries hinge on reasonableness. It considered that the 180-day bar as set out in s 7 of the PAJA is not an absolute time period as s 9 of the PAJA provides a mechanism for the extension of such time period. A legality review has no similar fixed period.[20] The court endorsed the test as enunciated in *Khumalo* and held the following: firstly, is the delay unreasonable or undue which is a factual enquiry upon which a court makes a value judgment based on the facts of the matter and secondly if a delay is unreasonable, the court must then decide whether it ought to nevertheless exercise its discretion to overlook the delay and entertain the application in the interests of justice.[21]

[52] The Court held that when assessing a delay in terms of legality no explicit condonation is required. The court can consider the delay and apply the *Gqwetha*[22] test as endorsed in *Khumalo* to ascertain if such delay is undue and whether it should be overlooked.[23] Even if a court finds that the delay is unreasonable it must not be 'evaluated in a vacuum'[24] and the court must determine whether the delay ought to be overlooked. At paragraph 53 the court held the following

'. . . Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.'

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[17] *Khumalo & another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC).
[18] *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC).
[19] *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC).
[20] *Buffalo City Metropolitan Municipality* paras 46-48.
[21] *Buffalo City Metropolitan Municipality* para 48.
[22] *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA).
[23] *Buffalo City Metropolitan Municipality* para 51.
[24] *Buffalo City Metropolitan Municipality* para 53.

[53] In essence, the Constitutional Court was of the view that 'the approach to overlooking a delay in a legality review is flexible'. It referred to the decision of Khampepe J in *Tasima I,* where she referred to 'the factual, multi-factor, context-sensitive framework' referred to in *Khumalo*. It held further that what the court embarked upon is:

'. . . a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this court's power to grant a just and equitable remedy and this ought to be taken into account.'[25]

[54] Of importance, the Constitutional Court reaffirmed its judgment in *Gijima* that: '…the extent and nature of the illegality may be a crucial factor in determining the relief to be granted when faced with a delayed review. Therefore, this court may consider, as part of assessing the delay, the lawfulness of the contract under the principle of legality.'[26]
In addition, a further factor to consider is the conduct of the applicant, especially that in instances where the litigant is the state.

[55] Lastly, even where there is no basis for a court to overlook an unreasonable delay, it may nevertheless be constitutionally compelled to declare the State's conduct unlawful as s 172 (1)(*a*) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.[27]

[56] In my view, the delay is not only unreasonable but also the explanation proffered by the applicant is so poor when one considers the obligations it is required to carry out. The applicant has failed dismally in providing a reasonable explanation for the delay. If one considers the time line, essentially it delayed in seeking a legal opinion from 2016 right through until 2017. Even when the opinion was provided in March of 2017, the review application was instituted some six months later in September of 2017. There is no explanation for this delay as is required and as is envisaged in the decided cases. In addition, the authorities have held that each and

[25] *Buffalo City Metropolitan Municipality* para 54.
[26] *Buffalo City Metropolitan Municipality* Para 58.
[27] *Buffalo City Metropolitan Municipality* Para 63.

every portion of the delay must be explained.[28] There is simply no explanation on these papers provided by the applicant.

[57] Organs of state are subject to a higher duty to respect the law as was held by Cameron J in *Kirland:* [29]

'. . . there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure–circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'[30]

[58] In *Khumalo* at paragraph 45, the court explained that the standard against which a State as a litigant's conduct is measured is high and must accord with the prescripts of the law. In *Merafong City v AngloGold Ashanti Ltd*[31] the court held the following in relation to the State as a litigant's duty to rectify unlawful decisions:

'This court has affirmed as a fundamental principle that the state should be exemplary in its compliance with the fundamental constitutional principal that proscribes self–help. What is more, in *Khumalo*, this court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty "to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power". Public functionaries "must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it".'

[59] In my view, the applicant has failed in its duty to rectify its decision within a reasonable time period. However, the lifeline referred to by Cameron J in *Kirland* does exist, in that a court in circumstances where a functionary, like the applicant, has not acted 'as a model litigant or Constitutional citizen',[32] this court can still overlook the delay if the applicant can show it acted in good faith with the intent to

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[28] *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 153.
[29] *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 CC.
[30] *Kirland Investments* para 82.
[31] *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) para 61.
[32] *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 CC para 159.

ensure clean governance.[33] Thus, although I am of the view that the delay is unreasonable and the explanation extremely poor, if I find that the applicant has attempted to 'act with the intent to ensure clean governance' and there is a constitutional imperative as envisaged in s 172 (1)(*a*) of the Constitution to declare its conduct unlawful, then this court must intervene.

[60] Section 217 of the Constitution reads as follows:

'When an organ of state in the National, Provincial or Local sphere of Government, or any other institution identified in National Legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.'

[61] In *Gijima* at paragraph 40, in considering whether the award of a tender was contrary to s 217 of the Constitution, the court held the following:

'What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is the consequence of what s 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: Did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.'

[62] The requirements of s 217 of the Constitution which insist on a procurement system that is compliant are pre-emptory. At paragraph 41 of the *Gijima* judgment the court held the following

'It was not in dispute that the award of the DoD agreement by SITA was not pursuant to a competitive bidding process. Neither party produced evidence to show that, despite not following a competitive process, the process followed complied with the relevant public procurement prescripts. Section 217 of the Constitution insists on a system of public procurement that complies with certain factors. It provides that "[w]hen an organ of state . . . contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost–effective". It therefore seems reasonable for this Court to infer that, in awarding the contract, SITA acted contrary to the dictates of the Constitution. Based on *Fedsure*, this was at odds with the principle of legality and liable to be

[33] *Buffalo City Metropolitan Municipality* para 62.

reviewed and possibly set aside. Indeed, we have previously held that the principle of legality would be a means by which an organ of state may seek the review its own decision. This was in *Khumalo*.'

[63] Further paragraph 52 of the judgment, the court held:

'Section 172 (1*)(a)* of the Constitution enjoins the court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution. The award of the contract thus falls to be declared invalid.'

[64] Although the delay is unreasonable, I am of the view that I can condone this and the provisions of s 217 enjoin me to nonetheless review the award of the tender on the basis of legality and non-compliance with the Constitution and make any order that I consider just and equitable. I am fortified in this view having regard to paragraph 53 of the judgment in *Gijima* where the court held the following:

'However, under section 172 (1)(*b*) of the Constitution, a court deciding a Constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity.'

The tender validity period

[65] Turning now to the declaratory relief. Clause 13[34] of the tender document deals with the tender validity period and is titled, 'Withdrawal of Bids'. It reads as follows

'Bids must hold good until 16h00 on the Friday of the twelfth week (85 calendar days) following the Friday on which Bids are opened or during such other period as may be specified. The Municipality may, during the period for which Bids are to remain open for acceptance, authorise a Bidder to withdraw his/her Bid in whole or in part on condition that the Bidder pays to the Municipality on demand, a sum of R1 000. The Municipality may, if it thinks fit, waive payment of such sum in whole or in part.'

[66] The basis upon which the applicant seeks the declaratory relief, namely that the tender lapsed on 22 May 2015 and subsequent extensions of the tender validity period after the lapse of the tender validity period be declared invalid and set aside is based on this clause. I may add that even though the applicant sought to review the

[34] Index to Pleadings, Volume 1, Annexure A at 50.

decision of the sixth respondent on the basis that he did not give consideration to this during the course of the proceedings, Mr *Kuboni* conceded that this was not an issue pertinently raised before the sixth respondent by the applicant or the first respondent.

[67] I may add that if one has regard to the record of the proceedings which served before the sixth respondent, this was not pertinently raised and the documents which served before him were those of the applicant. It is not surprising that he did not apply his mind to this in light of the fact that the applicant was under the impression that the tender validity period had been extended. That this was not raised as an issue which served before the sixth respondent comes as no surprise as no one was alive to it at that stage. It was only on receipt of counsel's opinion in March 2017 that this became a live issue for the applicant.

[68] Based on Mr *Kuboni's* calculations, the tender validity period would be until 2 May 2015. However, allowing for error in the calculation depending on the method of calculation used, 22 May 2015 is stated as the tender validity period. The applicant appears to have been under the mistaken impression, as is evident from the papers filed and the minutes of the various meetings, that the tender validity period was up to and including 16 June 2015. This simply cannot be so if one has regard to Clause 13 of the tender document. What this, in essence means, is that by the time the tender had been awarded, the tender validity period had lapsed.

[69] I do not believe that the tender validity period was an issue to which the first respondent or other tenderers considered. Even though it is clear from the papers filed that at various intervals in time, the applicant sought to extend the period, these extensions were invalid in light of the fact that the tender period had already lapsed and there were simply no tender in place to be extended. Two attempts were made by the applicant to extend the period but these would simply be invalid as the tender validity period had already lapsed.

[70] Ms *Sponneck* in her argument relied on the decision of Moodley AJ in *Cato Ridge Electrical Construction (Pty) Ltd v The Chairperson, Durban Regional Bid*

Adjudication Committee.[35] The submission being that even if the bid validity period had expired, nothing precluded the applicant from accepting the bid provided the bidder approved thereof. In others words, she submitted, that even if the court finds that the tender validity period had expired, nothing precluded the applicant, as it had done in this instance, from writing to the various bidders asking to extend the tender validity period and then approving the bidder and awarding the tender.

[71] The facts which were before Moodley AJ were distinguishable from the present. Moodley AJ in fact found that the tender validity period had expired and this precluded the award of the tender. His remarks in the judgment in relation to that submitted by Ms *Sponneck* were obiter.

[72] The aspects in relation to a tender validity period was considered by two Provincial Divisions. I am yet to find a decision in this Division which deals with it. These are the decisions of T*elkom SA Ltd v Merid Trading (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd & others*[36] and *Joubert Galpin Searle Inc & others v Road Accident Fund & others*[37].

[73] In *Telkom SA Ltd,* Southwood J considered the validity of the tender period. Drawing on what Southwood J said, the court in *Joubert Galpin* followed the view expressed by him in *Telkom.*

[74] At paragraphs 66 to 70 of the judgment of *Joubert Galpin*, the court held:

'[66] What then is the effect of the expiry of the tender validity period? This issue was dealt with squarely in a matter that is essentially on all fours with this case, *Telkom SA Limited v Merid Training (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Limited & others*.[38]

[67] In that matter, as in this one, Telkom published a request for proposals in order to appoint service providers. The request for proposals stipulated a closing date and a tender

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[35] *Cato Ridge Electrical Construction (Pty) Ltd v The Chairperson, Durban Regional Bid Adjudication Committee* 2010 JDR 1523 (KZP) paras 45 and 46.
[36] T*elkom SA Ltd v Merid Trading (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd & others* (27974/2010,25945/2010) [2011] ZAGPPHC 1 (7 January 2011).
[37] *Joubert Galpin Searle Inc & others v Road Accident Fund & others* 2014 (4) SA 148 (ECP) paras 66-70.
[38] *Telkom SA Limited v Merid Training (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Limited & others* [2011] ZAGPPHC 1.

validity period of 120 days from the closing date, during which offers made by bidders would remain open for acceptance by Telkom. By the time the tender validity period expired, no decision had been taken by Telkom and the tender validity period had not been extended. Despite this, Telkom continued to evaluate and shortlist the bids it had received. It was only after the tender validity period had expired that Telkom sent emails to the 15 bidders it had short-listed requesting them to agree to an extension of the tender validity period. Some, including the six successful bidders, agreed to do so. The decision to accept the bids of the six respondents was only taken after the expiry of this further period. Before any contracts had been concluded, Telkom decided, on legal advice, to apply for the setting aside of its own decision.

[68] As with this case, what had to be decided, according to Southwood J, was "the legal consequence of a failure by a public body to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received".[39] In deciding this issue, Southwood J's starting point was four interrelated propositions. They are that: (a) the decision to award a tender is an administrative action and the PAJA therefore applies; (b) generally speaking, once a contract has been entered into following the award of a tender, the law of contract applies; (c) but a contract entered into contrary to prescribed tender processes is invalid; and (d) consequently, "even if no contract is entered into, all steps taken in accordance with a process which does not comply with the prescribed tender process are also invalid".[40]

[69] Southwood J then went on to conclude:[41]

'The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity

[39] *Telkom SA Limited* para 4.
[40] *Telkom SA Limited* para 12. See further the authorities cited therein in support of these propositions.
[41] *Telkom SA Limited* para 14.

lacked transparency and was not equitable or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced.'

[70] I am in agreement with Southwood J for the reasons given by him. As a result, it is my view that, in this case, once the tender validity period had expired on or about 20 November 2012, the tender process had been completed, albeit unsuccessfully."

[75] Having regard to those decisions, it is clear that once the tender validity period had expired, there was no tender to offer to the parties and consequently no award of the tender could be made. In addition, the various extensions could not be made in light of the fact that the tender had already lapsed. Consequently, the applicant would be entitled to the declaratory orders in paragraphs one and two of the Notice of Motion. There is thus no need for an order in terms of paragraph three as any order which the sixth respondent issued will be a nullity.

Costs

[76] The award of costs is trite and is within the discretion of the court. The usual rule is that a successful party is entitled to its costs unless there is a reason through conduct or the nature of the proceedings to deprive such party of costs. The first respondent sought the dismissal of the application with costs both in its answering affidavit and the heads of argument filed by Mr *Edy*. Ms *Sponneck* who argued the matter submitted that in the event of the court granting the relief in paragraphs 1 and 2 of the notice of motion, the applicant still ought to bear the costs of the application.

[77] The reason being that the first respondent was entitled to oppose the application given the conduct of the applicant throughout the tender proceedings as well as a consequence of its dilatoriness in instating these proceedings.

[78] At the hearing, much was said about the conduct of the applicant and why a punitive costs order ought to be granted, given the manner in which the applicant has litigated in these proceedings.

[79] As already mentioned, the applicant's conduct leaves much to be desired. Its dilatoriness and tardiness in the manner which led to the review application being instituted, and its belated attempts at obtaining an adjournment to introduce a new

ground of review merely seek to reinforce the view that through its conduct it ought to bear costs.

[80] Despite the orders I will issue, I am of the view that the first respondent ought not to be out of pocket in opposing the application and a just and equitable order would be to hold the applicant liable for costs. The courts hold organs of state to a 'higher test of accountability'. In addition, the dilatory and tardy conduct of the applicant in instituting this application, warrants an order that it be mulcted with the costs of the first respondent's opposition. The reasons for this court entertaining this application and not dismissing it due to the delay is purely because of the imperative imposed by s 217 of the Constitution and the principle of legality.

Conclusion

[81] In the result the following orders will issue:

(a) That contract no. S–5010 for the supply and delivery of traffic signal pole fittings-Upper and Lower Brackets (grey cast iron) for 24 months is declared to have lapsed on 22 May 2015.
(b) The extension of the tender validity period, after the lapse of the tender validity period, is declared invalid and set aside.
(c) The applicant is granted condonation for the late institution of the review application and the declaratory relief.
(d) The applicant is directed to pay the respondents' costs occasioned by its opposition to the review application.

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HENRIQUES J

CASE INFORMATION

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