IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: **37721/2021**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

[redacted]
SIGNATURE

16 APRIL 2024
DATE

In the matter between:

PROFESSIONAL AVIATION SERVICES (PTY) LTD Applicant

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY First Respondent

LEANDA KOCK-ACKERMAN N.O. Second Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 16 April 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The Applicant, Professional Aviation Services (Pty) Ltd [Applicant] seeks to make a duly supplemented and amended arbitration award, dated 12 March 2021 [the award] an order of Court. The award was made subsequent upon the interim findings of the Second Respondent [arbitrator] pertaining to a contractual dispute arising from the non-payment of services rendered by the Applicant to Tshwane Municipality [Tshwane Municipality] in terms of a Service Level Agreement [initial agreement] [main application]. Tshwane Municipality does not oppose this relief sought in the main application.

[2] Tshwane Municipality in answer to the main application brought a counter application for, *inter alia*, a self-review of its own decisions taken on or around the 28 November 2018 and on the 1 August 2019 [impugned decisions]. The impugned decisions concern the procurement of the Applicant's services for an extended period without having followed the legislative and constitutional procurement prescripts [review relief]. By agreement, the review relief and the ancillary relief related thereto is the only issue for adjudication.

[3] Tshwane Municipality's papers in support of the review relief are procedurally disjointed. The disjoint is caused by their 'founding' papers, filed in support of the review relief, as it is incorporated into the body of their answering affidavit in the main application. A further disconnect occurred when Tshwane Municipality failed to simultaneously file the notice of motion setting out the review relief, as procedurally required, when it filed the 'founding' affidavit in the counter application.

[4] The sequence of papers to be filed and the procedural steps to be taken by a litigant when initiating application proceedings is clearly set out in Uniform Rule 6. The reason for this is clear, it regulates due process which affords each party the opportunity to know what case it has to meet and when. This did not occur in the counter application. When the Applicant filed its replying affidavit in the main

application it too, had to answer and deal with the founding allegations in the counter application. This it did without fully appreciating what case it had to meet because it had no insight of the sight of the prayers sought in the review relief.

[5] The domino effect is that Tshwane Municipality did not file a replying affidavit in its counter application and as will become apparent, a disconnect and failure to deal with and clarify allegations occurred.

[6] Tshwane Municipality only filed its notice of motion onto caselines on the 10 March 2022, this is three weeks after it filed its 'founding' papers.

[7] In fact, this is why Tshwane Municipality seeks condonation for the late filing of its answering affidavit in the main application, condonation for the late filing of its notice of motion in respect of the review relief and condonation for the delay in launching its review relief itself.

[8] The Applicant did raise certain technical objections in its papers because of the procedural disconnect but, in argument confirmed that by agreement, the only determinable issues are the merits of the review relief and the delay in launching it.

[9] In so doing, a brief introduction of the necessity for the institution of the main application is required. Prior to the main application and in 2020, a dispute arose between the parties concerning the non-payment of 7 (seven) invoices raised by the Applicant for services it rendered at the Wonderboom National Airport [WNA]. The services rendered where in terms of the initial agreement [the payment dispute]. The initial agreement regulated the terms and conditions of the services rendered from 14 November 2017 to 13 November 2018 [initial period].

[10] The Applicant finally referred the contractual dispute to arbitration. The arbitrator's award settled the contractual dispute involving the non-payment in part, namely, the resolution of the non-payment of 2 (two) remaining invoices remained unresolved. The arbitration process was postponed pending the outcome of the review relief.

[11] The reason for pending the arbitration was because Tshwane Municipality raised a special plea challenging the constitutional validity of the procurement process in respect of the extended contract period with the Applicant. The remaining 2 invoices were for services rendered within that extended period. The arbitrator upheld the special plea and ordered Tshwane Municipality to file review relief within 10 (ten) days of the award. Factually Tshwane Municipality only filed its review relief almost a year after being ordered to do so.

[12] Of significance then, an extract from the Arbitrator's award:

> "*61.4 Insofar as Respondent (Tshwane Municipality-own emphasis) filing its review application in respect of the issues falling outside of 61.1 above, as an arbitrator have no jurisdiction to hear that matter, the arbitration is not the correct forum to determine the Validity of the First and Second Extensions of the Service Agreement. The Special Pleas are upheld, and the Respondent is hereby ordered* (own emphasis) *to proceed to file its review application within ten days from date of this award, failing which the claimant may* (own emphasis) *bring a review application.*
>
> *61.5 The arbitration proceedings are hereby held in abeyance in respect of 61.4 above until the determination of the court insofar as the issues raised in the review application and the impact it may have on the continuation of the arbitration.*"

[13] Notwithstanding, as is apparent from the main application, Tshwane Municipality failed to pay the Applicant in terms of arbitration award and failed to launch the review relief in time as ordered. The Applicant, to secure the payment awarded launched the main application and opposed the review relief.

[14] To consider the impugned decisions in context requires consideration of the facts giving rise to the main application and the reason for launching the review relief.

FACTUAL BACKGROUND

[15] It is common cause that the Applicant 's services giving rise to the conclusion of the initial agreement was in terms of regulation 36(1)(a)(v) of the Municipal Supply Chain Management Act, 56 of 2003 published under the Municipal Finance Management Act[1] [[the MSCMA] [regulation 36]. The initial agreement was concluded on 19 June 2018 over the initial period.

[16] The relevance of the Applicant's appointment in terms of regulation 36 lies therein that the regulation caters for circumstances in which the Supply Chain Policy allows an accounting officer to deviate from and ratify any minor breaches of the procurement process itself. Regulation 36(1)(a)(v) specifically speaks to dispensing with an official procurement process established by policy to require the services through a convenient process or by direct negations in exceptional cases where it is impractical or impossible to follow a procurement process. In other words, regulation 36 caters for a deviation from legislative and section 217 Constitutional prescripts. The Applicant was appointed in such circumstances warranting a deviation from the official procurement processes.

[17] The necessity to appoint the Applicant is common cause on the facts, such depicting an exceptional case. The exceptional case is borne out of by the fact that the Applicant was appointed on an urgent basis to assist Tshwane Municipality with the management, aviation security and training services of the WNA to ensure that the WNA complied with 89 (eighty-nine) previously raised non-compliance matters raised by the South African Civil Aviation Authority [SACAA]. The consequence of which may have triggered the receipt of an enforcement order from the SACAA which could have led to the possible termination of Tshwane Municipality's operating licence and ultimately the closure of the WNA, the cities risk factor.

[18] The scope of the Applicant's primary appointment was to manage the aspects required to ensure compliance to the SACAA audit findings, aviation and business development, operation of the Permit System, provision of security expertise, safety,

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[1] Act 56 of 2003 and regulation 36 of the published Regulations 2005.

and quality assurance inclusive of conducting of regular audits and inspections of all operations of the WNA as set out in clause 5 of the initial agreement. The scope was expanded because of the circumstances to include assisting with the renewal of the operating licence of the WNA and acting as the interim airport manager. The later services a critical aspect for the need and reason proffered to deviate.

[19] Given the scope of work and the need in which the dire situation of the WNA, under the care of Tshwane Municipality, required attention, its City Manager deployed a municipal intervention team. The Applicant was part of that municipal intervention team. According to Tshwane Municipality, the implementation of the work to be done by the municipal intervention team was in two phases. The first phase dealing with the SACAA and the non-compliance matters relating to both airside and landside including the appointment of the required staff at the airport in terms of the redesigned institution. Phase two dealt with governance and international and financial matters, logistics inspection and audit matters concerning the implementation of the aerodrome licence. The scope between these two phases are interlinked.

[20] The Applicant assisted with the clearance and closure of the 89 (eighty-nine) SACAA non-compliance findings, some which had been unresolved since 2012. SACAA matters required continual monitoring and auditing by personnel who possessed the appropriate qualifications and experience.

[21] To achieve the implementation of both phases took time. The time it took exceeded the initial period and Tshwane Municipality desired to retain the Applicant's expertise on the intervention municipal team.

[22] Contractually, the initial agreement catered for such eventualities, the renewal of or termination of the initial agreement was regulated by clauses 3.3 and 3.4 of the initial agreement. Both the Applicant and Tshwane Municipality rely on these clauses.

[23] On 5 November 2018, the City Manager approved the recommendation for the extension of the initial agreement period from 1 December 2018 to 31 July 2019

to be tabled before the Bid Adjudication Committee [Committee]. On 15 November 2018, the Committee received a deviation report by N Pillay dealing with the reasons and comments from the respective Divisional Heads for such extension to be recommended in terms of regulation 36 [the report].

[24] According to the report which served before the Committee, the Head of Legal and Secretarial Services supported the recommendation stating that it would be impractical to follow an official procurement process. Mr Mphahlele, the current Acting Head of Legal for Tshwane Municipality, and the deponent of their 'founding' papers did not deal with content of the report. This would explain why the Applicant contended that Mr Mphahlele did not possess the requisite knowledge of the facts as stated under oath. This allegation remained unchallenged.

[25] The Divisional Head of the Supply Chain Management [SCM] however did not support the deviation request on the same basis as Tshwane Municipality now brings the review relief (i.e. the appointment was an extension of the initial agreement which could not at that time be validly extended, a procurement process to be followed).

[26] The Committee notwithstanding the view of the SCM, recommend the deviation, stating that what served before them was not an extension and in consequence the SCM response was irrelevant but noted. The Committee noted further that should the Tshwane Municipality not have an airport manager in place by 1 December 2018, it would result in the licence of the WNA being revoked placing the city at risk. The Committee's recommendation was signed by the Acting Chairperson, Previn Govender on 20 November 2018 and by the City Manager on 23 November 2018.

[27] On 28 November 2018, the Applicant received notice of the deviation in line with the Committee's recommendation. Of significance the preamble of the notice which states that "*I have the pleasure to inform you that the City Manager on 14 November 2017 (date of inception of the initial agreement period-own emphasis) has in terms of Regulation 36(1)(a)(v) of the Municipal Finance Management Act, appointed your company for the management of the Wonderboom National Airport*

from 1 December 2018 to 31 July 2019". This supports the Committee's contention of 'no extension' and the automatic renewal argument of the Applicant. Such argument expanded below.

[28] The 2 (two) remaining unpaid invoices, the subject matter still before the arbitrator, were raised for services afforded Tshwane Municipality during the period of 1 December 2018 to 31 July 2019.

[29] On 1 August 2019, the Committee was again approached with a request for deviation in terms of regulation 36 read with regulation 18(1)(a)(iv). The reason for the request was that the cities risk had persisted in that an airport manager for the WNA had still not been appointed, this risk contended the Committee, would spill onto the tenants who occupy the WNA. The Committee resolved to ameliorate the persisting risk to the city, warranted a deviation of the prescribed procurement process and that a contract with a service provider was to be concluded on a month-to-month basis.[2] The Applicant had, in the interim being acting as the WNA airport manager. The Applicant received notice on the 1 August 2019 of its appointment on a month-to-month basis. Tshwane Municipality relying on a "devious scheme" by the Applicant to be reappointed on a month-to-month basis. No outstanding payments are due to the Applicant during this period.

[30] Having regard to the circumstances, procedural and otherwise, Tshwane Municipality brings an application for condonation for its delay in launching the review relief. This is the first issue requiring the Court's attention before dealing with the review relief.

Was the delay undue/unreasonable and condonable?

[31] Tshwane Municipality contends that it should request condonation for its delay in bringing a legality review, it being the first prayer in the review relief. In support it deals with the circumstances from paragraphs 79-97 of the 'founding' papers under the heading 'AD CONDONATION'. As a preamble, Tshwane

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[2] See regulation 18.

Municipality contends that the reason for its delay is the same reason for its non-compliance of the unform rules dealing with its delay in filing its answering affidavit in the main application.

[32] To unpack the contention, it is not condonation which the Applicant should seek in a legality review as, unlike the ability to condone the non-compliance of a procedural prescript provided for by the uniform rules, no such procedural prescripts apply to the time in which a legality review is to be brought and as such, there is no non-compliance to speak of. However, it is trite that a legality review must be brought without undue delay therefore triggering an enquiry into whether there is a delay and if such delay is reasonable. Therefore, the clock in the legality review does not start ticking because of a provision of a uniform rule, but rather the date on which Tshwane Municipality became aware or reasonably ought to have become aware of the impugned decisions it seeks to challenge. For this reason alone, Tshwane Municipality's contention that same reasons will suffice for the consideration of the delay and failure to serve their answering affidavit appears, on the face of it, is misplaced.

[33] Be that as it may, in dealing with a delay on the papers, the Court commences by considering the weight of paragraph 81 in the 'founding' affidavit which deals with Tshwane Municipalities condonation. Mr Mphahlele in paragraph 81 states that "*During consultation on or around November 2020, it transpired that there were glaring irregularities and gross malfeasance* (own emphasis) *in the award and conclusion of the extension agreements.*"

[34] Such knowledge occurred against the backdrop of a contract dispute having arisen between the parties, knowledge of which was gained by Tshwane Municipality when it received the written demand on 30 December 2019.

[35] The Applicant correctly argues that Tshwane Municipality must reasonably have been aware of the reason why it refused to pay them warranting the formal demand. This factually refers to a period from 30 December 2019 to 10 March 2022 (the date when the notice of motion was filed). During this period the Head of the Legal and Secretarial Services for Tshwane approved the deviation process referred

to in the notice of the 28 November 2018, Tshwane Municipality raised the special plea regarding such knowledge before the arbitrator and Tshwane Municipality had knowledge of the arbitration award which in unambiguous terms ordered them to bring the review relief within a limited time. Furthermore, no evidence from the City Manager nor Acting City Manager are attached to the papers in an attempt to explain what transpired during this period nor, for that matter, what happened at the relevant times the impugned decisions were taken preventing Tshwane Municipality from launching the review relief without delay. No evidence of other attempts to review the decisions are apparent. A full and proper explanation is key in assessing whether Tshwane Municipality's behaviour is reasonable.

[36] Against this backdrop there is no explanation from Mr Mphahlele how these glaring irregularities and gross malfeasance, now relied on, did not or could not have reasonably come to his attention sooner than in November 2020. This allegation is made by Mr Mphahlele whilst, at the time, he must have been aware that a live contractual dispute had already arisen in 2019 which necessitated not only the referral of the contractual dispute to mediation but finally to arbitration. Yet no attempt is made to launch the review relief. Mr Mphahlele too, fails to explain why the Head of the Legal and Secretarial Services for Tshwane was incorrect to support the deviation recommendation brought before the Committee on the 15 November 2018. Such explanations critical in establishing any reasonable behaviour. Lack thereof speaks lack of effective oversight.

[37] This lack of explanation and oversight warrants a reminder of what, Theron J, aptly stated in the Buffalo City matter when she referred to an overview report[3] by the Department of Cooperative Governance and Traditional Affairs on the State of Local Government in South Africa, she quoted: "*Municipalities must have effective structures and mechanisms in place to ensure proper oversight for its services delivery projects. This is one of its responsibilities.... A lack of effective oversight leads to dysfunctionality within municipalities by creating loopholes for fraud and corruption.*"

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3 **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd** [2019] ZACC 15; Overview Report (October 2009), Footnote para [81].

[38] Tshwane Municipality has failed to provide any, let alone, a sufficient explanation for the delay for the whole relevant period. Where there is no explanation for the delay, the delay will be undue.[4]

[39] As far as the delay explanation from February 2021 to filing the counterclaim is concerned, such explanation only speaks of internal administrative difficulties to get their house in order from February 2021 until they appointed new attorneys in May 2021. The explanation too, fails to speak to when they acquired the knowledge to review the impugned decisions. It is apparent from the procedural chronology that Tshwane Municipality and its attorneys, only got their house in order on the 22 March 2022. This is a year, on their own explained version, from February 2021.

[40] It is because of these glaring failures to explain the delay or insufficient explanation of the delay in their papers, that Counsel for Tshwane Municipality, in argument conceded that the delay explained on the papers was unreasonable. In consequence, the delay for the explained period too, is undue. A concession well-made in the circumstances.

[41] The enquiry which then follows is whether the undue delay for the period over 2 (two) years from December 2019 to 22 March 2022 should be overlooked.

Should the undue delay be overlooked?

[42] This Court notes that the approach to overlook an unreasonable delay in a legality review is rather a flexible one and is a legal evaluation. Bearing in mind that a delay bar serves an important rule of law function: it promotes the public interest in certainty and finality in decision-making.[5]

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4 **Khumalo v Member of the Executive Council for Education, KwaZulu-Natal** [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at paras 49-51.

5 Khumalo ibid at para 47.

[43] To evaluate this the Court considers a number of factors being the nature of the impugned decisions[6] [nature of impugned decision consideration], the conduct of Tshwane Municipality [conduct consideration] which is an evaluation of Tshwane Municipality conduct in approaching this Court with its review relief which, if unsatisfactory is alone sufficient to refuse to overlook the delay.[7] Lastly, on the authority of Gijima,[8] whether the this Court must declare any agreements with the Applicant unlawful and set them aside if, on the undisputed facts are clearly unlawful. The Gijima principle or rule applies withstanding an unreasonable delay in bringing review relief.

Nature of the impugned decision consideration

[44] The thrust of Tshwane Municipality's attack on the first impugned decision on or around 28 November 2018 giving rise to the award of the Applicant's services period 1 December 2018 to 31 July 2019 has consistently been that due to the effluxion of time determined by the initial agreement, no valid agreement was in place when the impugned decision was taken to extend the agreement and that process to procure the Applicant services in awarding them the contract, was not done according to legislative and section 217 Constitutional prescripts.

[45] To illustrate the effluxion of time argument, Tshwane Municipality relied on clauses 3.3 and 3.4 of the initial agreement. The Applicant conversely being of the view that the initial agreement was automatically renewed relying on the application of the same clauses.

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6 Skweyiya J who wrote for the majority in the Khumalo matter (footnote 4) explained that: "*An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decisions*".

7 Buffalo at para [82]; **Member of the Executive Council for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye & Lazer Institute** [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (C) at par 82. Cameron J reaffirmed: "*There is a higher duty on the State to respect the law, to fulfil procedural requirements respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly*"

8 **State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd** [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) at par 52.

[46] **Clauses 3.3 and 3.4** of the initial agreement states as follows:

> "*3.3 The Principal shall be entitled to renew, or cancel, the agreement at its sole and absolute discretion prior to, and with effect from, the renewal date by giving written notice to the contract 3 (three) months prior to the renewal date. Should the municipality not give renewal notice as aforesaid, then this agreement will automatically be renewed upon existing terms and conditions* (own emphasis).
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> *3.4 If the municipality chooses not to notify the contractor in writing of renewal or cancellation the service agreement will continue subject to a 3 (three) month notice period by either party.*"

[47] In clause 3.3, reference to "*the Principal*" and '*renewal date*' are words and phrases which are not clearly defined in the initial agreement however when reading the initial agreement as a whole and when considering the arguments advanced, the Principal is Tshwane Municipality and the renewal date, the date following the initial agreement period, from the 14 November 2018.

[48] To place the nature of the first impugned decision in context there is a necessity to appreciate the reason for the conclusion of the initial agreement. The necessity and the urgency of acquiring the Applicant's expertise is to appreciate that it was for a very specific task, *inter alia*, to secure the functionality and lawfulness of the WNA. This fact warranted the authorisation of a deviation from the legislative prescripts and constitutional constraints when Tshwane Municipality procured their services. To achieve the result, Tshwane Municipality implemented regulation 36, a common cause fact.

[49] The necessity to deviate would explain the purpose of clause 3.3 as it caters for an automatic renewal of the initial agreement on the same terms and conditions, in circumstances when the very specific task has not been completed. Clause 3.3 too allows Tshwane Municipality, at its own discretion, to renew or cancel the initial agreement within a prescriptive notice period. No notice in terms of clause 3.3 is evident from the papers. In applying clause 3.3 the initial agreement, absent a notice

to renew or to cancel prior to the 13 November 2018, the initial agreement automatically is renewed.

[50] Tshwane Municipality contends that a decision to award and agreement was taken on or about the 28 November 2018 which is capable of being reviewed and set aside and for that matter declared unlawful *ab anitio*. However, this contention is factually incorrect. The only documentary evidence connected to the 28 November 2018 was attached to the Applicant's papers which is simply a notice of a decision already taken. The City Manager in the notice letter confirms that the Applicant has already been appointed on 14 November 2017 and announces a further renewal term, the continuation of these services for a further 8 (eight) months. This catered for in clause 3.4 of the initial agreement and supports the Committee's unchallenged view that the deviation was not in support of an extension. The only reasonable inference on the facts that the initial agreement was in place by virtue of the automatic renewal trigger in clause 3.3.

[51] Tshwane Municipality fails to deal, nor does it challenge the decision of the Committee of the 15 November 2018 who factually, at resolution 2 thereof, approved the Applicants. Their internal committee process and reasoning remains unchallenged and exists as a fact until set aside.[9]

[52] On the facts the decision to award an agreement to the Applicant on or about the 28 November 2018 on the facts must fail and too, any declaratory relief based thereon.

[53] The nature and consideration of the second impugned decision of 1 August 2019 remains to be considered. According to the Applicant's papers the letter of 1 August 2019 indeed confirms that the impugned decision was taken on 1 August 2019 in terms of regulation 36(1)(a)(v) of the Municipal Supply Chain Management Regulations read together with paragraph 18(1)(a)(iv) of the City Supply Chain Management Policy by the Committee. The Committee however resolved on the 1

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9 **Oudekraal Estates (Pty) v City of Cape Town & Others** [2004] 3 All SA 1 (SCA) (28 May 2004).

August 2019 that a service provider be appointed without the necessity to following the procurement process.

[54] Tshwane Municipality attacks the second impugned decision on the basis that no legislative procurements were followed, that a deviation was not rational in that, *inter alia*, any emergency was self-created by Tshwane Municipality, the Applicant not the sole provider of such services. The glaring difficulty is that the rationality argument to deviate demonstrates a disconnect between the facts and the applicable regulation 36.

[55] Regulation 36 relied on and as provided as authority, does not rely on Tshwane Municipality making the impugned decision in terms of regulation 36(1)(a)(i) which speaks of an emergency, but rather sub-regulation (a)(v) which refers to an exceptional circumstance in cases of impracticality. The then reliance of a self-created emergency misplaced as too, reference to the amount and sole provider as none of these are requirements of regulation 36(1)(a)(v) nor of the performance management on a month-to-month basis in terms of regulation 18 which was not even addressed.

[56] The absence of a proper record filed by Tshwane Municipality in its review application too created the impression that general statements are made without applying any facts. A further example is the allegation that the Applicant obtained the month-to-month agreement through devious tactics. This remains a hollow allegation unsupported by facts upon which this Court can entertain the weight or veracity of the allegation. In fact, what is demonstrated is that phase two had still not been finally implemented at the material time and that the services of the Applicant were required as they were when the initial undisputed agreement was awarded to them in terms of regulation 36. The Applicant fulfilling the role of the airport manager.

[57] No evidence exists that the agreement awarded to the Applicant was irrational in circumstances when the risk to the city persisted. Furthermore, the agreement was concluded on a month-to-month basis allowing Tshwane to

terminate it with a month's notice. No attack regarding Tshwane's failure to terminate is on the paper.

[58] The award to the Applicant appearing rational from the supported facts.

What was the conduct of the Tshwane Municipality?

[59] The conduct consideration weighs heavily against Tshwane Municipality. Not only have they failed to explain the relevant delay properly or al all from December 2019 but, they have failed to demonstrate how they actioned a proper coherent judicial self-review.

[60] Having regard to the papers the picture which emerges is an application as an afterthought, a knee jerk reaction to the main application. This observation is borne out by their failure to launch a substantive application timeously and/or at all, failure to provide the Applicant and the Court with a complete record, failure to follow procedural prescripts necessitating three applications for condonation, failure to even honour and pay the Applicants for services rendered during the initial agreement which arose from a common cause fact thereby forcing the Applicants to incur costs by launching the main application, failure to file a reply to the Applicant's answer to their counterclaim in circumstances when the possession of knowledge of Mr Mphahlele of the material requisite facts was placed in dispute, they raised a special plea during the arbitration proceedings without demonstrating that they truly had an intention to bring a review without delay whilst being represented, failed to file papers which with a degree of accuracy dealing with the first impugned decision and failed to show any regard to the weight of an arbitrator's award causing this Court to now be seized with forcing them to do was ordered of them.

[61] Having regard to the above the only reasonable inference is that they wished to delay paying the Applicant. In consequence on their conduct alone the unreasonable delay should not be overlooked.

Gijima consideration

[62] However, what of the Gijima principle? Is this Court enjoined to declare the impugned initial renewed agreement and the further month to month service level agreement unlawful? The answer on the fact is no.

[63] The lawfulness of both extended agreements remains disputed on the papers and no clarity exists that they are unlawful.

[64] In consequence, the inevitable. The delay bar applies having regard to all three of the factors and Tshwane Municipality's delay is not to be overlooked. The outcome too, in any event would have had the same result as the order given considering the merits of the review relief and the ancillary relief sought as a direct result thereof.

Costs

[65] The Applicant seeks a punitive cost order of attorney own client in respect of the main application. Although the Applicant was forced to approach this Court to ensure execution of the arbitration award it, also sought other relief in the main application. Such relief possibly usurping the arbitrator's function. Nevertheless, a reason for Tshwane Municipality to oppose the main application. The matter became settled, the Applicant did not move for the remainder of its relief and as such no grounds or facts warrant the exercise of the Court's discretion to grant a punitive cost order.

[66] The Applicant too, seeks a punitive cost order in circumstances of the dismissal of Tshwane Municipalities counterclaim. Reference was made to In Re Alluvial Creek Ltd matter[10] with reference the consideration where proceedings have the effect of being vexatious. Having regard to the reasons listed above in the main application and that Tshwane was ordered to bring review relief the proceedings

[10] 1929 CPD 532 at 535.

initiated and or opposed by them seen in their totality cannot be seen as possessing a vexatious effect.

[67] In consequence, the following order:

1. The Arbitrator's award dated 12 March 2021, duly supplemented is amended on the 17 March 2021 is hereby made an order of Court.

2. The First Respondent is ordered to pay the costs occasioned by prayer 1.

3. The First Respondent is granted condonation for the late filing of its answering affidavit in the main application and is granted condonation for the late filing of its notice of motion in the counter application.

4. The First Respondent's counter application is dismissed with costs.

[redacted]

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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