IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Case No.: 1884/2020

Date Heard: 19 May 2022

Date Delivered: 15 November 2022

In the matter between:

FLEET SYNC CALTEX JOINT VENTURE Appplicant

and

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY First Respondent

MASANA PETROLEUM SOLUTIONS (PTY) LTD Second Respondent

KINGSMEN INVESTMENTS (PTY) LTD Third Respondent

MM FUEL TRADERS / KEMPSTON GROUP JOINT VENTURE Fourth Respondent

TOTAL SOUTH AFRICA (PTY) LTD Fifth Respondent

BAUMI BARUDI TRADING (PTY) LTD Sixth Respondent

NEXOR 312 (PTY) LTD t/a VNA CONSULTING Seventh Respondent

QTIQUE 27 (PTY) LTD Eighth Respondent

FUELSERVE RETAIL TRANSIT SOLUTIONS JOINT VENTURE Ninth Respondent

BHOTANI WPK ENERGY JOINT VENTURE Tenth Respondent

MHLANGOVUYO TRADING t/a LUK BROS PETROLEUM SOLUTIOBNS Eleventh Respondent

KHANGELO PHANDA INVESTMENTS (PTY) LTD Twelfth Respondent

WILLIE NGEMA MOTORS Thirteenth Respondent

JUDGMENT

RONAASEN AJ

Introduction

[1] It is apposite to commence this judgment with reference to section 217(1) of the Constitution, which provides as follows:

> "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

[2] It is the constitutional imperative of transparency in procurement processes that I wish to emphasise. It will become apparent from this judgment that the unexplained failure to adhere to this imperative features largely in this matter.

[3] This application concerns the fate of a tender in respect of which the first respondent ("the municipality") published an invitation to bid in August 2019 under the description SCM//19-239/S: "*Supply of Fuel, Installation, Management and Maintenance of an Integrated Electronic Fuel Management System*" ("the tender").

[4] The description of this application by counsel for the applicant in heads of argument as relating to "*the murky world of municipal procurement*", although unfortunate, has proved to be remarkably appropriate in the circumstances of this matter. The facts revealed in this application show that the administrative activities of the municipality are tightly controlled, although the nature of the control at play hardly promotes efficiency. The factionalism and resultant power struggles in the political structures of the municipality have, in turn, impacted negatively on the municipality's administration, with a consequent lack of adherence to constitutional prescripts, including transparency in procurement processes. Officials avoid the taking of decisions and the fulfilment of designated functions, all of which, constitutionally, they are required to do diligently and without delay. Requests for information, which should be furnished, are met with silence.

[5] The role of municipal officials in administering procurement in terms of the supply chain management policies of the municipalities they represent is an important executive function in our constitutional dispensation and its primary goal is to promote administrative certainty in a transparent manner. I shall deal with the constitutional imperative requiring them to perform their designated functions expeditiously in more detail, below.

[6] The municipality maintains a large fleet of vehicles and procures all its petroleum fuel requirements from an external supplier. Previously the second respondent supplied the requirements envisaged in the tender pursuant to a fixed term contract of three years awarded to it following a competitive bidding process as envisaged in the relevant procurement legislation and the municipality's supply chain management policy. That contract has long since expired by the effluxion of time.

[7] The tender was intended to award a new fixed term contract to a fuel supplier for the municipality, pursuant to a competitive bidding process. Although the tender was awarded to the applicant as far back as February 2020 it took this application for it to be advised, only in November 2020, that its bid had been successful. The underlying administrative failures are at the heart of this application.

[8] Despite the expiry of its contract to supply fuel to the municipality, the municipality continued to use the services of the second respondent as its sole fuel supplier, this without any formal procurement process. This stopped after the appointment of the municipality's attorneys of record in this application. However, fuel continues to be supplied to the municipality by other suppliers on a temporary basis, pending the adjudication of this application, again in the absence of any formal procurement process. This practice is obviously undesirable as it comes with the obvious potential for irregularities.

[9] Once again, this court is called upon to unravel the entanglement created by the administrative ineptitude of the municipality's officials, at great expense to its

ratepayers, and the municipality remains in limbo while an important aspect of its infrastructure is operating outside formal strictures.

The other parties to this application

[10] Only the applicant and the municipality took part in the proceedings before me. The remaining respondents all bid unsuccessfully for the tender. No relief is envisaged against any of the remaining respondents.

The relief sought by the applicant and the municipality, respectively

The applicant

[11] In terms of its amended notice of motion the applicant seeks the following relief, namely that:

11.1. it be declared that the resolution of the municipality's acting City Manager, on 5 February 2020, as confirmed in her formal resolution on 12 February 2020, approving the recommendation to her of the Bid Adjudication Committee that the tender of the applicant be accepted, as finally conveyed to the applicant during November 2020, constituted acceptance by the municipality of the applicant's offer in the tender, subject to the conclusion of a service level agreement;

11.2. the failure of the municipality to implement the award of the tender to the applicant be reviewed and set aside;

11.3. the municipality be directed with effect from a date 10 days after the date of the order sought to implement and give effect to the decision of its accounting officer to accept the applicant's tender;

11.4. the continuing acquisition by the municipality of its petroleum fuel requirements from suppliers other than the applicant be declared to have no lawful basis and to be inconsistent with the Constitution and illegal and invalid;

11.5. the continuing acquisition by the municipality of its petroleum products from suppliers other than the applicant and/or its decisions to continue to so acquire its petroleum products, be reviewed and set aside;

11.6. the municipality be interdicted from acquiring its petroleum fuel requirements from a supplier or suppliers other than the applicant;

11.7. the municipality pay the applicant's costs of this application on the scale as between attorney and client.

[12] The relief sought by the applicant is founded principally in the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

The municipality

[13] The municipality, by way of counter application seeks the following relief, namely that:

13.1. it is declared that the decision ("the impugned decision") to award the tender to the applicant is unlawful and invalid and is reviewed and set aside;

13.2. the tender be cancelled, and the municipality be authorised to re-advertise the tender and reformulate the specifications in respect thereof; and

13.3. the applicant pay the municipality's costs of the counter application.

[14] Thus, the relief the municipality seeks in terms of its counter application is in the form of a legality review. Underlying the relief foreshadowed in paragraph 13.1, above is the municipality's contention that for two principal reasons (alleged irregularities), which will be discussed in more detail, below the applicant's bid was not an acceptable tender, as defined in the Preferential Procurement Policy Framework Act, 5 of 2000 ("the Act") and should have been rejected.

The main issues which must be determined

[15] A determination of the counter application of the municipality will be determinative of this application, one way or the other. If the counter application is determined in favour of the municipality, the applicant cannot obtain the relief it seeks. If, however, the counter application is dismissed the applicant would be entitled to the relief it seeks.

[16] Crucial to the determination of the counter application is the question of the acknowledged delay on the part of the municipality in bringing the counter application. Objectively, it is so that the counter application was only launched some 16 months after the date of the impugned decision. First, it must be decided whether the delay in bringing the counter application was reasonable. If it is found that the delay was unreasonable it must be established whether the delay, nevertheless, should be overlooked in the interests of justice. *Administrative Law in South Africa*, third edition by C Hoexter and G Penfold ("*Hoexter*") at pages 734-743.

[17] The questions relating to the delay must be determined at the outset as their determination will have a vital bearing on the outcome of the counter application and, thus, on the applicant's application.

Chronology of the events against which the reasonableness or not of the delay must be assessed

[18] On 5 February 2020, the accounting officer of the municipality approved the recommendation of its bid adjudication committee, recommending that the tender be awarded to the applicant. On 12 February 2020, the accounting officer confirmed her approval by signing a city manager's resolution.

[19] On 20 February 2020, the municipality advised the second to thirteenth respondents that their bids had been unsuccessful and that they were entitled to lodge objections in terms of the municipality's supply chain management policy. In terms of this policy the

implementation of the impugned decision was suspended for 14 days as from 12 February 2020.

[20] Significantly, the applicant was not advised that it had been awarded the tender.

[21] The second, seventh, eighth and eleventh respondents lodged objections with the municipality. An "*objections committee*" was established under the chairmanship of a senior legal adviser of the municipality and this "*committee*" considered the objections between February 2020 and mid-May 2020 and recommended to the municipality's accounting officer that the bids should be referred back to the bid evaluation committee and that a panel attorney should be appointed to provide an opinion. It was not disputed by the municipality in argument that the objection process embarked on by the municipality was wholly irregular and had no foundation in statute or any other valid empowering provision. The fruitlessness of the exercise is confirmed by the fact that the committee's recommendations were never implemented.

[22] In the meantime, the Covid pandemic had intervened, and the hard lockdown commenced on 27 March 2020 for a period of 21 days. As from 1 May 2020 there was a gradual easing of the lockdown restrictions. Nothing is really advanced on the papers as to how the lockdown restrictions impacted specifically on the process of awarding the tender, if at all.

[23] In mid-2020 various changes were made to the identity of the municipality's accounting officer. Although the political instability which prevailed at the time is not disputed,

quite how this impacted on the implementation of the tender, which by that time had already been awarded is uncertain and unexplained.

[24] On 19 August 2020, the applicant launched this application. On 2 September 2020 the municipality appointed its attorneys of record in this application.

[25] In terms of the notice of motion the applicant, in accordance with uniform rule 53, called on the municipality to dispatch within 15 days of the receipt of the application to the Registrar all records relating to or resulting in the impugned decision being made ("the record"). The application was served on the municipality on 21 August 2020. It failed to deliver the record within the prescribed 15-day period and its failure persisted despite a notice in terms of rule 30A of the Uniform Rules requiring compliance with rule 53(1), served on 15 September 2020.

[26] During the week ending 25 September 2020 the municipality's attorneys were provided with the bulk of the documents comprising the record, which was to be delivered to the Registrar in terms of rule 53. Its attorneys reviewed the record over a period of two weeks and made certain recommendations to the municipality. Still the record was not provided to the Registrar.

[27] On 7 October 2020 the applicant brought an application to compel the delivery of the record, which was opposed by the municipality. The municipality however failed to deliver its opposing affidavit in the prescribed time and this application was enrolled for hearing on the so-called uncontested opposed motion court roll on 17 November 2020.

[28] On 30 October 2020, the municipality terminated the "contract" with the second respondent in terms of which it, at that stage, was supplying fuel to the municipality. Although I am not called upon to decide anything in this regard, I have alluded to the fact that the validity of the "contract" in terms of which the second respondent remained the municipality's exclusive fuel supplier was questionable.

[29] On 11 November 2020 the municipality's attorneys addressed a letter (described as the "proposal letter") to the attorneys of the applicant and the second respondent. It was apparent from this letter that the municipality's attorneys were in possession of the record. In terms of this letter the applicant was also for the first time advised that:

29.1. it had been awarded the tender as far back as February 2020, and

29.2. the municipality intended, within four weeks of the date of the letter, bringing a legality review to set aside the award of the tender to the applicant. The proposal was that the applicant withdraw its application, in light of the legality review process, which would determine the fate of the tender.

[30] On the morning of 17 November 2020, the municipality delivered an opposing affidavit in the application to compel delivery of the record, to which the applicant, in due course, replied. The application to compel was set down for hearing on the opposed motion roll on 11 March 2021.

[31] Between 7 December 2020 and 16 February 2021, meetings took place between the municipality's attorneys and members of the bid evaluation committee involved in the

evaluation of the various bids for the tender. The members of the bid evaluation committee apparently refused to explain to the attorneys how they had assessed the applicant to have satisfied the minimum requirement of "*proven skills and experience*" - the municipality contends that the applicant had not satisfied these requirements and therefore had not submitted an acceptable tender. This is one of the grounds on which the municipality seeks to review and set aside the award of the tender to the applicant and which will be dealt with more fully, below.

[32] After the receipt of the applicant's heads of argument in the application to compel delivery of the record, the municipality, without any explanation, delivered the record.

[33] On 23 March 2021 the applicant filed its supplementary affidavit, in response to the record.

[34] The opposing affidavit in this application, which also served as the founding affidavit in respect of the counter application, was delivered four weeks late, on 10 June 2021. The unavailability of counsel and the municipality's attorneys occasioned the lateness.

Legal principles

Delay

[35] In this case it was undoubtedly the constitutional obligation of the municipality diligently to consider the bids for the tender, to award the tender to a successful bidder and to advise the successful bidder of the award without delay. Similarly, if it felt itself

constitutionally obliged to assail the award of the tender to the applicant it should have proceeded to do so expeditiously. These obligations are consonant with section 237 of the Constitution, which provides that all constitutional obligations must be performed "*diligently and without delay*".

[36] In *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) it was held as follows at [46] and [47]:

"[46] Section 237 of the Constitution provides: 'All constitutional obligations must be performed diligently and without delay.' 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."

[37] *Khumalo* then goes on to set out the following principles in considering a delay in the context of a legality review, at [49]-[52]:

37.1. first, it is considered whether the delay is unreasonable or undue, which is a factual enquiry upon which a value judgment is made in the light of "*all the relevant circumstances*";

37.2. second, if the delay is considered to be unreasonable whether the court's discretion should nevertheless be exercised to overlook the delay and entertain the application;

37.3. in terms of the first leg of the enquiry any explanation offered for the delay is considered;

37.4. on the second leg of the test, the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision.

See also *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at [141]-[144] and [164]-[171] and the reference to *Hoexter*, above.

[38] *Tasima*'s paragraph [144] is apposite and reads as follows:

"[144] As I see it, the only arguably new question presented by the first judgment is whether, in instances where the subject of the review implicates a court's s 172(1)(a) obligations, the court should substitute *Khumalo*'s factual, multifactorial and context-sensitive framework for a strict rule that delay can never prevent the court from deciding the matter. In my view the answer is 'no'. *Khumalo* made it perspicuous that the timely performance of constitutional obligations is itself a constitutional concern. Therefore, s 172(1)(a) cannot automatically subordinate s 237."

[39] The judgment of the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at [41]-[58] applied and refined the principles applicable to the consideration of a delay in respect of a legality review, as set out in *Khumalo*. In summary the following factors are applicable in the case of a delayed legality review:

39.1. first, the reasonableness of the delay must be assessed with reference to the explanation offered for the delay, which explanation must cover the entire period of the delay - *Asla* at [52];

39.2. second, if the delay is considered to be unreasonable the next leg of the test is whether it ought to be overlooked. A court has the discretion to overlook the delay, but there must be a basis for it to exercise this discretion. The basis must be gleaned from the available facts or objectively available factors - *Asla* at [53];

39.3. the approach to overlooking a delay in a legality review is flexible and entails a legal evaluation taking into account a number of factors. The first of these factors is the potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision – *Asla* at [54];

39.4. a second factor relevant to overlooking a delay is the nature of the impugned decision. In considering the nature of the impugned decision, essentially, a court has regard to the merits of the legal challenge to the decision, in other words the prospect of success on review - *Asla* at [55]-[58];

39.5. a third factor to consider when deciding to overlook the delay is the conduct of the applicant for the legality review (in this case the municipality). In this regard the Constitutional Court, on a number of occasions, has stated that the state or an organ of state is subject to a higher duty to respect the law. The standard against which a state litigant's conduct is measured is a high one and ought to accord with the prescripts of the law – *Asla* at [59]-[61];

39.6. even where the administrator had not acted as a model litigant or "*constitutional citizen*" there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance - *Asla* at [62];

39.7. in cases where there is no basis for the court to overlook an unreasonable delay the court may nevertheless be constitutionally compelled to declare an organ of state's conduct unlawful in accordance with the provisions of section 172(1)(a) of the Constitution which requires a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution -*Asla* at [63]. These considerations have their origin in the judgment of the Constitutional Court in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC). The Constitutional Court in *Asla* at [71] however, held that the *Gijima* principle should be narrowly interpreted and also restrictively so that the valuable rationale behind the rules on delay are not undermined.

The merits

[40] In this case the municipality contends for the existence of certain irregularities in that the requirements of an empowering provision, namely the tender requirements were allegedly not correctly applied in the evaluation of the applicant's tender, resulting in the irregular award of the tender to the applicant.

[41] In considering the municipality's contentions, the materiality of the alleged deviations from the tender requirements must necessarily be assessed by linking the question of compliance to the purpose of the relevant tender requirements. The approach is no different to that postulated by the Constitutional Court in respect of a review under PAJA in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at [28].

Judicial deference

[42] The legal framework against which I must consider whether the administrative actions concerned are reviewable was succinctly set out by Plasket, J (speaking for the Full Bench of this Division) as follows in *WDR Earthmoving Enterprises CC and Another v Joe Gqabi District Municipality and Others* ZAECGHC 45 (13 March 2017):

> "[8] A court that is approached to review an administrative action does not have a free hand to interfere in the administrative process. Its powers are limited. As Lord Brightman stated in *Chief Constable of the North Wales Police v Evens "[j]udicial review is concerned, not with the decision, but with the decision-making process".* This was

made clear by Innes CJ more than a century ago in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* when he said*:*

'Whenever a public body has a duty imposed on it by statue, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.'

[9] Less than a decade later, after Union and the establishment of the Appellate Division, Innes ACJ, in *Shidiack v Union Government (Minister of the Interior),* captured the limits of the review functions of a superior court when he said that a court would be *"unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong".* The reason for this is simple: the legislature mandated and empowered administrators to administer, and not courts; and the role of the court is limited to ensuring that administrators do not stray beyond the legal limits of their mandates.

[10] The passages I have cited from the *Johannesburg Consolidated Investments* case and the *Shidiack* case articulated the position when the review of administrative action was the common law jurisdiction of the superior courts. The principles stated still hold good now that the power to review administrative action is sourced in the Constitution and the PAJA: the distinction between appeal and review, based as it is on the doctrine of the separation of powers, remains in place and remains fundamentally important. Administrative action may only be set aside by a court exercising its review powers if it is irregular. It may not be interfered with because it is a decision a judge considers to be wrong."

[Detailed case references omitted]

[43] The abovementioned principles are consonant with the concept of judicial deference described by *Hoexter* (2000) 117 SALJ 484 at 501 – 2, as follows:

"(A) Judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

[44] In *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at [50] it was held that judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It merely recognises that the law itself places certain administrative actions in the hands of the executive and not the judiciary.

[45] These sentiments were endorsed by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at [48] as follows:

"[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

Application of principles and discussion

Was the delay reasonable

[46] The impugned decision was taken on 12 February 2020. That is the date on which the municipality would have been aware of its decision and is the date on which the assessment as to the reasonableness of the delay must commence.

[47] The municipality's counter application to review the award of the tender to the applicant was launched on 10 June 2021. Thus, a delay of 16 months.

[48] The constitutional imperative that constitutional obligations must be performed diligently and without delay has as its foundation the necessity for administrative finality and certainty. To that end a bidder such as the applicant is entitled to be advised of the success, or not, of its bid promptly after its adjudication. In this regard, in the conduct of the officials of the municipality, bad faith is clearly displayed, in that:

48.1. in a complete absence of transparency, the applicant was not advised of the successful outcome it had achieved with its bid. This seems to have occurred by design rather than mere administrative ineptitude if the further conduct of the municipal officials, described herein, is considered;

48.2. compounding the lack of transparency the unsuccessful bidders were, however, advised of the failure of their bids and invited to participate in an unlawful objection process. It is conceded by the municipality that this process was illegal and void from the outset;

48.3. no explanation has to date to been proffered for the failure to advise the applicant of the successful outcome of its bid. In fact, the conduct of the municipality during and after the futile objection process was aimed at misleading the applicant with plainly false communications in response to its attempts to establish the result of the bidding process;

48.4. the delaying conduct of members of the bid evaluation committee of the municipality in refusing to cooperate with the municipality's attorneys is also to date unexplained. These persons are administrators in the employ of the municipality and, as such, are obliged to cooperate to ensure the speedy resolution of problems arising from an administrative process such as their evaluation of the tender.

[49] The explanation for the delay, such as it is, does not cover the entire period of the delay. In this regard the following is to be noted:

49.1. The fruitless objection process spuriously undertaken lasted some four months. Never is it explained quite how this process proceeded, what transpired during the process and why the process took so long;

49.2. the period between the conclusion of the fruitless objection process in May 2020 and the appointment of the municipality's current attorneys is an as yet unexplained "black hole" in the sequence of events;

49.3. the delay occasioned by the refusal to provide the applicant's attorneys with the record, which in turn delayed the launching of the counter application is not explained. The record must have been available to the municipality's attorneys at least by the time the proposal letter was sent out in November 2020. Why not then furnish the record to the applicant's attorneys and focus on launching the counter application, instead of engaging in unnecessary "side issue" litigation? I shall revert to this aspect, below.

[50] I have already stated that the conduct of the municipality in occasioning the delays which occurred leaves the clear impression of it acting in bad faith. The delay in launching the counter application is indicative of inept administration, resulting in an important component of its administrative structures operating in the pale instead of on a formal basis as envisaged by procurement legislation and its supply chain management policy. Its conduct was nothing short of egregious.

[51] Thus, the delay in launching the counter application was unreasonable.

Should the delay be overlooked

The consequences of setting aside the impugned decision and possible prejudice to the parties

[52] The consequences of setting aside the impugned decision would mean that an essential component of the municipality's administration, for a further protracted period, while a tender process is run afresh, will not be conducted on a formal footing, with yet further scope for irregularities.

[53] The applicant contends for prejudice occasioned by the delay in that the members of its joint venture had been obliged to keep available substantial capital resources which will be necessary to implement the contract underlying the tender. If it is deprived of the tender it will also have been deprived of the opportunity to utilise these resources productively elsewhere.

[54] The prejudice to the municipality if the impugned award is set aside is clear. It will remain in limbo and have no service provider with regard to its fuel supply and fuel management requirements which period of limbo will continue while a further tender process is being conducted.

[55] Conversely there will be no prejudice to the municipality if the impugned award is not set aside and it is implemented.

The nature of the impugned decision and the merits of the legality review

[56] The nature of the impugned decision is in the form of an award of a tender to the applicant to supply the municipality with its fuel supply and fuel management requirements.

[57] The municipality contends that the applicant's bid falls short in respect of two minimum requirements contained in the tender specifications, namely those of "*proven skills and experience*" ("the first requirement") and "*support and capacity*" ("the second requirement").

[58] The "*Minimum Criteria*" were inserted into the tender criteria for the purpose of attracting bidders who could satisfy those criteria.

[59] In respect of the first requirement, the suggestion that that requirement could only be satisfied with reference to two letters is not rationally connected to the purpose of the requirement. To hold otherwise and find that the requirement could not be satisfied

with reference to other documents contained in the tender submission would be to render an absurd result against the purpose to be achieved by the tender requirement. See in this regard the unreported judgment of Lowe J in *Amakahaya Construction CC v The Eastern Cape Department of Human Settlements and Another* (Eastern Cape Division, Makhanda case number 3782/2021) at paragraph 61.

[60] The Constitutional Court asserted in *Allpay (supra)* at [30] that the assessment of the materiality of compliance with legal requirements in our administrative law is not encumbered by excessive formality. To the extent that the municipality's bid evaluation committee evaluated the applicant's compliance with the first requirement with reference not only to two letters but also with reference to other documents contained in the applicant's bid submission that, in my view, would not be a material deviation from the tender requirements if it was a deviation at all.

[61] I am also in agreement with the submission made on behalf of the applicant that I should exercise deference towards the evaluation of the bid evaluation committee in respect of the first requirement, it being a technical requirement as opposed to a requirement of rationality or reasonableness.

[62] I do not therefore agree with the submission on behalf of the municipality that its case in respect of the first requirement is unassailable. On the contrary it is my view that there is no merit in the municipality's case in this regard. My view is enhanced by the fact that the municipality's contentions of irregularity in respect of the first requirement is rather in the form of a conclusion *ex post facto* rationalisation arrived at without

reference to any evidence from or support by the members of the bid evaluation committee.

[63] In respect of the second requirement the municipality's case is that the applicant did not provide a contract with a fuel supplier which would cover the duration of the contract underlying the tender. The applicant counters with the assertion that it did not in terms identify the documents provided by it as being specific support of a particular requirement, but rather included all relevant documents to substantiate its ability to satisfy the requirements.

[64] One of the members of the applicant joint venture is a fuel supplier. In support of the joint venture's bid, it put up the agreement establishing the joint venture in terms of which one of the joint venture members (the fuel supplier) undertook the obligation to supply fuel through a selected network of its local service stations to the municipality and supply fuel to those service stations to that end. Again, given the purpose of the requirement namely, to ensure that the successful bidder was able to provide fuel for the duration of its contract with the municipality, the applicant satisfied this requirement. Again, the municipality's complaint is immaterial in the sense envisaged in *Allpay (supra)* and judicial deference constrains me to accede to the expertise of the bid evaluation committee.

<u>The conduct of the municipality</u>

[65] In finding that the delay of the municipality in bringing the counter application was unreasonable, I dealt extensively with the conduct of the municipality and its officials.

Its conduct and that of its officials, some of which remain unexplained, are not supportive of its request that I exercise my discretion and overlook the delay. In this instance the municipality has not acted in consonance with its higher duty as an organ of state to respect the law.

[66] What is of particular concern to me is the manner the record was dealt with. The provisions of uniform rule 53 requiring the timeous delivery of a review record have their foundation in our common law relating to review. The purpose of the delivery of a review record is to enable an applicant for review to assess its position and, if so advised, to supplement its founding affidavit and amplify or amend its notice of motion. This case clearly demonstrates why the delivery of the record was essential, in circumstances where the applicant was unaware of the success of its bid or the fact that the municipality had changed fuel suppliers. These facts had a vital bearing on the relief which it would ultimately seek.

[67] Rule 53 does not provide that the review record must be filed by the attorneys of the respondent in the review, although I accept that, for practical purposes, they may play a facilitative role in helping the respondent comply with its obligations in terms of the rule.

[68] On 9 September 2020 the municipality's attorneys advised the applicant's attorneys that it was in possession of a portion of the record and that the record would be filed as soon as reasonably possible. The affidavit opposing the application to compel delivery of the record makes it clear, however that there was no intention of delivering the

record. I find particularly disturbing the following statement in the municipality's affidavit opposing delivery of the record:

"24. Once JGS (the municipality's attorneys) was placed in possession of the documents constituting the record of decision (as contended by Fleet Sync) it was necessary for me (one of the municipality's attorneys) to superficially work through the documents to establish what had transpired and then advise the NMBM on the best course of action to adopt."

[69] The statement suggests that while the municipality's attorneys were considering the record and advising the municipality the requirements of rule 53 could be ignored or frustrated. As a fact they were being ignored. The rule's requirements regarding the delivery of review records are there to facilitate the speedy disposition of review applications which, in turn, promotes administrative certainty and finality. The rule is not there to be ignored while the litigant who is obliged to provide the review record considers its position. Why can't the applicant for review have the record and consider its position simultaneously? Should a respondent in a review have a good reason not to comply with the rules its obligation is to approach this Court for appropriate directions without delay.

[70] The municipality opposed the application to compel delivery of the record with the full benefit of the record. Its opposing affidavit was delivered in November 2020. The thrust of its opposition was that the relief sought by the applicant in its notice of motion (as then formulated) had become moot for various reasons, which included the fact that the tender had been awarded to the applicant. The applicant was obliged to reply to the assertions in the affidavit opposing the delivery of the record without the benefit of

the record and, correctly, contended that it was at a considerable disadvantage in its ability to respond appropriately. Quite how the applicant was to respond meaningfully to averments that the relief it sought in terms of its notice of motion had become moot without being able to consider the record is not understood.

[71] The delivery of the record ultimately occurred in February 2021, which enabled the applicant to amplify its founding affidavit and recast its notice of motion.

[72] The unnecessary delay in the delivery of the record was underpinned by a spurious opposition to compel the delivery thereof. The delay necessarily occasioned a further delay in the launching of the counter application. The consequence of the delays was continued administrative uncertainty and lack of finality.

[73] Attorneys representing respondents in review proceedings, by virtue of their position as officers of this Court, have an obligation to ensure the timeous compliance by their clients with the rules of this Court. As stated, if such compliance is not possible a prompt approach to the Court for appropriate directions is required.

[74] Here, rather, the municipality's attorneys unilaterally concluded that as, in their view, the applicant had no prospects of success with regard to its review application, access to the record could be refused, thereby not only ignoring a rule of this Court but also flouting the constitutional imperative of transparency. Clearly the applicant was entitled to and had required access to the record to place its application on a proper footing, particularly as, since February 2020, the municipality had persistently refused to advise it that its bid had been successful.

Was the delay the result of the municipality acting in good faith with the intent of ensuring clean governance

[75] The answer to this question must emphatically be "no" in the light of the conclusions I have reached above.

Conclusion on the question as to whether the delay should be overlooked

[76] Again, in the light of the conclusions I have reached above, the municipality's delay in bringing the counter application cannot be overlooked in the interests of justice.

[77] Below, I reach the conclusion that the tender was validly awarded to the applicant. In the light of this conclusion the *Gijima* principle does not come into play.

Conclusion in respect of the main application and the counter application

[78] I have found above that the municipality's delay in bringing the counter application was unreasonable and that the delay cannot be overlooked in view of the conclusions I have reached. Given this the counter application stands to be dismissed.

[79] As stated above, a finding that the counter application must be dismissed would mean that the tender was validly awarded to the applicant and the applicant is then entitled to the relief it seeks in terms of its amended notice of motion.

Costs

[80] There is no reason in this case to depart from the general rule that costs follow the result of the matter. The applicant has asked that I award these costs against the municipality on the scale as between attorney and client, i.e., on a punitive scale.

[81] I have found that in causing the delay in bringing the counter application the municipality acted in bad faith and egregiously.

[82] It was not only in causing the delay that the municipality acted, as described. Particularly in its failure to advise the applicant of the outcome of its bid, whilst continuing to engage with unsuccessful tenderers in a futile objection process, failed to act transparently and heed the repeated admonishments made by the Constitutional Court in terms of which it has a higher duty as an organ of state to respect the law, to fulfil its procedural requirements and to tread respectfully when dealing with the rights of third parties, such as the applicant. *Asla* at [60] and [61].

[83] The applicant, despite being constitutionally entitled to transparency and administrative justice, was the victim of atrocious and inept treatment at the hands of the municipality. Thus, in this case, it is appropriate, that the municipality face an order for punitive costs.

Order

I accordingly make the following order:

1. It is declared that the resolution of the first respondent's Acting City Manager, on 5 February 2020, as confirmed in her formal resolution, on 12 February 2020, approving the recommendation to her of the Bid Adjudication Committee that the tender of the applicant under contract SCM/19-239/S for the "*Supply of Fuel, Installation, Management and Maintenance of an Integrated Electronic Fuel Management System* ("the tender") be accepted, as conveyed to the applicant during November 2020, constituted acceptance by the first respondent of the offer contained in the tender, subject to the conclusion of an agreement in terms of section 116 of the Local Government: Municipal Finance Management Act, 2003.

2. The failure of the first respondent to implement and give effect to the decision of its accounting officer to accept the applicant's offer as contained in the tender is reviewed and set aside.

3. The first respondent is directed to implement and give effect to the decision of its accounting officer to accept the applicant's offer as contained in the tender within 10 days of the date of this order.

4. The continuing acquisition by the first respondent of its petroleum fuel requirements from a supplier or suppliers other than the applicant is declared to have no lawful basis and is inconsistent with the Constitution and illegal and invalid accordingly.

5. The continuing action or actions of the first respondent in acquiring its petroleum fuel requirements from a supplier or suppliers other than the applicant and/or its decisions to continue to so acquire such requirements, are reviewed and set aside.

6. The first respondent is interdicted from acquiring its petroleum fuel requirements from a supplier or suppliers other than the applicant.

7. The first respondent's counter application is dismissed.

8. The first respondent shall pay the applicants costs, such costs to be taxed or agreed on the scale as between attorney and client and are to include the costs of:

   8.1 the main application;

   8.2 the counter application;

   8.3 the application to compel delivery of the review record.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

The parties were represented as follows:

The applicant: Adv J.G. Richards, instructed by:
Kaplan Blumberg Attorneys, First Floor, Block A, Southern Life Gardens, 70 – 2nd Avenue, Newton Park, Gqeberha.

The first respondent: Adv A.J. Nepgen, instructed by:
Joubert Galpin & Searle, 17 Cape Road, Mill Park, Gqeberha.