IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 1145/2017P

In the matter between:

UMGUNGUNDLOVU DISTRICT MUNICIPALITY	**APPLICANT**
And	
AMARAKA INVESTMENTS 37 (PTY) LIMITED	**FIRST RESPONDENT**
HILTON LIFE PRIVATE HOSPITAL (PTY) LIMITED	**SECOND RESPONDENT**
ANDRE MARK VOIGTS N.O.	**THIRD RESPONDENT**
IVAN STEVEN COLENBRANDER N.O.	**FOURTH RESPONDENT**
GARY LEORNARD BANFIELD N.O.	**FIFTH RESPONDENT**

Date of hearing:	**09 November 2017**
Date judgment handed down:	**11 April 2018**

ORDER

(a) The contract provisions as specified in paragraphs 1, 2 and 3 of the Notice of Motion are declared constitutionally invalid.

(b) The order of constitutional invalidity in paragraph (a) is suspended pending the applicant complying with the requirements of sections 76 and 78 of the Municipal Systems Act 32 of 2000 and subjecting the provision of the service to a competitive procurement process.

(c) From the date of this order and pending compliance alluded to in paragraph (b) the first respondent may continue to provide the service and bear the costs thereof itself.

(d) The respondents' counter-application is dismissed.

(e) The applicant must pay the respondents' costs including costs in the application to compel the applicant to deliver a Record in terms of Uniform Rule 53 as well as costs for the joinder of the Trustees of the former Third Respondent.

JUDGMENT

NKOSI J,

INTRODUCTION

[1] The applicant seeks declaratory orders by notice of motion which are in the form of a review of its decisions to authorise and conclude three contracts, being annexures "A2", "A3" and "A4" to the founding affidavit. The applicant requires severance of some provisions specified in paragraphs 1, 2, 3 of the notice of motion from the contracts.

[2] To the extent that this is necessary, the applicant also seeks the extension of the 180 day period referred to in s 7(7) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA)".

[3] The applicant is a District Municipality as well as Water Services Authority in terms of the Water Services Act 108 of 1997 and, as such, responsible for the provision of water and sanitation in its area of jurisdiction. The provision of services by a municipality is dealt with in s 76 of the Local Government: Municipal Systems Act 32 of 2000 ("the Municipal Systems Act"). What is envisaged in the section is that the municipality will either provide the service itself through an internal mechanism as dealt with in s 76 (a) or through an external mechanism which involves entering into a service delivery agreement as contemplated by s 76 (b).

[4] The service delivery agreement that is contemplated by s 76 (b) may be concluded with various entities and for present purposes sub-paragraph (b) is applicable, namely, it may conclude such an agreement with "any other institution, entity or person legally competent to operate a business activity".

[5] The first respondent is the developer of the second respondent which is run as a private hospital. The third, fourth, and fifth respondents are the trustees of the Hilton Health Property Investment Trust (the former third respondent).

BACKGROUND

[6] The following facts are generally not disputed. On 31 October 2011 the applicant and the first respondent concluded the Service Level Agreement (annexure "A1") in respect of a medical center that was to be built in Hilton, now known as Hilton Life Private Hospital, the second respondent. The services agreement relates to bulk services and, relevant for the purposes of the present application, this included sewage services for the interim infrastructure and for the supply of the services relating thereto and for payment thereof.

[7] The material terms of the agreement are, inter alia, the following:

(a) the first respondent would procure the design and installation, to the satisfaction of the applicant, of all the internal services; such to be designed by competent professional engineer who was to be responsible for the construction and supervision of such internal services.

(b) the applicant undertook, at its own cost, to provide sufficient water capacity to meet the needs of the development to the edge of the property boundary to enable the development to proceed;

(c) the applicant undertook to construct a sewage treatment – plant;

(d) should the development commence prior to the commencement of the bulk sewage disposal system, then the first respondent agreed that it would construct conservancy tanks or other suitable interim means of sewage disposal on the site at its own cost;

(e) the applicant was to charge the developer in accordance with the prevailing standard tariffs for water bound sewage disposal or such tariffs as it deems applicable;

(f) the first respondent agreed that it would be responsible, at its own cost, for the provision and maintenance of all sewage disposal infrastructure required to link the development to the municipal sewage disposal system; and

(g) the first respondent was responsible, at its own cost, for any construction that may be required to link the proposed development to the proposed water bound sewage system.

[8] The construction of the second respondent was completed in December 2014 but the bulk and water sewage infrastructure was not yet ready. The applicant and first respondent thus varied the terms of the agreement by way of the first addendum (annexure A2) on 9 December 2014 to deal with this situation.

[9] In the aforesaid addendum the parties agreed, inter alia, as follows:

(a) the first respondent will be responsible for the design and construction of the sewer pump station and rising main from the sewer pump station to the M139, including the encroachment application across the M139 (Clause 2.1);

(b) the first respondent shall be responsible to fence off the sewer pump station with a Clearview fence, including the provision of an access gate onto Monzali Drive (Clause 2.3);

(c) on completion of the sewer pump station, the first respondent shall notify the applicant who shall take over or be deemed to have taken over the sewer pump station upon the issuing of a completion certificate by the developer's engineer (Clause 2.5);

(d) the applicant shall be responsible for all costs associated with the operation and maintenance of the sewer pump station from the date of handover (Clause 2.6);

(e) the first respondent shall connect the sewer pump station onto the electrical supply provided in the hospital (Clause 2.10);

(f) the first respondent shall be responsible for the design and construction of an outfall sewer linking the rising main from its crest near the M139 to a new 80 m^3 conservancy tank suitably located to link the proposed sewer line from the Hilton / Mondi development adjacent to the Grace College boundary (Clause 2.13);

(g) the first respondent shall be responsible for the construction of a 80 m^3 conservancy tank to accommodate effluent flow until the Waste Water Treatment Works is fully operational, provided that such capacity shall not exceed the permissible environmental thresholds (Clause 2.16);

(h) the applicant shall be responsible for the operation and maintenance of the 80 m^3 conservancy tank, including, but not limited to emptying it with vacuum tankers to an existing waste water treatment works from 1 May 2015 or from the date when the hospital is opened, until the new waste water treatment works is fully operational (clause 2.22); and

(i) the applicant shall, from date of occupation, charge what were referred to as Hilton Life Hospital and Hilton Health Development the published rates, as reviewed from time to time for water and sewage (Clause 2.23); and

(j) the applicant shall, prior to implementing such charges, credit the first respondent's service accounts the amount of the total development cost (Clause 2.24)

[10] The first respondent designed and constructed the conservancy tank as agreed to in the addendum. Due to the fact that the construction of the waste water treatment works had been delayed and therefore the construction of a conservancy tank was required, the parties concluded the second addendum agreement (annexure A3) on 2 October 2015.

[11] In the second addendum the parties are agreed, inter *alia*, as follows:

(a) the applicant is unable to operate and maintain the conservancy tank due to insufficient vacuum tankers (Clause 2.3);

(b) the first respondent agrees to take over the emptying of the conservancy tank by contracting an external service provider and shall only contract with service providers with a valid permit (Clause 2.4),

(c) the first respondent and its service provider shall be permitted to take effluent to the Howick Waste Water Treatment Works for treatment (Clause 2.5);

(d) the first respondent shall keep the delivery notebook for every trip made by the service provider and each load shall be signed as accepted at the Howick Waste Water Works (Clause 2.6);

(e) the first respondent shall not be charged any cost for the delivery of effluent at the Howick Waste Water Treatment Works (Clause 2.7);

(f) the first respondent shall be responsible for all costs associated with the delivery of effluent to the Howick Waste Water Treatment Works by the external service provider. The rate per load from the conservancy tank to the Howick Waste Water Treatment Works shall be R1 500.00 inclusive of VAT (Clause 2.8);

(g) the applicant shall, from date of occupation, charge the second and third respondents (now second to fifth respondents) the published rates, as reviewed from time to time for water and sewage (Clause 2.9);

(h) the applicant shall, prior to implementing such charges as referred to in (g) (Clause 2.9 of the addendum), credit what was referred to as the "developers entity", presumably a reference to the hospital and health centre (now second to fifth respondents), the total development cost, as well as the additional operation and maintenance cost of R1 500.00 per load to transport effluent from the conservancy tank to the Howick Waste Water Treatment Works (Clause 2.10); and

(i) the maintenance costs of R1 500.00 per load shall be reviewed annually from the date of signing the agreement (Clause 2.11).

[12] On or about 4 February 2016 the parties further varied the terms of the agreement by way of a third addendum (annexure A4). This was necessary because the applicant's proposed waste water treatment works had again been delayed and the applicant was still unable to operate and maintain the conservancy tank due to insufficient vacuum tankers.

[13] In the third addendum the parties agreed, inter alia, as follows:

(a) the applicant would charge the hospital and health center the published rates for water and sewage from date of occupation and that the applicant would refund the developer's entity (presumably the hospital and health center) on a monthly basis, being thirty (30) days after submission of proof of delivery, the cost of R1 500.00 per load to transport effluent from the conservancy tank to the Howick Waste Water Treatment Works (Clause 2.10);

(b) the first respondent shall only be reimbursed by the applicant for loads signed off by the developer's service provider in the delivery notebook (Clause 2.12);

(c) the first respondent shall ensure that the electricity account for the sewer pump station is registered in the name of the applicant (Clause 2.14);

(d) until such time as the account is transferred, the first respondent shall meter the consumption and recover such costs from date of handover, from the applicant by submitting monthly accounts, including proof of consumption from Msunduzi Municipality (Clause 2.14);

(e) the cost as per Clause 2.24 from addendum one are updated to a cost of R1 321 324.33 incurred to date by the first respondent, inclusive of VAT as per the breakdowns attached to the third addendum;

(f) the applicant agreed to refund the first respondent, within (30) days of the signing of the addendum, the full amount reflected in Clause 2.19 (Clause 2.20);

(g) the first respondent was to install an electronic flow meter onto the sewer pump station to record the volume of effluent transferred to the conservancy tank (Clause 2.23);

(h) the flow meter shall be read daily and monitored by the developer until the sewer pump station is handed over to the Municipality, who shall from then on be responsible for the recordings (Clause 2.23); and

(i) the first respondent shall further install a communication system, whereby the actual flow readings, as well as the level in conservancy tanks are recorded and sent to the Municipality and developer (Clause2.24).

[14] The aforesaid agreements were concluded with the authority of the Full Council of the applicant. The first respondent commenced the outsourcing of the transportation and dumping of the effluent from the conservancy tank to the Howick Waste Water Treatment Works site and issued its invoice for the payment of the transportation costs of R1 500.00 per load.

[15] On 27 May 2016 the Full Council of the applicant resolved to rescind the addenda (annexure “B” to the founding affidavit). As of 19 August 2016 the amount

claimed by the respondents for the period commencing on 1 February 2016 and ending 22 June 2016 was a total sum of R4 365 000.00. As at 2nd of February 2017 the first respondent had carted loads of effluent at the agreed rate with a total in excess of R9 million (annexure “R2” at page 157 of the indexed papers). On 22 August 2016 the respondents forwarded a breach notice to the applicant (annexure “F”). The outstanding amount has not been paid.

PLEADINGS

[16] The applicant avers in its founding papers that while the applicant is empowered in terms of s 76 of the Municipal Systems Act to provide a municipal service in its area, or part of its area, either through an internal mechanism, or an external mechanism it has an obligation to comply with the provisions of s 78 of that Act if it decides to provide the municipal service through an external mechanism.

[17] In terms of s 78 of the Municipal Systems Act the applicant must:

(a) give notice to the local community of its intention to explore the provision of the municipal service through an external mechanism;

(b) assess the different service-delivery options in terms of s 76 (b) of the same Act;

(c) conduct or commission a feasibility study which must be taken into account; and

(d) comply with any applicable legislation relating to the appointment of a service provider and any additional requirements that may be prescribed by regulation.

[18] The legislation foreshadowed in s 78 of the Municipal Systems Act is Chapter 11 of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA"). In terms of s 111 of the MFMA the applicant must have and implement a Supply Chain Management Policy which is fair, equitable, transparent, competitive and cost effective and comply with the prescribed regulatory framework for municipal services.

[19] The applicant avers that the applicant has and does implement a Supply Chain Management Policy (annexure "C" to the founding affidavit).

[20] The policy provides, *inter alia*:

(a) that it applies when the municipality –

(i) procures goods or services;

(ii) selects contractors to provide assistance in the provision of municipal services otherwise than in circumstances where Chapter 8 of the Municipal Systems Act applies; or

(iii) selects external mechanisms referred to in s 81 (b) of the Municipal Systems Act for the provision of municipal services in circumstances contemplated by s 83 of the Act.

(b) the Council has a right to maintain oversight of the implementation of the Supply Chain Policy;

(c) competitive bids must comply with the provisions contained in Clauses 18-28 of the policy;

(d) the Accounting Officer may dispense with the procurement processes, only –

(i) in an emergency;

(ii) goods or services are from a single provider only; or

(iii) in any other exceptional case where it is impractical or impossible to follow the official procurement process; and

(e) the Accounting Officer must record the reasons for the deviation and report them to the next meeting of the finance committee of the Council and include it as a note to the annual financial statements.

[21] The applicant contends that it abdicated its function in allowing the first respondent to take over the emptying of the conservancy tank and transport the effluent to the Howick Waste Water Treatment Works. Further, the applicant abdicated, it says, its functions by authorising the first respondent to contract an external service provider without following the required processes and procedures. That be so, it continues to say, because the applicant's policy was not followed in contracting the services of the first respondent and the external service provider to empty the conservancy tank and transport the effluent and there was no lawful basis to deviate from the policy.

[22] The applicant submits that in terms of its Water Services Bylaw (annexure "D") the charges for any sewage delivered for disposal to the municipality sewage treatment plants shall be assessed by the municipality or the authorised provider in accordance with the prescribed tariffs or charges. The charges adopted by the

Council of the applicant in respect of the conservancy tank is R300. 00 for household and R500.00 for commercial premises (annexure “E”). The municipality is entitled to charge fees for the transportation of the effluent from a consumer’s conservancy tank if it transports the effluent and even if the municipality contracts a service provider to perform that service, the cost is generally passed on to a consumer through a debit on its account with the municipality.

[23] The applicant contends that it is unconstitutional and offends the principle of legality for the respondents to charge the applicant for the service for which the respondents would ordinarily pay if the service was supplied to the consumer by the municipality. The applicant submits that the municipality is not deriving any benefit from the service that it is paying for while the second to fifth respondents are unduly benefiting from the transportation of the effluent. In conclusion the applicant submits that there has not been compliance with the Constitution, the relevant legislative prescripts, the bylaws and the procurement policies applicable to the applicant which render the clauses in the addenda set out in the Notice of Motion unlawful. The failures, the applicant submits, constitute administrative action and the resultant unlawfulness of what was done falls to be reviewed and set aside in terms of the applicable provisions of PAJA, alternatively on the principle of legality since they offend the rule of law.

[24] The applicant’s proposition on the impugned parts of the contract is challenged by the respondents. The respondents contend that the parts of the contract sought to be set aside which are categorised as unlawful procurement are not procurement at all. They are merely contractual amendments which were proposed to provide a solution for a problem which arose on the applicant’s side. The proposed amendments were accepted by the first respondent in order to solve

the applicant's problems and the amendments were effected with the authority of the applicant's Council. The respondents aver that the first respondent undertook to transport the effluent from the conservancy tank built by it because the applicant had not built the treatment works, had no tankers to transport the effluent and had asked the first respondent to do so for a charge.

[25] The respondents submit that the applicant has no legal right to refuse to comply with its contractual obligations. In the premises, they add, the first respondent has the right to ask for a decree of specific performance in a counter – application. Alternatively the respondents are entitled to an order that the applicant must comply with the obligations undertaken by it and authorised by the Council of the applicant until this Court sets aside the impugned parts of the contract as amended.

[26] In addition, the respondents contend that any legality review or a review brought in terms of PAJA is out of time. That is so, it is argued, because the third addendum was concluded, agreed and authorised on 4 February 2016. The application for the review of the latest act was brought on 2 February 2017 almost a year later than it should have been and outside of the reasonable time within which to bring it in terms of the common law or PAJA. The respondents submit that it is unconscionable for the applicant to run up an account with the first respondent in terms of the agreement for a considerable period of time and amass a debt in excess of R9 million before approaching a court to have the contract set aside. They contend that the delay has caused great prejudice to the respondents.

ISSUES

[27] The issues that arise for the determination are - whether the provisions in the addenda to the service level agreement between the applicant and the first respondent in terms of which the first respondent took over the service of emptying the conservancy tank of the Hilton Life Private Hospital by engaging an external service provider and charging the applicant R1 500.00 per load was concluded in violation of ss 76, 78 and 80 of the Municipal Systems Act. If the contract is invalid the Court is asked to determine the appropriate remedy. Also in issue is whether or not the review should fail because of delay.

[28] I propose to first deal with the issue raised in *limine* whether condonation should be granted for the late review application. In this regard the question is whether the review application ought to be considered in terms of PAJA or as a legality review.

[29] The Constitutional Court has already pronounced on this question. In the judgment of *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*, 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) paras 29-31, the court proclaimed as follows:

> '[29] In the end, we are fortified in the conclusion that section 33 of the Constitution creates rights enjoyed only by private persons. And the bearer of obligations under the section is the State.
>
> [30] Given this interpretation of section 33 of the Constitution, does the language of section 6 of PAJA extend to an organ of State seeking the review of its own administrative action? In answering this question, a fact that should be paramount is that PAJA is legislation that was enacted pursuant to the provisions of section 33 (3) of the Constitution to give effect to the rights

contained in section 33 (1) and (2) of the Constitution. PAJA must therefore be interpreted through the prism of section 33 of the Constitution.

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

REVIEW UNDER LEGALITY

[30] Regard being had of the above pronouncement, the applicant's review of its own decision can only proceed under the principle of legality. In *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), para 56, the Court said:

'…a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the*

Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada the Supreme Court of Canada held that:

> "Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter,* the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v The Queen* [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source'' (Footnotes omitted.)

[31] In *Affordable Medicines Trust & others v Minister of Health of RSA & others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) the Court stated (para 49) as follows:

> 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution'. (Footnotes omitted.)

[32] The applicant bears responsibility for the provision of water and sanitation in its area of jurisdiction. By entering into a service delivery agreement as contemplated by s 76 (b) of the Municipal Systems Act with the first respondent the applicant was clearly acting in the exercise of public power. The principle of legality thus becomes a vehicle for its review. The next question is whether or not the review has been brought within a reasonable period of time and, if not, whether a case for condonation has been made.

[33] In *Khumalo & others v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) the Court relying on s 237 of the Constitution held as follows:

> '[46]….Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.
>
> [47] This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.
>
> [48] In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts…. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a length delay, its ability to evaluate fully an allegation of illegality is impaired.' (Footnotes omitted.)

[34] The same sentiments were expressed in *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) where Cameron J said (para 73):

> 'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself'.

[35] Relating the principle to this matter the Council of the applicant took a decision on 27 May 2016 to rescind the addenda. The decision of the Council was communicated to the Municipal Manager of the applicant to take action on or about 19 June 2016. The Council resolution was then referred to the Legal Services Department of the applicant. On 22 August 2016 the applicant received a breach

notice (annexure F) from the respondents. The parties agreed to refer the matter to arbitration as per the arbitration clause in the agreement. The pre- arbitration meeting was scheduled for 1 December 2016 where the applicant's attorneys advised the applicant that the Arbitrator would not have the jurisdiction to entertain the setting aside of the addenda to the agreement and proposed that a review application should be brought. On 13 January 2017 the arbitration proceedings were adjourned sine die by consent to enable to the applicant time to lodge this application. On 2 February 2017 this application was launched.

[36] It appears to me that the applicant must have been aware that some parts of the addenda relating to the service delivery agreement with the first respondent might be invalid for lack of conformity with legal prescripts applicable by the time they resolved to rescind them on 27 May 2016. The applicant had a Legal Service Department at its disposal. The applicant should have appreciated the need and urgency for the review of the addenda by then to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Procurement is part and parcel of its business and there is no plausible explanation why – when it concluded the addenda – nobody within the structures of the applicant became aware that their conduct, in view of non-compliance with the legal prescripts, might be unlawful. The applicant should have provided a full and satisfactory explanation for the entire period of the delay. See *eThekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC); 2013 (5) BCLR 497 (CC) paras 25-28. It is unconscionable for the applicant to run up an account with the respondents for an amount in excess of R9 million (annexure R2, page 157) before approaching the Court to have addenda set aside. Under the circumstances the delay of eight months was unreasonable.

[37] In *Khumalo* (para 45) it is said that courts have a "discretion to overlook a delay''. It is put thus:

> '[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'

[38] However it is said that this discretion should not be exercised lightly. In *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) the exercise of this discretion was explained as follows (para 160):

> 'While a court "should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power", it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.'(Footnotes omitted.)

[39] The applicant's counsel submits that I should exercise the discretion based on the unusual set of circumstances which compelled the applicant to comply with some illegally procured provisions contained in the addenda. Mr *Pillemer* puts it thus:

> 'The applicant is contractually obliged to make payment to the First Respondent which effectively is the beneficiary of the service and the party that should be paying the Applicant (if the Applicant had provided the service). Since Applicant is not, the cost should be borne by the user itself and not subsidised or paid for providing itself with the service by the Applicant.
>
> The result is that the Applicant's tax payers are subsidising a private hospital that operates at a profit and the agreement is not valid, there is no rational or reasonable basis why they should have to do so and it is not in the interests of justice.

> The rate that the Applicant is paying is three times greater than the tariff it would charge for providing the service if it was able to do so making the charge appear to be out of kilter and astronomically high. In addition on the basis of a benchmarking exercise the approach that is set out in the agreement is out of kilter with what happens in other private hospitals in other areas, notably Hillcrest Hospital which is responsible for the cost of its own sewage disposal.
>
> It is submitted that it is in the interests of justice for the review to be heard notwithstanding the delay, if it is found to have been brought out of time'.

[40] By and large the impugned provisions of the addenda are associated with the procurement of services which the applicant itself could not provide to fulfil its constitutional responsibilities as a municipality. The applicant had to build and provide an effluent treatment plant for the respondents' development which it had approved as it was obliged to do. I assume that due to some budgetary constraints it could not do so. As a result the first respondent had to build an effluent conservancy tank from which the applicant would have to cart the effluent to a treatment plant. The applicant had no tankers, certainly not enough to do so, and the first respondent as was agreed, had to do so for a charge. All this was done with the authority of the Full Council of the applicant. It appears to me that the applicant was too enthusiastic to conclude the addenda now impugned and created a predicament it finds itself in. The predicament was self-created. It irrationally abdicated its legal powers and responsibilities to the first respondent. But should the *status quo* remain?

[41] Section 217 of the Constitution deals with the obligation of an organ of State in, inter alia, the local government sphere to apply a system of procurement when it contracts for goods and services. The section provides that when an organ of State contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost – effective. Section 195 (1) of the

Constitution contains the list of basic values and principles that should govern public administration. Such principles include (a) efficient, economic and effective use of resources, and (b) provision of services impartially, fairly, equitably and without bias. I believe the arrangement between the applicant and the respondents is one of its kind in the applicant's area of jurisdiction.

[42] The Supply Chain Management in the local government sphere is contained in Chapter 11 of the MFMA. Section 80 of the Municipal Systems Act deals with the provision of services through service delivery agreements with external mechanisms. Section 83 deals with the competitive bidding and due compliance with tender processes. The requirements stated therein are peremptory. It is common cause that the contract between the applicant and the first respondent did not go through any of the tender processes. The applicant concluded an agreement for the transportation of bulk sewage to the water treatment centre by an outside contractor at the cost of R1 500.00 a load significantly in breach of the peremptory requirement that the agreement had to follow an open tender process as set out in the Municipal Systems Act as read with s 217 of the Constitution. The applicant clearly misconstrued its power and this failure offends the principle of legality.

[43] Section 172 (1) (a) of the Constitution enjoins the court to declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. What the applicant agreed to in concluding the impugned provisions of the addenda is irrational, unconstitutional and unlawful. The applicant's conduct / decision should thus de declared to be invalid.

[44] However, under section 172 (1) (b) of the Constitution, a court is empowered to make "any order that is just and equitable". In consideration thereof, it would be

paramount for the court to determine the prejudice likely to be suffered by the respondents as a result of the declaration of invalidity of the applicant's decision and any delay in seeking to have the decision reviewed (*Khumalo* para 56).

[45] The respondents had throughout the existence of the agreement carted loads of effluent at the agreed rate with a total, as at 2 February 2017, in excess on R9 million and counting. The contract was concluded with the authority of the Full Council of the applicant and the respondents were at all times *bona fide* and in the honest belief that the applicant was acting legally. The applicant proposed and the first respondent accepted to move the effluent for a charge agreed to because the applicant had failed in its obligations. When it eventually dawned on the applicant that its decision was illegal it unreasonably delayed to subject the decision to a review to be declared invalid for non-compliance with the legal prescripts. From the aforegoing, it seems to me that justice and equity dictate that, despite the invalidity of its conduct, the applicant must not benefit from displaying false pretences to the respondents that its impugned decision accorded with legal prescripts and from its undue delay to realise its unlawfulness and in instituting appropriate proceedings to remedy the status quo. The declaration of invalidity must not have the effect of divesting the respondents of rights to which – but for the declaration of invalidity – it might be entitled to.

[46] Both counsel proposed that I suspend the declaration of invalidity pending the applicant complying with the legal prescripts. I believe it would be just and equitable for the court to direct so and that from date of the order the first respondent may continue to provide the services at its own costs pending the applicant complying with the legal prescripts.

COSTS

[47] The applicant submits that there should be no order as to costs in accordance with the decision in *BiowatchTrust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC). The respondents (as private parties) should not as a rule be mulcted in costs. However, there must exist particularly powerful reasons for a court not to award costs against the State in favour of a private litigant who achieved substantial success in proceedings brought against it (*Biowatch,* para 24). I can find no such reasons and none were advanced.

[48] The respondents' counsel submitted in this regard that the respondents were led on by the applicant for a considerable period before turning around and claiming that it had a duty to have the contractual arrangements which it had concluded voluntarily set aside. The submission has merit. In addition there are costs related to interlocutories which are not disputed. They are the following:

(a) The respondents made an application to compel the applicant to deliver a Record in terms of Uniform Rule 53 because it was seeking a review; and

(b) The respondents also asked for the joinder of the Trustees of the former Third Respondent which was incorrectly cited. The orders sought were granted. The respondents are thus entitled to all its costs.

ORDER

[49] In the result the following order shall issue.

(a) The contract provisions as specified in paragraphs 1, 2 and 3 of the Notice of Motion are declared constitutionally invalid.

(b) The order of constitutional invalidity in paragraph (a) is suspended pending the applicant complying with the requirements of sections 76 and 78 of the Municipal Systems Act 32 of 2000 and subjecting the provision of the service to a competitive procurement process.

(c) From the date of this order and pending compliance alluded to in paragraph (b) the first respondent may continue to provide the service and bear the costs thereof itself.

(d) The respondents' counter - application is dismissed.

(e) The applicant must pay the respondents' costs including costs in the application to compel the applicant to deliver a Record in terms of Uniform Rule 53 as well as costs for the joinder of the Trustees of the former Third Respondent.

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NKOSI J

APPEARANCES

DATE OF HEARING	**09 NOVEMBER 2017**
DATE JUDGMENT HANDED DOWN	**11 APRIL 2018**
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