OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES
.....	.....
SIGNATURE	DATE

CASE NO: 1168/2017

In the matter between:

GOVAN MBEKI MUNICIPALITY **PLAINTIFF**

and

NEW INTEGRATED CREDIT SOLUTIONS (PTY) LTD **DEFENDANT**

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] This matter concerns the validity of a contract concluded between the plaintiff and the defendant on 12 September 2015 for the provision of debt management services by the defendant to the plaintiff ("the contract").

[2] The plaintiff seeks a declaratory order to the effect that the contract between the plaintiff and defendant be declared unconstitutional, invalid and unlawful, and void ab initio. In the alternative, the plaintiff claims that the reference to "*as well as 2.5% to debt collected from customers under 60 days*" contained in clause 6.2.5 of the contract between the plaintiff and defendant to be declared unconstitutional, invalid and unlawful and void ab initio.

[3] The plaintiff, in the alternative, seeks the decision to award and conclude a contract for the provision of debt management services on 10 September 2015/12 September 2015 to be reviewed and set aside together with costs.

[4] To fully grasp the disputes it is necessary to give a brief history of the matter.

[5] During 2014 the Newcastle municipality placed advertisements in a local newspaper for bids to procure debt-collection and management services. The advertisements in each case stipulated that there was a *compulsory briefing session* on 17 October 2014 at the Newcastle municipality.

[6] I pause to mention that plaintiff actually called a director in the department of Financial Management ("Ms Haripersad") of the Newcastle municipality to testify about the tender process. I will revert to her evidence in due course.

[7] The compulsory briefing session that all interested bidders had to attend was held, and it was made clear at the briefing session that the tender is only in respect of debts older than 60 days. The debts included municipal services such as rates, taxes and other services rendered by the Newcastle municipality to its residents and other customers.

[8] The closing date for submission of bids was 5 November 2014 and 17 service providers (private companies) submitted their bids to the Newcastle municipality. The defendant's bids were amongst the highest bids received by the municipality.

[9] The defendant's bid in Newcastle was received on 5 November 2014, and included a bid price of 16.5% (inclusive of VAT) for all amounts collected on behalf of the Newcastle municipality. The amount of 16.5% commission will be in respect of all successfully recovered revenue paid into the Newcastle municipality's banking account. On 21 January 2015 the Newcastle municipality bid evaluation committee convened to consider the 17 bids received and resolved that the following recommendations to its bid adjudication committee should be made:

"*That bid No AO67-2014/5: request for proposals for provision of debt management services be awarded to New Integrated Credit Solutions (Pty) Ltd with a commission charge of 16.5% (including VAT) on all successfully recovered revenue, due to the fact that they met requirements of the supply chain management policy*".

[10] On 29 January 2015 Newcastle municipality's bid adjudication committee convened with the purpose of evaluating the relevant

recommendations of the bid adjudication committee with specific reference to recommendations relating to the appointment of the defendant.

[11] I pause to mention that at the compulsory briefing session, and according the evidence of Ms Haripersad, the Newcastle municipality excluded outstanding debtors for less than 60 days as it intended to create its own internal unit for recovery of these debts.

[12] On 27 February 2015 the Newcastle municipality bid adjudication committee convened and confirmed that the defendant should be appointed for the provision of debt management services subject to the following:

1. that the defendant should collect debts from the customers exceeding 60 days and above;

2. that it be noted that the defendant does not appear on the National Treasury restricted supplier data base;

3. that the successful and unsuccessful bidders be advised; and

4. that the bid be referred to the accounting officer for final decision on the award as it exceeds the amount of R2 million.

[13] On 3 February 2015 the defendant was informed of the fact that it is provisionally appointed as preferred bidder, and that commission of 16.5% on collected debt from customers exceeding 60 days for a period of 36 months is awarded to it.

[14] On 25 March 2015 the Newcastle municipality finally appointed the defendant as service provider and it is recorded that "*commission of 16.55% (sic) on collected debt for customers exceeding 60 days will be payable to it*".

[15] On 30 March 2015 a variation order was generated by Newcastle municipality which recommended, and accepted, that commission calculated at 2.5% (VAT inclusive) will be payable to the defendant on debts less than 60 days. It was explained by Ms Haripersad that the reason for this was as they could not form this internal unit due to budget restraints, and a moratorium that was placed on appointment of new staff. She was further explained that she understood that a new bid process was not necessary as the amount of the new contract did not exceed 15% of the total contract amount already allocated or approved and allocated to the defendant.

[16] It is common cause between plaintiff and Ms Haripersad that award of the bid in respect of the collection of debt of less than 60 days was never subject to a bid process but simply awarded to the defendant.

[17] On 30 April 2015 the contract for provision of municipal debt management services was entered into between Newcastle municipality and the defendant which includes *clause 6.2.5 providing for compensation of 2.5% commission in respect of debt younger than 60 days*, as well as 16.5% for the balance of the debtors book.

[18] On 31 July 2015 the plaintiff requested the procurement of goods and services under contract secured by other organs of state in accordance with the provisions of regulation 32 of the Municipal Supply Chain Management Regulations [1] ("The Regulations") and addressed a letter to Newcastle municipality to applying for approval to enter into such an contract with defendant for which approval was received from Newcastle municipality in a letter dated 12 August 2015. The defendant accepted its appointment as debt collection management service provider in accordance with the provisions of Regulation 32 in a letter addressed to the plaintiff on 31 August 2015, and on 12 September 2015 a contract for provision of debt

[1] Published under Gen N868 in GG 27636 of 30 May 2005 as amended by GN R31 in GG 40553 of 20 January 2017.

management services was concluded between plaintiff and defendant.

[19] On or about 7 November 2016 the Auditor General of South Africa addressed a letter, communication 18 of 2016, to Newcastle municipality in terms of which the Newcastle municipality's attention was directed to the following:

"*The variation memo was signed on 30 March 2015.*

The MBD 7 form was signed by accounting officer on 9 April 2015 (makes no mention of the 2.5%).

The final appointment letter marked 25 March 2015 faxed to supplier on 31 March 2015 (<u>makes no mention of the 2.5%</u>).

Contract singed on 30 April 2015 (included 16.5% and 2.5%). Looking at the minutes of the bid adjudication committee we noted that the supplier was chosen as being the one with the lowest price. And it was not further noted that the additional 2.5% was <u>not</u> taken into account into the bid evaluation or adjudication.

Based on the above we therefore belief that the procurement process was <u>not</u> fair as other suppliers was disadvantaged and the chosen supplier might <u>not</u> have been the lowest if the priced award were taken into account into the evaluation or the other companies prices might have been different if the changes scope of work might have

been known. Given that the variation was signed before awarding of contract, the municipality should have therefor started the procurement process afresh if it was no intended to change the scope of the word to give other companies a fair opportunity. The amount paid to the supplier above 16.5% is therefore considered to be irregular.

It should also be noted that the fact that the company is entitled to a percentage from all debtors below 60 days is not considered to be cost effective as that might be inclusive of debtors that would pay without the need of debt collectors thus resulting in expenditure in vain and that could have been avoided. There is a lack of control over compliance with law and regulations. Furthermore, there is lack of controls over ensuring economical use of resources. It is recommended that the management should ensure that there is a designated person to ensure compliance with laws and regulations." (Own emphasis added).

[20] On 8 February 2017 the plaintiff addressed a letter of termination of the agreement to the defendant[2]. In terms of the said letter the plaintiff's attorneys, Cronje de Waal - Skosana Incorporated, referred the defendant to, amongst others section 217 of the Constitution of South Africa of 1996, regulation 32 of the Municipal Supply Chain

[2] Annexure E to plaintiff's particulars of claim

Management Regulations and other facts. In paragraph 6 of the said letter the attorneys state the following:

"*In the result your client is not entitled to claim 2.5% commission in respect of monies collected from our client's customers in respect of current accounts. Your client's' entitlement' to claim 2.5% commission on debt collected from our client's customers (with specific reference to current accounts) was not subjected to a competitive bidding process referred t o and provided for in regulation 32(1)(a) of the Municipal Supply Chain Management Regulations*".

It was also placed in dispute whether the defendant was entitled to 16.5% commission on all amounts paid into the plaintiff's bank account since 1 September 2015.

[21] The plaintiff, in the said letter concluded that it therefore terminated the agreement with 30 days' notice.

[22] The defendant did not accept the termination and rushed off to court on 1 March 2017 (the High Court of South Africa Gauteng Division functioning as the Mpumalanga Circuit Court under case 374/17). In the said application the respondent, amongst others, sought to interdict the applicant from cancelling the agreement. The parties

entered into a settlement which was made an order of court on 14 March 2017 with the following terms:

"*1. The matter is removed from the roll and costs are reserved;*

2. The issue of validity of the respondent's purported termination and the amount owned to the applicant is referred to arbitration before Judge Harms to take place from 8-12 May 2017;

3. The applicant shall leave the respondent's site by 22 March 2017;

4. Respondents purported termination is suspended pending the outcome of the arbitration;

5. The respondent shall continue to provide the following information to the applicant;

5.1 NF05, PF06; PG09 and PF10 on a daily basis; and

5.2 PF15 on a monthly basis".

[23] *Before the urgent application became settled, the applicant instituted a conditional counter application against the defendant in which the following relief was applied for:*

1. That the contract for provision of debt management services entered into and concluded on or about 12 September 2015 to be declared unconstitutional, invalid and unlawful, and void ab anitio;

2. *That the applicant be ordered to pay the costs of both the main application and the additional counter application*.

[24] I pause to mention that it seems to be common cause that the dispute referred to the arbitration, in terms of the settlement agreement, only concerned the purported cancellation of the agreement and the quantum of defendant's claim. Judge Harms, the arbitrator, concluded during the arbitration process that the issue pertaining to the validity or lawfulness of the agreement concluded between plaintiff and defendant, and as to whether it complies with the provisions of sections 217 of the Constitution did not fall within the jurisdiction of the arbitrator.

[25] For some reason or the other the plaintiff then initiated this action proceedings in this court on 20 June 2016.

[26] The arbitration proceedings were finalised before Judge Harms on 23 October 2017 and an award was issued in favour of the defendant in terms whereof the plaintiff was ordered to pay the defendant 1. In respect of 60 days plus accounts R22 344 374.32 and 2. In respect of the current accounts (0-60 days) R23 767 462.03. I was also informed

that the quantum has not yet been finally determined and will exceed the amounts above.

[27] The plaintiff appealed to an arbitration tribunal that dismissed the plaintiff's appeal to it on 3 September 2018. After receipt of the plaintiff's summons the defendant filed a plea which included the special plea.

THE PLEADINGS

[28] Plaintiff's particulars of claim is premised on the fact that the plaintiff entered into the agreement with the defendants based on regulation 32.

[29] Regulation 32[3], provides that under certain circumstances an organ of state, in terms of its supply chain management policy may procure goods or services for the municipality under the contracts secured by another organ of state under certain conditions.

[3] (1) A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if –
(a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;
(b) the municipality or entity has no reason to believe that such contract was not validly procured;
(c) there are demonstrable discounts or benefits for the municipality or entity to do so; and
(d) that other organ of state and the provider have consented to such procurement in writing.

[30] Plaintiff contends that the conditions as set out in section 32 was not complied with, and further that the contract entered into between Newcastle municipality and the defendant was not compliant with section 217 of the Constitution read with regulations 32 and 51.

[31] Accordingly the plaintiff claims an order declaring the agreement unconstitutional, invalid and unlawful and void ab anitio, alternatively that the portion referring to 2.5% on younger than 60 days debt should be declared unconstitutional, invalid and unlawful and void ab anitio alternatively that the decision to enter into the contract on 12 September 2015 must be reviewed and set aside.

[32] Defendant filed a plea in which it raised two special pleas to the effect that:

32.1 The matter is *lis pendens* as there is a pending application between the same parties under case no 374/17 in the High Court of South Africa, Mpumalanga Circuit Court where the plaintiff, in such application launched a counter application against the defendant for the same relief.

32.2 The plaintiff should not be entitled to the relief sought by way of review (or declaratory) as it delayed the launching of this action

as outside the 180 days limit prescribed in terms of the promotion of administrative justice act no 3 of 2000 (PAJA), and if PAJA is not applicable, the delay was inordinate and unreasonable in any way.

[33] Further in the defendant pleaded that the plaintiff is not entitled to the relief sought or that the agreement was void for the reasons as stated by the plaintiff.

[34] Both parties seek costs against each other.

[35] Before I turn to the merits, and the necessary interpretation, I have to deal with a legal point raised by the defendant. In its heads of argument, the defendant allege that the relief sought by the plaintiff is of the nature of declaratory relief whilst it is in fact a legality review. It states that the relief is couched in such a way by the plaintiff in its particulars of claim, (in *casu* a declaratory order which is not a review application), but that this court should in any way find that the relief that is sought is in nature a review application. I was referred to the judgment of Hannaker v Minister of Interior[4] in this regard.

[4] 1965(1) SA 372(C) at 375 C.

[36] The judgment by Corbett J was as a judgment that predates the current constitution but is of importance. In the case the plaintiff caused a summons to be issued in which he claimed an order setting aside, and declaring null and void proclamation 190 of 1957, which was issued in terms of section 3 of the Group Areas Act 41 of 1950, as amended. He alleged that certain proclamations made by the Minister in terms of the group Areas Act was invalid as the board was precluded from so advising the Minister unless it took into consideration whether or not suitable alternative accommodation would be available amongst others. It was also required to enquire into, by means of a written report, the desirability of issuing the proclamation. The plaintiff's case was also that the board had failed to carry out its duties under section 27(5) of the Act and that therefore a necessary and important step leading up the issue of the proclamation was omitted and the proclamation itself was invalid. The judgment incorporated an application for an amendment of a plea by the defendant to incorporate a plea that there was an unreasonable delay by the plaintiff to approach the court to have its own decisions set aside. The plaintiff denied the delay principle is applicable as it was seeking a declaratory relief and not a review application. The learned Judge dealt with review applications and confirmed that review applications, amongst others, could be done by motion where the process by which there was a public body had a duty imposed on it by statute is guilty of gross irregularity, or a clear legality in the

performance of that duty. In such case the proceedings may be set aside. The court in this instance found that the gravamen of the plaintiff's complaint relates to the proceedings of a statutory body, the group areas board. It was claimed by him that, because the board failed to perform the duty imposed upon it in terms of section 27(5) the proclamation is invalid. It might be said with justification, therefore, that in substance this action constitutes a review of the proceedings of the board'[5].

[37] The court referred with approval to the judgment of Rex vs Minister of Health: ex parte Yaffe: stating: *'that this procedure is permitted where an attack is made on subordinate legislation on the grounds that is statutory or public body has failed to observe the statutory duty or procedure, compliance with which is a condition precedent to the exercise of the subordinate legislative power. That is precisely the plaintiff's complaint in the present case. Consequently still assuming the validity of the certiorari analogy, it seems to me that a reference to English law, so far from supporting Mr Molteno's contention, suggests that in circumstances such as these a common law review is both a competent and proper procedure. Paragraph generally for the afore going reasons I am satisfied that the present action may be classed as*

[5] Hannaker, supra, p380 B-D

being a review under the common law and that, accordingly, the delay rule is applicable'[6].

[38] Although Hannaker might be classified as pre-constitutional authority, I was referred to the judgment of Municipal Manager: Qaukeni Local Municipality and Another vs FV General Trading CC[7]. In this judgment the Supreme Court of Appeal also had to deal with an application to have certain agreements concluded declared invalid due to the non-compliance with section 217 of the Constitution as well as the Local Government: Municipal Systems Act 32 of 2000. There are similarities between the current case and the Qaukeni judgment in that in both instances a contract was awarded to a service provider without a transparent bidding process having been followed. Leach AJA writing for the court stated as follows[8]:

'While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second respondent's procurement of municipal services through its contract with the respondent was

[6] Hannaker supra p 380 A-C.
[7] 2010(1) SA356 SCA.
[8] Qaukeni supra par 26.

unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief'. (Own emphasis).

It is accordingly clear that our highest court found, although obiter, that although the plaintiff seeks the relief by way of declarator, it should not be prevented to do so.

[39] The relief sought by the plaintiff in the alternative in its particulars of claim amounts to review in any way.

[40] Whether the plaintiff seeks to a declarator or relief by review is actually irrelevant.

[41] It is my finding that the defendant raised this defence as it wished to raised a defence of delay against the plaintiff to trump the plaintiff's relief to have the contract declared unconstitutional, unlawful and therefor void *ab anitio*.

DELAY

[42] The defendant pleads that the plaintiff, in an application for review to set aside the decision it took in September 2015 being an administrative decision delayed bringing an action or an application to review the administrative decision.

[43] A court must consider whether there was a delay and whether, if there was a delay such delay was unreasonable the facts of the matter becomes of cardinal importance.

[44] A very important aspect of delay is when the plaintiff became aware of the illegality of the decision, or contract, or should reasonably have to became aware of such illegality.

[45] During argument, and in the evidence by the witnesses called by the plaintiff, it became common cause that the plaintiff, at the time it

entered into the agreement with the defendant, had no reason to believe that the contract between the defendant and Newcastle municipality was not validly procured. In argument, advocate Rip SC, on behalf of the defendant, and advocate Maritz SC on behalf of the plaintiff, made this common cause. They however had different interpretations thereof. It is therefore common cause, and even on the evidence of Mr Mokgatsi who testified on behalf of the plaintiff regarding the delay, that the plaintiff was unaware of the fact that the Newcastle municipality failed to subject the "*new debts*" to a competitive bid process. It assumed for the purposes of contracting the defendant that compliance with all the legislative requirements had taken place which on the undisputed evidence is not a correct assumption.

[46] Departing from the common feature it is clear that the plaintiff, according to itself, became aware of the irregularities that tainted the Newcastle contract at or about 8 February 2017. Even if it became aware of such irregularities upon receipt of the Auditor General's report (the 71116), same will apply.

[47] Subsequent to the letter addressed by the plaintiff's attorneys to the defendant's attorneys on 8 February 2017, the defendant reacted by launching the urgent application against the plaintiff in the High Court

under case no 374/17 on 1 March 2017. The plaintiff instituted, before 14 March 2017 a conditional counter application against the defendant in the urgent application in terms whereof it sought to have the agreement between itself and the defendant declared unconstitutional invalid and unlawful and void ab initio.

[48] Therefor, on the evidence before me, from 8 February 2017, the date upon which the plaintiff became aware of the irregularities and unlawfulness of the contract between Newcastle municipality and the defendant it did not drag its feet. Not even a month passed before it instituted its counter application, and its collateral challenge to the defendant's challenge and insistence on specific performance of the agreement.

[49] Subsequent to the counter application a dispute was referred to arbitration and this action was initiated on 20 June 2017. This action actually overtook the counter application which was later withdrawn by the plaintiff and costs tendered.

[50] I can therefore not agree with the defendant that there was an undue delay by the plaintiff in instituting the proceedings to have the agreement declared unconstitutional, unlawful and invalid. It is

therefore not necessary to deal with the authorities cited by both parties in respect of the delay.

[51] It is important to note that the defendant did not dispute any of the evidence by Mr Mokgatsi during the proceedings before me where he explained when the municipality became aware of the irregularities and unlawfulness of the Newcastle agreement.

[52] I therefor find that the plaintiff did not unduly delay launching the proceedings currently before now, if it were to be review proceedings.

PLAINTIFF'S CASE

[53] Plaintiff's case is that during or about 2015 it decided to procure the services of debt collector in order to assist it with the collecting of its book debts for municipal services rendered to customers which remains unpaid.

[54] It became aware of the fact that Newcastle municipality has concluded a similar agreement with the defendant.

[55] It accordingly addressed a letter to the Newcastle municipality and sought consent as provided for in regulation 32 (1)(d) to such procurement. Newcastle municipality had no objection and provided such consent to utilise its tender (bid no 067/2014/15) for the purpose of procuring the services.

[56] The plaintiff then secured a similar agreement to that concluded between Newcastle municipality and the defendant for the same services with the defendant. In terms of the agreement which is annexed to the plaintiff's particulars of claim defendant had to render the following services amongst others

1. It should negotiate acceptable payment arrangements in accordance with the Municipal policy with debtors.
2. The defendant must prepare and issue summons.
3. The defendant must prepare reports on arrangements made for domestic, businesses and indigent debtors.
4. Defendant must handle correspondence with debtors.
5. Defendant will be entitled to use the plaintiff's premises but will responsible for all its own overheads.
6. The defendant must identify debtors through arrear extracts preferably through interface with the municipalities systems. It

must obtain and maintain acknowledgment of debts through attachment orders and data based thereof.

7. Identify defaults on negotiated agreements.

8. Obtain judgments after issuing summons identify and prepare reports in respect of amongst other indigent applications.

[57] It appears that the plaintiff would be represented by the defendant as if it was the plaintiff in the collection of municipal debts. The only exception was that all payments in respect of the debts would be effected by customers into the account of the plaintiff.

[58] In terms of paragraph 6.2.5 of the agreement the payment for the services would include the following:

"*Effect payment based on commission of 18.5% on collected debt from the customers exceeding 60 days as well as 2.5% to debt collected from customers under 60 days to the following bank account:*".

[59] From the agreement it is clear that the plaintiff agreed with defendant that it would see the collection of its total book debt in respect of municipal services. The service charges defined in the agreement

"*means the basic services or levy chargeable in respect of services needed by the citizens or customers of GMM (plaintiff), including but not limited to, water supply, sewage collection and disposal, refuse removal, electricity and gas supply, municipal health services, municipal road and storm water drainage, municipal paths and recreation, etc*". It is clear that the defendant would collect all debts for customers in respect of municipal services rendered to the residents and other customers in the plaintiff's jurisdiction.

[60] As *quid pro quo* the defendant would then be entitled to the remuneration on the amounts collected and banked into the plaintiff's bank account as stated earlier.

[61] The basis for entering into this agreement with the defendant is also common cause between the parties. In terms of regulation 32 which reads as follows:

"*32. Procurement of goods and services under contracts secured by other organs of state*

(1) A supply chain management policy may allow the accounting office to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if -

(a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;

(b) the municipality or entity has no reason to believe that such contract was not validly procured;

(c) there are demonstrable discounts or benefits for the municipality or entity to do so; and

(d) that other organ of state and the provider have consented to such procurement in writing".

[62] The plaintiff may negotiate with Newcastle municipality to enter into the agreement with the defendant on the same terms and conditions. The municipality may select the external service provider as stated in Blue Nightingale Trading 397 vs Amathole District Municipality[9]:

"*Thus, where an organ of state had procured goods or services under a contract preceded by due processes in compliance with the prescribed supply chain management policy, then another organ of state which requires the same goods or services, may contract with the first organ of state for the supply of such goods or services. Of course, the supplier must agree to such procurement. This procedure removes the duplication of costs relating to bureaucratic red-tape from the*

[9] 2017(1) SA 172 (ecg) at par 31.

tender process, whilst retaining all the elements of the constitutional imperatives under section 217 of the Constitution. It cannot be over-emphasized that the enquiry must always be whether the constitutional imperatives have been compromised by the exemption; if so, it is unconstitutional, if not, the exemption is permissible under section 110(2)." (Own emphasis).

[63] The purpose of regulation 32 is therefor to save valuable time and money where another organ of state or municipality have acquired services, and went through the costly process of securing bids for a certain service. The next municipality may then, with the consent of the first municipality enter into an agreement with the same advantages that the first municipality has.

[64] Section 217 of the Constitution of the Republic of South Africa reads:

"*Procurement*

(1) 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.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[65] It is a constitutional imperative that, when any organ of state such as the plaintiff procures any goods or services it must be done in a fair, equitable, transparent, competitive and cost effective way.

[66] Each municipality must have a supply chain management policy which give effect to the provision of the Municipal Finance Management Act no 56 of 2003[10].

[67] Regulation 32, as stated earlier in this judgment, creates a mechanism to prevent burocratic red tape from repeating itself. Like in *casu*, the plaintiff's supply chain management policy allows it, via its accounting

[10] Section 111 of the Municipal Management Finance Act 56 of 2003.

officer, being the Municipal Manager, to procure goods and services for the municipality under a contract secured by another organ of State provided that:

1. the contract has been secured by that other (in *casu* Newcastle Municipality) organ of State by means of a competitive bidding process applicable to that organ of State; and

2. That the municipality or entity (the plaintiff) has no reason to believe that such contract was not validly procured; and

3. There are demonstrable discounts or benefits for the municipality (plaintiff) to do so.

[68] These conditions must be read conjunctively. All these conditions must be complied with before the plaintiff can validly conclude the contract with a service supplier.

[69] The defendant's argument in this regard is that the agreement between Newcastle Municipality and the defendant is irrelevant in so far its legal requirements as long as the plaintiff, when it entered into the agreement with the defendant had no reason to belief that the first contract was not validly procured.

[70] If the second leg, in other words the subjective leg (Regulation 32(1)(b)) was complied with, the objective requirement in Regulation 32(1)(a) became irrelevant, so argues Mr Rip.

[71] He however loses sight of the fact that **all four** conditions must be present before such an agreement may be entered into. If it appears later on that all four peak conditions or (as Mr Rip called it: jurisdictional facts) were not present at the stage the plaintiff concluded the contract with the defendant, the plaintiff must address the validity and lawfulness of the agreement it entered into with the defendant.

[72] The plaintiff's as an organ of State has an obligation in terms of the Constitution to comply with all statutes and regulations pertaining to procurement. In Member of the Executive Council for Health Eastern Cape and Another vs Kirland Investment (Pty) Ltd t/a Eye and Lazer Institute[11] the court stated the following:

"*. . . 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*

[11] 2014(3) SA 481 (CC).

procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly"[12].

[73] As soon as the plaintiff became aware of the irregularities in the conclusion of the contract between the Newcastle municipality and the defendant, it informed the defendant's attorneys accordingly, and the plaintiff, during March 2017, launched its counterapplication to have the agreement between it and the defendant declared unconstitutional invalid and therefore void.

[74] It is important to have regard to process preceding the conclusion of the contract between defendant and Newcastle Municipality. In this regard plaintiff called Ms Haripersad to testify. As stated before she is a Director in the Financial Department of the Newcastle Municipality. It became clear from her evidence, which was not disputed, that in respect of the debtors due to the Newcastle Municipality of less than 60 days in age, no competitive bidding process was undertaken. She specifically testified that during the compulsory bid meeting it was specifically stated that this category of debt was excluded.

[12] Kirkland supra par 82

[75] All the bids (all 17 thereof) received in respect of debt collection for the Newcastle Municipality was solely in respect of the debtors exceeding 60 days. The initial reward to the defendant by the Newcastle Municipality of the tender was also owned in respect of those debts older than 60 days. So much appears in numerous documents and communications between defendant and the Newcastle Municipality.

[76] The Newcastle Municipality realised that there was a moratorium on the appointment of further staff, and when the special unit that was to be established did not realise they reverted to an in-house agreement (a variation order) as well as private negotiations with the preferred bidder, the defendant, to include the debts younger than 60 days in the contract. This without reverting to a fresh bid process. The defendant gladly accepted this unexpected windfall.

[77] It is therefore clear that with respect to the debts less than 60 days old there was no fair, equitable, transparent, competitive and cost-effective process that took place before awarding it to plaintiff. The process followed is similar to the process that was followed in Qaukeni. One can actually not refer to it as a process, but rather a lack thereof. No bid process was followed and the debts younger than 60 days which, in most circumstances does not even need follow up by the municipality and includes its good and solid paying customers, was

suddenly included and the defendant unduly preferred. I refer to what the Audit General stated to the Newcastle Municipality in respect of the procurement process that was followed which was not fair or transparent and that it suggested that it should start afresh to provide the other bidders a fair opportunity to compete with the defendant.

[78] A lot of truth lies in the argument by the Auditor General where it stated that it should be noted that the fact that the defendant is entitled to a percentage from all debtors below 60 days is not cost effective as might be inclusive of debtors that would pay without the need of debt collectors thus resulting in an expenditure in vain and that could have been avoided.

[79] I also agree with the Auditor General's contention that other companies might have been in a position to quote differently on the services to be rendered as it includes the debt younger than 60 days which is less tedious to collect and which could have resulted in a lower percentage on both older than 60 days and younger than 60 days debts. I need not speculate about it. The fact remains that the Constitution and more specifically section 217(1) which is couched in peremptory terms and ignored by the Newcastle Municipality. That causes the agreement entered into between the Newcastle Municipality and the defendant, as appears from the common cause,

facts to be unconstitutional unlawful and therefore invalid. I am not required to make an order in respect of the Newcastle contract.

[80] If it is accepted that the Newcastle contract did not comply with the prescripts in section 217(1) of the Constitution, it is clear that the peremptory prescripts of section 32(1)(a) was not complied with by plaintiff as there was no competitive bidding process applicable to the agreement between Newcastle Municipality and the defendant in respect of the debts younger than 60 days.

[81] The requirements which set by regulation 32 must be seen through the prism of section 217 of the Constitution.

[82] The Newcastle Municipality contract will then be visited with unconstitutionality and therefore the plaintiff could not procure the goods under a contract secured by the Newcastle Municipality. As stated in Qaukeni[13]:

"*Consequently, in a number of decisions this court has held contracts concluded in similar circumstances without complying with prescribed competitive processes are invalid. . . this court set aside a contract concluded in secret in breach of provincial procurement procedures, holding that such a contract was 'entirely subversive of a credible*

[13] Par 15.

tender procedure' and that it would 'deprive the public of the benefit of an open competitive process'. Similarly in Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd[14]*, which concerned the validity of two leases of immovable property concluded between the respondent and a provincial department without the provincial tender board having arranged the hiring of the premises as was required by statute, this court concluded that the leases were invalid*."

[83] I do not hesitate to find that the procurement of the services in respect of the debts younger than 60 days between the Newcastle municipality and defendant was in breach of the provisions of the Constitution and therefore not valid.

[84] The question remains whether this court must set aside the whole contract between plaintiff and defendant or only a portion thereof. I have already found that a competitive bidding process, as required by section 217(1) of the Constitution was complied with when Newcastle municipality solicited bids in respect of the debt <u>older</u> than 60 days.

[85] The eventual award of the tender to the defendant in that regard remains valid and a valid agreement could have been concluded.

[14] 2001 (4) SA 142 (SCA)

[86] The court may, under certain circumstances, and if an agreement is severable, sever the good from the bad out of the contract. In Retail Motor Industry Organisation and Another vs Minister of Water and Environmental Affairs and Another[15], Plasket AJA on behalf of the full bench of the SCA stated as follows:

"*[46] The fact that the November plan deals with solid tyres as well as pneumatic tyres does not necessarily mean that the entire plan must be set aside. If the bad can be severed from the good, the bad can be set aside and the good left intact. The correct approach to the question of whether the bad in an instrument of subordinate legislation can be severed from the good was set out as follows by Centlivres CJ in Johannesburg City Council v Chesterfield House (Pty) Ltd:30*

'The rule, that I deduce from Reloomal's case is that where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute. In Arderne's case the main object of the Ordinance was to raise revenue by means of taxation and the good could easily be separated from the bad. The main object of the Ordinance was, therefore, not

[15] 2014(3) SA 251(SCA) at par 46 and 47.

defeated by holding that the Ordinance, shorn of its bad parts, was valid. Where, however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole Statute must be declared ultra vires. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the Statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test.'

[47] Severance is possible in this case. It is possible, textually, to separate the references to solid tyres from references to tyres as defined in the Waste Tyre Regulations. The references to tyres as defined are not dependant in any manner on the references to solid tyres, because solid tyres are always referred to expressly and separately from tyres as defined. It is a simple matter to order that any reference to solid tyres in the November plan be set aside. This does no violence to the objects of the plan. Indeed, all that it does is to leave the remainder of the plan in place and consistent with the Waste Tyre Regulations."

[87] The decision by the plaintiff to engage defendant and utilise the procedures created in regulation 32, is objectively, and seen in hindsight, not good.

[88] The contract between the plaintiff and the defendant deals with all the obligations of the parties. Only one clause in the agreement between plaintiff and defendant refers to the debts younger than 60 days. In clause 6.2.5 of the agreement, as quoted earlier, the reference to the commission payable for services rendered is made. If the position of the clause referring to 2.5% on the debts younger than 60 days is declared unlawful, and severed from the contract, the balance of the contract remains intact regarding the 16.5% in respect of the debts older than 60 days. It is not difficult to separate the "good from the bad" in this agreement. If the reference to the 2.5% on new debts is removed the agreement clause 6.2.5 will read:

"*Effect payment based on commission of 16.5% on collected debt from the customers exceeding 60 days to the following bank account:*".

That will not render the agreement invalid at all".

[89] I have explained that I accept that the contract between the Newcastle municipality and the defendant in as far as the debts older than 60 days were validly concluded. Effect can then be given to the balance of the agreement that the parties envisaged anyway.

[90] It is clear from the plaintiff's particulars of claim, as well as the letter dated 8 February 2017, that the plaintiff basically strongly objected to the portion of the agreement between defendant and Newcastle municipality that dealt with the 2.5% on current debts. Even the plaintiff's particulars of claim and its prayers deals with such relief.

[91] Mr Maritz of behalf of the plaintiff argued that the relief sought is not of a Constitutional nature and that I should not venture into considering applying section 172(1) of the Constitution and grant remedial relief.

[92] In terms of section 172(1) a court:

"*(1) When deciding a constitutional matter within its power, a court—*

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[93] I do not agree with Mr Maritz's argument is good in law. I do not have to consider it, but after the urgent application was launched by the defendant, the plaintiff was amenable to allow the defendant to proceed with the contract. It actually took part in the arbitration proceedings between the plaintiff and the defendant regarding the validity of the cancellation of the agreement and the quantum due to the defendant by the plaintiff. The contract eventually terminated by a fluxion of time.

[94] It would be unjust for this court to hold that the defendant is to forfeit all benefits that accrued to it under the contract in these circumstances. This when the plaintiff allowed the defendant to render their services for an unlimited time until the contract expired due to effluxion of time. It voluntary, duly represented by legal representatives, on date of hearing of the urgent application agreed that the defendant could proceed to render services.

[95] This however does not cause the contract, in so far as it is unlawful, to be enforceable.

[96] In Qaukeni[16] the court said the following:

"[22] *Despite this, the respondent raised, both in the court a quo and in the heads of argument, what effectively amounts to an objection in limine based on the contention that it was an innocent party who had done nothing wrong but had merely accepted the appellants' offer whereas the appellants had failed to follow the municipal procedures that bound them. The respondent therefore argued that the appellants were not entitled to bring proceedings that would result in them gaining an advantage from their own unlawful conduct to the prejudice of the respondent.*

[23] *This argument cannot be upheld. This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act.*"

[97] The plaintiff, *in casu*, appears to be innocent. It relied, as it was entitled to, on the fact that Newcastle municipality entered into an agreement with it in terms of a competitive bidding process applicable to the Newcastle municipality, and it had no reason to belief that such contract was not validly procured. When it became aware of the

[16] Par 22 and 23.

irregularities in the Newcastle agreement it took all reasonable steps that could have been expected of a State organ to have the agreement between the plaintiff and defendant set aside. The defendant was party to the Newcastle agreement. It was aware of the fact that no competitive bidding process in respect of the current debts of the Newcastle municipality was followed and that such was awarded to it. In light of my finding above, it is therefore clear that in the circumstances the plaintiff cannot be blamed for its failure to attack the validity of the contract on an earlier stage.

[98] After having notified the defendant on 8 February 2017 of its concerns about the validity of the Newcastle agreement, and consequential effect it has on the agreement between plaintiff and defendant in terms of section 217(1) of the Constitution, and regulation 32, it was the defendant that rushed to court to compel the plaintiff to honour the agreement and thereafter took part in proceedings in the arbitration. The award in favour of the defendant in arbitration, was then, referred to this court in an effort to make the award an order of court to coerce payment out of the plaintiff.

[99] Plaintiff however raised the collateral challenge in the form of a review application, or counter application, and a declarator as soon as it became aware of the tainted Newcastle contract.

[100] Under the circumstances, I am of the opinion and find that the plaintiff remains liable for payment of all debts to the defendant in respect of services rendered in respect of debtors older than 60 days at a rate of 16.5% (VAT inclusive) from date of agreement till date of termination of the agreement. In respect of the debts younger than 60 days (current debts), as found herein, such portion of the agreement is unconstitutional unlawful and is severed from the contract.

[101] In respect of these debts the defendant will not be entitled to payment of any amount.

COSTS

[102] The plaintiff had to revert to this court to challenge the Constitutionality of the contract. When defendant became aware of the plaintiff's case and the fact that it relied on the illegality of the Newcastle contract, and acceded to the plaintiff's claim that at least such portion (2.5% on debts younger than 60 days) as set out in its particulars of claim and alternative claim is invalid, this action would not have been necessary.

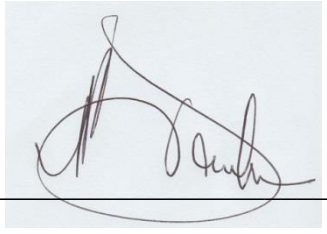
[103] The plaintiff achieved substantial success in this litigation taken into accounts the amounts referred to in respect of the current debts that it does not have to pay to the defendant.

[104] My finding will reflect in the costs award hereunder. I accordingly find and make the following order:

1. That the reference to "as well as 2.5% to debt collected to customers under 60 days" contained in clause 6.2.5 of the "contract for provision of debt management services" be declared unconstitutional invalid unlawful and void ab initio;

2. That the defendant will not be entitle to recover any compensation/commission in respect of the debts recovered by the plaintiff from customers under 60 days for the duration of the agreement between plaintiff and defendant;

3. That the defendant is ordered the pay the plaintiff's costs, including the costs consequent upon the employment of three counsel where applicable.



HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE PLAINTIFF:	**ADV MM RIP (SC)**
	ADV C RIP
INSTRUCTED BY:	**CRONJE DE WAAL-SKHOSANA INC**
REPRESENTATIVE FOR THE DEFENDANT:	**ADV M MARITZ (SC)**
	ADV F.W BOTES (SC)
	ADV D.D SWART
INSTRUCTED BY:	**DE JAGER INC.**
DATE OF HEARING:	**5 NOVEMBER 2019**
DATE OF JUDGMENT:	**3 DECEMBER 2019**