IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2018/14332
and 2018/11314

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

8.10.2020
DATE

SIGNATURE

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA APPLICANT

and

SIYANGENA TECHNOLOGIES (PTY) LTD FIRST RESPONDENT

RETIRED JUSTICE EZRA GOLDTEIN SECOND RESPONDENT

RETIRED JUSTICE MEYER JOFFE THIRD RESPONDENT

and in the interlocutory between:

#UNITEDBEHIND	INTERVENING APPLICANT
and	
PASSENGER RAIL AGENCY OF SOUTH AFRICA	FIRST RESPONDENT
SIYANGENA TECHNOLOGIES (PTY) LTD	SECOND RESPONDENT
RETIRED JUSTICE EZRA GOLDTEIN	THIRD RESPONDENT
RETIRED JUSTICE MEYER JOFFE	FOURTH RESPONDENT

JUDGMENT

THE COURT

Lamont J, Raulinga J and Hughes J

[1] In this application the applicant seeks to review and set aside certain unlawful and irregular conduct on the basis that there has been wasteful and fruitless expenditure of public funds. It is alleged that the conduct in question involved the deliberate contravention and avoidance of the checks and balances within the procurement system of the applicant and that individuals seeking an advantage intentionally perverted the procurement process.

[2] The review is founded on the doctrine of constitutional legality, which is the foundation stone for the control of the exercise of public power. The source of the principle is found in Section 1(c) of the Constitution read together with the principles set out in the authorities. The doctrine is an incident of the Rule of Law. The doctrine

of legality requires that only powers and functions conferred by law be exercised and performed by public entities.[1]

[3] The principle is well-established. See for example Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa PhD Thesis, Rhodes University:* 2002 at 164 where the following is stated:

> 'The principle of legality as articulated by the Constitutional Court consists of rules of administrative law applied under another name. In this sense s 1(c) appears to be something of a poor relation of s 33: it mirrors s 33 at the moment, except for the right to reasons and, to an extent, the right to be treated in a procedurally fair manner. The rule of law, however, is not only concerned with legality in the strict sense – what Baxter calls "law following" – but also with procedural justice. It would be most surprising, given this fact, if the courts were to free those exercising public powers to act unfairly simply because those public powers could not be said to be administrative, as defined in s 1 of the [Promotion of Administrative Justice] Act. Review in terms of s 1(c) therefore can be taken to have all the ingredients of review envisaged by s 33(1). All that is required is for the right to procedural fairness to be fully recognised by the courts.'

[4] Chaskalson P, Goldstone J and O'Regan J in *Fedsure* held:

> 'These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. . .
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> . . .
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> It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in

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[1] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* ('*Fedsure*') 1999 (1) SA 374 (CC) at paras 57- 9. See also *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at para 49.

this sense, then, the principle of legality is implied within the terms of the interim Constitution. . .'[2]

[5] The Court in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*[3] ('Sarfu') held:

'It does not follow, of course, that, because the President's conduct in exercising the power conferred upon him by s 84(2)*(f)* does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under s 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; until 30 April 1999 the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power. They arise from provisions of the Constitution other than the administrative justice clause. In the past, under the doctrine of parliamentary supremacy, the major source of constraint upon the exercise of public power lay in administrative law, which was developed to embrace the exercise of public power in fields, which, strictly speaking, might not have constituted administration. Now, under our new constitutional order, the constraints are to be found throughout the Constitution, including the right, and corresponding obligation, that there be just administrative action.'[4]

[6] O'Regan J in *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others*[5] held that:

'It is an important principle of the rule of law that rules be stated in a clear and accessible manner.'

[7] Chaskalson P in *Pharmaceutical Manufacturers Association of SA & Another: In re ex parte President of the Republic of South Africa & Others*[6] stated:

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[2] *Fedsure supra* n 1 at paras 56 and 58.
[3] 2000 (1) SA 1 (CC).
[4] *Ibid* at para 148.
[5] 2000 (3) SA 936 (CC) at para 47.
[6] 2000 (2) SA 674 (CC) at paras 82-3 and 85-6.

'That raises the question whether a Court can interfere with a decision made in good faith by the President in the exercise of such a power. A discussion of this question in South Africa prior to the enactment of the interim Constitution usually began with a reference to the much quoted statement from the judgment of Innes ACJ in *Shidiack v Union Government (Minister of the Interior)*, where it was said:

> "Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own."

The judgment goes on to hold that there are circumstances in which "interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."

To the extent that *Shidiack* requires public officials to exercise their powers in good faith and in accordance with the other requirements mentioned by Innes ACJ, it is consistent with the foundational principle of the rule of law enshrined in our Constitution. The Constitution, however, requires more; it places further significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law.

. . .

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it

mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.'

[8] The doctrine prohibits the exercise of public powers and public functions in the absence of knowledge and understanding of their true nature and extent; without any ulterior motive or dishonest intent and with a proper appreciation of the powers and functions conferred upon a functionary who, when acting, must act in good faith.[7]

[9] The doctrine of legality, embracing as it does the requirement that power be exercised in a rational manner, requires that the exercise of the power be rationally connected to the achievement of what its exercise is intended to achieve. This introduces and entrenches the fit for purpose principle. The exercise of the power must produce a result which is intended as well as a result which accords with the needs it was intended to fulfil. The language used to describe this requirement is that there must be a rational connection between the purpose for which the power was conferred.

[10] Rationality applies to every exercise of public power. Any exercise of public power that lacks a rational relation to a legitimate government purpose is arbitrary and at odds with the Constitution. See *Poverty Alleviation Network and others v President of the Republic of Applicant and Others*[8] which held:

> 'The principle that every law and every exercise of public power should not be arbitrary but rational has been developed by this court in a series of judgments. This principle sets rationality as a necessary condition for legal validity that every law or active organs of state should fulfil'.[9]

[11] Private entities, which contract with government to provide essential public services, take on public powers and constitutional obligations. Thus, they are open to public scrutiny and for purposes of the contracts are considered to be organs of State.[10]

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[7] See *Sarfu supra* n 3 at para 148.
[8] 2010 (6) BCLR 520 (CC).
[9] *Ibid* at para 65.
[10] See *Allpay Consolidated Investment Holdings (Pty) Ltd. and Others v Chief Executive Officer of the African Social Security Agency and Others* 2014 (4) SA 179 (CC) at para 52 (*'Allpay 1'*) and *City Power*

[12] The application of these principles to tenders generally speaking will result in a finding that the award of a tender to do work where the responsible organ of State has failed to undertake an appropriate needs analysis business case or options analysis is irrational and unlawful. In the absence of the appropriate determination of the scope of the work, there can be no proper determination that the tenders were fit for the purpose for which they are statutory and constitutionally to be concluded. In the circumstances the award of the tenders would be irrational unreasonable and unlawful.

[13] The State has a responsibility to ensure that public resources are properly used. The public has an interest in ensuring that the tender process is free of corruption and that public funds do not find their way into the pockets of corrupt officials and business people.[11] Corruption and maladministration are inconsistent with the fundamental values of our Constitution. They undermine commitment to human dignity, the achievement of equality, and the advancement of human rights and freedoms. They are the antithesis of open and accountable democratic government, which is required by the Constitution. In particular, if they are allowed to go unchecked and unpunished they pose a serious threat to a democratic state.[12]

[14] The applicant is a public functionary. The applicant is a statutory juristic person which was established in terms of the Legal Succession to the South African Transport Services Act[13] which provides in section 23 for the objects and powers of the applicant as follows:

(a) to ensure that, at the request of the Department of Transport, rail commuter services are provided within, to and from the Republic in the public interest; and

(b) provide, in consultation with the Department of Transport, for long haul passenger rail and bus services within, to and from the Republic in terms of the principles set out in section 4 of the National Land Transport Transition Act, 2000 (Act number 22 of 2000).

(Pty) Ltd. v Grinpal Energy Management Services (Pty) Ltd. and Others 2015 (6) BCLR 660 (CC) at paras 22 – 7.

[11] *State Information Technology Agency SOC Ltd. v Gijima Holdings* 2017 (2) SA 63 (SCA) at paras 55–60. See also *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality and Others* [2014] 2 All SA 493 (SCA) at para 26.

[12] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 4. See also *Glenister v President of RSA* 2011 (3) SA 347 (CC) at para 83 and para 166.

[13] 9 of 1989.

[15] Section 23 of the Act also sets out that the second object and the second business of the applicant is to generate income from the exploitation of the assets acquired by it. In carrying out its objects in business, the [applicant] shall have due regard to key government social, economic and transport policy objectives.

[16] The exercise of public power must also be reasonably related to a legitimate government purpose and must be so designed as to reasonably achieve the legislatively defined ends.[14]

[17] Sections 33, 195 and 217 of the Constitution are of application to the activities of the applicant. Section 195 of the Constitution sets out various principles of application to administration in all spheres of government.

[18] Section 195(1) provides:

'(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

...

(e) People's needs must be responded to...'

[19] Section 195 enshrines the values that public administration is required to adhere to and promote.[15]

[20] Section 217(1) of the Constitution provides:

'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.'

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[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC).
[15] See *Sarfu supra* n 3 at paras 133 - 145 and 148.

[21] When organs of State administer tenders relating to the delivery of essential public services, the substantive purpose of the service must be the primary consideration. Public goods and services are not provided merely for the benefit of a particular person or entity but for the public's benefit. The consideration for those goods and services is public money. Fitness for purpose is a consideration rationally linked to functionality, which in turn is a prerequisite for the award of any tender.[16]

[22] As the applicant is an organ of State in terms of section 239 (b)(ii) of the Constitution and is a National Business Enterprise listed in Part B of Schedule 3 of the Public Finance Management Act[17] ('PFMA'), the provisions of section 217 of the Constitution are applicable. Section 217 of the Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful bidder. The section adds requirements for a valid tender decision to the general requirements as valid administrative action. The result is that tender decisions are also subject to review for fairness, equity, transparency, competitiveness and cost-effectiveness.[18] Section 217(1) lays down a constitutional imperative that an organ of State which contracts for goods and services must do so in accordance with the constitutional system.[19] Procurement law is prescriptive because the award of public tenders is notoriously prone to influence and manipulation.[20] The Constitution requires the procurement process to be professional, ethical, fair, transparent, competitive and cost-effective. The process of this nature will result in the efficient economic and effective use of resources to meet the needs of the public.

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[16] *Bytes Technology Group South Africa (Pty) Ltd. v IDC of South Africa Ltd. and Another* [2015] JOL 33949 (GP) and *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* 2013 JDR 0198 (WCC) at para 109.

[17] 1 of 1999.

[18] *Millennium Waste Management (Pty) Limited v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at para 4. See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 20 and *First Base Construction CC v Ukhahlamba District Municipality and Others* [2006] JOL 16724 (E).

[19] *Principal Manager: Qaukeni & Others v FV General Trading CC* [2009] (2) All SA 231 (SCA) at para 4.

[20] *Sanyathi Civil Engineering and Construction (Pty) Ltd and another v Ethekwini Municipality and Others; Group Five Construction (Pty) Ltd. v Ethekwini Principality and Others* [2012] 1 All SA 200 (KZP) at para 34.

[23] The PFMA has as its object the securing of transparency and accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which it applies (section 2). The general responsibilities of accounting officers are set out in section 38 of the PFMA and include that the accounting officer maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective (section 38 (1)(a) (iii). Section 51 (as does section 57) of the PFMA requires accounting officers to ensure that all procurement adheres to the general principle of frugality. The accounting officer is required to take effective and appropriate steps to prevent fruitless and wasteful expenditure and to discipline any employee who makes or permits fruitless and wasteful expenditure to take place. It is immediately apparent that the constitutional principles relating to administration in public spending are dealt with in the statute with a view to regulate conduct. These principles set out requirements for the applicant and ensure that an appropriate procurement and provisioning system which is fair and equitable, transparent, competitive and cost-effective is in place.

[24] Section 51 of the PFMA sets out the responsibilities of persons and authorities within the public entity of ensuring that all procurements adheres to the general principle of frugality. The applicant's accounting officer is required to take effective steps to prevent fruitless and wasteful expenditure and to discipline any employee who makes or permits fruitless and wasteful expenditure to take place. (See also section 57(c) of the PFMA).

[25] Regulation 9.1.2 of the Treasury Regulations promulgated in terms of PFMA set out that an official who discovers fruitless and wasteful expenditure is required to immediately report such expenditure to the accounting officer, who thereafter is required to investigate the matter and determine the appropriateness of disciplinary steps to be taken.

[26] The PFMA promotes professional standards by requiring officials to act with fidelity, honesty and integrity (section 50). The Treasury Regulation 16A8.1 provides for compliance with ethical standards by all officials and other role players in the supply chain management system. They are required to comply with the highest ethical

standards to promote mutual trust and respect, and an environment where business can be conducted with integrity and in a fair and reasonable manner. Treasury Regulation 16A8.3 deals specifically with how management officials and other role players are to act by providing that they must treat all suppliers and potential suppliers equitably; must not use their position for private gain or to improperly benefit another person; must ensure they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or other acts; and must assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.

[27] The high ethical standards set out in the Treasury Regulations find expression in the Code of Conduct of the procurement policy. The rules regulating delegation of authority expressly incorporate sections 50 and 51 of the PFMA. The procurement policy requires a competitive bidding process for any significant procurement. The applicant is permitted to deviate only in cases of emergency, where there are only very limited resources in the market or in instances of single sourcing. Noteworthy is the fact that a two-stage billing process is required for works of a special nature including but not limited to "the procurement of equipment" which is subject to rapid technological advances such as major computer communications systems, particularly when it is not feasible for the applicant to formulate detailed tender specifications or to identify the specific characteristics required of the solution to the procurement needs. The overall principle remains that the applicant should only award tenders to bidders who provide the best overall value.

[28] The applicant has, as it is required in terms of Regulations 16A8.1 and 16A.8.2 of the Treasury Regulations, established a supply chain management policy of application to all its business units, all levels and types of procurement and all capital expenditure.[21] The policy requires procurement and tendering to take place in accordance with a system which is fair and equitable, transparent, competitive and cost-effective and which safeguards against favouritism, improper practices and opportunities for fraud, theft and corruption.

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[21] See *Government Gazette* No.25767 dated 5 December 2003.

[29] The procurement policy requires a competitive bidding process for any significant securement. The applicant is permitted to deviate from this requirement only in cases of emergency; where there are only very limited sources available in the market; or in instances of single sourcing. A two-stage billing process is required for works of a special nature including, but not limited to, the procurement of equipment which is affected by rapid technological advances such as major computer and communication systems where it is not feasible to formulate detailed tender specifications or to identify the specific characteristics for the solution which is required for the procurement needs.

[30] The Regulations provide a framework within which the process operates. The ethical standards must engender mutual trust and respect and establish an environment in which integrity, fairness and reasonableness are the norm. In order to have any prospect of establishing these aspects, the ethical standards require that the persons involved in the process act in a manner that is free from a perception of bias, self-interest and gain and that they actively oppose corruption.

[31] The principle of legality founded as it is on the Rule of Law imparts rules, norms and standards of universal application. Hence if man-made rules and laws do not coincide with those standards they must yield to them. The laws of legality do not tolerate any man-made limitation. This is the simple explanation why there appears to be no limit to the court's powers – the powers are to be found in the Rule of Law. Their apparent elasticity is only due to the man-made lens, which sometimes imperfectly identifies them.

[32] The general principle is stated to be that tenders should ideally be awarded only to bidders who provide the best overall value.

[33] The application of the principle of legality set out above will determine the outcome of the conduct of the parties to the contracts (both applicant and first respondent).

WITNESS AFFIDAVITS

[34] This review served before a full bench (differently constituted) which gave consideration to the position of witnesses against whom allegations of serious misconduct and wrongdoing had been made. It had been expressed by the witnesses that they feared that a decision might be made in the matter without any regard to the evidence and version of the witnesses being heard by the court. The court decided to make an order concerning the rights of the witnesses. A list of relevant witnesses was made in the order identifying the relevant persons. Every one of those persons was afforded certain rights identified as being –

> '(i) the right to intervene in these proceedings as an interested party; or
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> (ii) the right to intervene as a witness and deliver an affidavit, with or without supporting affidavits and documents, in his or her defence to the alleged wrongdoing;
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> (iii) in the event she or he elects to file an affidavit, such affidavit must confine itself to the issues raised in the founding affidavit, answering affidavit or replying affidavit including any confirmatory or supplementary affidavit or any annexure attached thereto. She or he may attach any relevant documentation in response to the allegation.
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> (iv) he or she may elect not to intervene either as a party or as a witness by way of an affidavit and supporting affidavits if so advised;
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> (v) the right to obtain legal representation...
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> (e) In the event that any of the aforementioned persons elect to intervene in the proceedings either as a party or as a witness, such person is to notify all the parties and recorded in writing, of the intention to intervene, whether as a party or as a witness... From then on all parties shall exchange affidavits in accordance with the time frames stated in rule... '

[35] Some witnesses decided to file affidavits as witnesses. None of the witnesses made application to join as a party. Such application, if it was brought was unlikely to succeed.[22]

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[22] See *Prasa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GP) at para 3; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 11 and *NDPP v Zuma* 2009 (2) SA 277 (SCA) at paras 84 – 5.

[36] The placing of information before court is not the same as intervening as a party.[23]

[37] The order of the full court must be interpreted to ascertain what its true intention was.[24]

[38] In our view, the intention of the order and its ambit was to provide a forum for witnesses to raise matters concerning themselves in a forum separate from the litigation proceedings. The order provided a mechanism for witnesses to make statements, which in due course could be considered by some person (not the court considered in the context of the litigation). The court was seeking to meet the complaints of the witnesses that they had not had an opportunity to explain and disavow allegations made against them. The fact that further affidavits were permitted to be filed concerning the witnesses affidavits must be read within that context. It is as if the court created two boxes – one box consisting of the litigation and one box consisting of matters raised by witnesses. In the litigation box, no party called to admit any evidence of a witness neither did the court. Indeed, the court, without the consent of the parties, was not permitted to call witnesses.[25] No consent has been forthcoming for the court to call the witnesses and the court did not call them.

[39] In our view, the court should have no regard to the affidavits made by the witnesses. The contents of the affidavits are simply not evidence in the present matter. It must also be recalled that the witnesses have no responsibility inside the litigation. Their only concern relates to their own personal position, facts, and matters concerning that position. This makes it difficult to assess the value of the evidence supplied by them in the affidavits, as they have no obligation to deal with all matters. In the normal course, their failure to deal with facts and matters would result in inferences being drawn against them. In the present case, that failure to deal with facts and matters can lead to no inference. As they have chosen what matters they

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[23] *United Watch & Diamond Co. (Pty) Ltd. v Disa Hotels Ltd.* 1972 (4) SA 409 (C) at 502.
[24] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (SCA). See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[25] *Rowe v Assistant Magistrate Pretoria* 1925 TPD 361. See also *City of Johannesburg Metropolitan Council v Ngobeni* [2012] ZASCA 55 at para 37 and *Simon v Van Den Berg* 1954 (2) SA 612 (SR).

wish to deal with, it is difficult to assess the value of the evidence in the context of litigation which deals with all the evidence. I would accordingly rule the affidavits inadmissible as evidence in these proceedings.

HEARSAY

[40] Siyangena Technologies (Pty) Ltd (the respondent) submitted that much of the evidence set out by the deponent to the founding affidavit constituted hearsay. The applicant concedes that some of the evidence is not given by a person with personal knowledge. It submits correctly in our view that documentation and witnesses support all the material relevant evidence. To the extent that the evidence is hearsay, it seeks its admission in terms of section 3(1) of the Law of Evidence Amendment Act.[26] The Act was considered in similar litigation to the present in *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa.*[27] It was held:

> Swifambo's chief complaint appears to be that allegations of fraud and corruption should not be made lightly, and should be based on hard facts, or amount to the 'clearest evidence' or 'clear and satisfactory evidence'. It argues that no such evidence was tendered by PRASA. Molefe's conclusion, in the replying affidavit, that there were 'irregular and corrupt practices at PRASA', is criticized on the basis that there is no direct evidence supporting it. However, Swifambo in its heads of argument on appeal gives no detail as to what evidence it objected to. Moreover, it did not take issue with the conclusion itself, professing ignorance as to the practices within PRASA. Swifambo did not contest the merits of the application, and did not generally dispute the factual allegations made by Molefe. Nor did Swifambo dispute the contents, or the reliability, of the documents attached to the affidavits deposed to by Molefe. And as Francis J held, confirmatory affidavits were provided in respect of the replying affidavit. Thus while hearsay evidence is generally not permitted in affidavits, where there is no reason to doubt the reliability of the allegations made, they are uncontested, and the deponent says he believes them to be true, they will be admissible.
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> Section 3(1) of the Law of Evidence Amendment Act provides that hearsay evidence is inadmissible unless the court, having regard to the nature of the proceedings; the nature of the evidence tendered; its probative value; the reason why the evidence is not given by the person upon whose credibility it depends; any prejudice to the party who objects to its admissibility; and any other factor which, in the opinion of the court,

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[26] 45 of 1988.
[27] 2020 (1) SA 76 (SCA).

should be taken into account, is of the view that the evidence should be admitted in the interests of justice. As Francis J held, the evidence in the documents supporting both the founding and replying affidavits was not alleged to be unreliable and the facts and documents were discovered by independent investigators in the course of their broader investigation into corruption within PRASA. The reasons why direct evidence could not be given were explained by Molefe in the passages quoted above: some employees of PRASA had resigned, others were uncooperative, records were concealed, and in so far as possible documentary evidence was adduced. Swifambo had the opportunity to examine all the evidence and to respond to it. But since it did not dispute that there was corruption, claiming ignorance, it was not in any way prejudiced by the admission of the evidence. The application was manifestly in the public interest. And it was in the interests of justice to admit the evidence adduced by PRASA. Swifambo did not take issue with any of the allegations of PRASA's corruption. Francis J thus correctly admitted the evidence."[28]

[41] In our view, the evidence is largely admissible to the extent it is given by someone with personal knowledge but it would in any event be admissible because of the reasoning in *Swifambo*.

CASE IN REPLY

[42] The respondent submits that the applicant has made out its case in reply. It appears to me that the case was made out at length in the founding affidavit and that the allegations made there were only amplified, in consequence, to produce the detail in the reply. In our view, the applicant is not disqualified from presenting its case on the basis of the matter in the founding and replying affidavit. The respondent suffers no prejudice.

THE FACTS

[43] The background facts are detailed because they provide insight into how the relationship was formed and developed. The details of the pattern of conduct show how increasingly the participants came to ignore the procurement requirements, the need to continuously act in good faith, seeking the best technical outcome to meet the requirements and at the most economic price.

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[28] *Ibid* at paras 19 – 20.

[44] The background concerns two preliminary phases: the pilot project and an extension to the pilot project. Those phases preceded the phases presently in issue. (The phases in issue are phase 1, the phase 1 extension and phase 2.)

[45] The background reveals that initially a sparing and economic approach to the installation of the equipment in issue was adopted. The installations were intended to be effective and efficient, and focused on the needs of PRASA. The initial approach, however, was abandoned on or shortly after the introduction of the respondent. The scope, extent and cost of the work increased dramatically, and the work was precipitously proceeded with in the absence of a budget or any planning, and in utter disregard of the procurement process, while the functionality of the system decreased.

[46] The applicant (as the SA Rail Commuter Corporation ('SARCC')) had identified certain needs and developed specifications to address those needs:

46.1 Applicant identified a need to "disseminate relevant, accurate and up-to-date information on the movement and time-keeping of trains to commuters".

46.2 Applicant developed a specification (October 2007) for a passenger system ("APIS") to address this need. APIS was a "collection of hardware and software elements, operational procedures and logistic support requirements" that disseminated the information. The APIS system was an integrated (or Information) communication system ("ICS"). The APIS (or ICS) was provided on Railcom software.

46.3 In terms of the specification, the information would be provided through display boards and a public address system linked to the train signaling system. The specification provided, "the minimum standards ...to meet the basic requirements and to ensure...some consistency between installations undertaken...by different contractors and suppliers."

46.4 The specification set all the requirements for the system and equipment, and provided for certain equipment to be obtained and the incorporation of existing equipment such as CCTV, automatic gates control, fire protection systems.

46.5 The specification applied to "any organization or contractor intending to undertake works on SARCC Metrorail stations." The specification does not require equipment of any specific brand.

46.6 All stations were, at the time, controlled by rotating turnstiles, a "much cheaper" option than automated access gates. However, applicant identified a need to improve the ease of movement into and from the stations, improve the customer experience, create a safer environment, reduce costs and increase the rate of fare collection.

46.7 The solution to this need was the installation of an automated access control and fare collection system ("AAFC"). The system was not needed in every station and was not considered to be a priority. The system was intended to be selectively installed, and the turnstiles redeployed where they could be used. There was consideration given to the need to keep expenditure to a minimum.

46.8 Applicant developed a draft specification (September 2008) for access (speed) gates.

46.9 The specification explains the reasons for installing access gates, instead of the traditional turnstile. The specification envisaged an integrated system that would serve the abovementioned purpose. The specifications were intended to apply to new stations, "and, where possible, [the] 2010 Soccer World Cup", and incorporated in future designs.

46.10 The specification provided the technical description and requirements, and provided the minimum specifications for access gates. The specification set sub-assembly, operating modes, external interfaces (fire alarm), maintenance and motor control requirements for the access gates. As with the ICS specification, the specification for the access gates did not require a specific brand of gate.

[47] The applicant commenced seeking to install the ICS envisaged in the (SARCC) specification:

47.1 Siemens was engaged to install the abovementioned components of an ICS (and self-help points).

47.2 The installation was initially limited to the abovementioned components of an ICS at "certain", "relevant applicant stations", in identified regions and cities. The ICS installed by Siemens did not include access control, CCTV, smoke detection and turnstiles.

47.3 The installation of an ICS was done in accordance with the SARCC (ICS) specifications.

[48] The applicant upgraded a few stations for the purposes of the FIFA soccer tournament and, in so doing, expanded upon the ICS being installed by Siemens:

48.1 The work was required in order to satisfy FIFA.

48.2 The scope of work included the initial components of an ICS referred to above (public address, display boards and help points), and added access control, CCTV, smoke detection and turnstiles. There is no indication that specific brands of equipment were required.

[49] The applicant's executives attempted to confine the appointment of contractors for the expanded ICS work to Siemens. Despite the initial intention to do so, the work was not placed with Siemens. Instead, the respondent was introduced, and part of the work on the expanded ICS that had been intended to be performed by Siemens, was placed with the respondent. The evidence shows that Mr. Ferreira (who was previously involved in Siemens, and subsequently ESS and the respondent) had a meeting with Mr. Kgaudi, a consultant to the applicant on the work. Mr. Ferreira (on behalf of ESS) thereafter submitted a proposal and the respondent (not ESS) was employed as the subcontractor.

[50] In addition to the abovementioned work, the installation of the access gates ("speedstiles") was placed with the respondent:

50.1 The access gate specifications were incorporated in the SARCC specification and the respondent's quote was based on the SARCC specification. The specifications did not require a specific brand of access gate and the access gates were intended to function as an AAFC. The importance of not including a specific named brand in the specification is that it is anti-competitive. The specification should refer only to functionality specifications leaving it open to the tenderer to choose the brand that meets the functionality requirement.

50.2 The respondent and two others tendered for the supply and installation of the access gates.

50.3 The respondent was awarded the tender, despite the consultants raising issues about the price, the specifications of the product, and the offer being approximately three times more than the best priced bid and exceeding the budget.

[51] The ICS, expanded ICS and access gates, were renamed and referred to as an integrated security access management system ("ISAMS"). The specifications for the ISAMS thereafter included references to the brands introduced by the respondent. Future tenders would accordingly contain brand specific products of the respondent.

[52] The work was extended to other stations, and the respondent was approached to perform that work, after private meetings were held between the respondent and individuals assisting or employed by the applicant, and without the knowledge of the Group Executive for Strategic Asset Development ("GE: SAD"):

52.1 The applicant at a point in time contemplated installing access (speed) gates at a few other stations for the purposes of the soccer tournament referred to above. The stations were referred to as the World Cup 2010 stations. The installations at those stations were not proceeded with at the time because of the unavailability of a budget. The reason the budget for the installation of access gates was exceeded was due to costs occasioned in the appointment of the respondent to perform the pilot project.

52.2 In November 2009, Mr. Ferreira and Mr. Kgaudi held a further meeting at which they discussed the "work that had to be executed in respect of the World Cup Stations."

52.3 On the respondent's evidence, after an internal meeting in January 2010, Mr. Gantsho (of the applicant) was instructed to contact the respondent. There is no record of this meeting. On the respondent's evidence, Mr. Montana (of the applicant) and Mr. Ferreira met privately in February 2010. There is again no record of this meeting.

52.4 The respondent's evidence is that the respondent was engaged pursuant to the meeting. The inference is that respondent was engaged or that a commitment to contract was provided to the respondent at the meeting.

52.5 The respondent was subsequently approached and discussions held against the advice of SCM and without the knowledge of the GE: SAD. In the course of those discussions, respondent solicited a commitment to be given further work.

[53] Despite the absence of a budget to pay for the work, concerns about the cost and suitability of the access gates, the intention to install local gates, and without a procurement process and any prior assessment or recommendation, Mr. Montana, acting on behalf of the applicant, directed Mr. Gantsho to contract the respondent:

53.1 On 22 February 2010, Mr Gantsho reported, "[a]fter interrogating the operation methods and comparing with other installed gates elsewhere in the world", the gates were, "not suitable", were "too ... high end in terms of our current operations", were "fully imported [from Yugoslavia] and very expensive", that gates were available from local suppliers (for less), the intention was "to install the local speed gates", and there was no budget for the gates.

53.2 Mr. Gantsho reported that the thinking behind the decision to install access gates instead of turnstiles in the World Cup 2010 stations was "to explore the market and to centralise the fast gates to one ... supplier."

53.3 Mr. Gantsho reported further that "the intention is to install the local speed gates on the remaining 2010 stations as a pilot project for future installation on all the other applicant stations."

53.4 Despite the content of the abovementioned report, Mr. Montana (telephonically) directed Mr. Gantsho to "approach ESS and get the gates installed for the remaining WC2010 stations". Mr. Gantsho recorded the telephonic discussion and directive in a letter addressed to Mr. Montana, dated 23 February 2010.

53.5 In the founding affidavit, the letter was interpreted as recording a telephone discussion in which Mr. Montana instructed Mr. Gantsho to "contract with respondent".

[54] The contents of internal documents were manipulated in an attempt to justify the directive, conceal the prior commitment to the respondent, and used as a basis to expand on the scope of work:

54.1 The scope of work was amended to include the installation of a CCTV system.

54.2 The abovementioned letter purported to set out the background and discussion on which Mr. Montana based the directive to contract with the respondent. The content of the letter is materially different to the initial report provided the day before.

54.3 For example, the words, "not suitable" and "very expensive" were removed and replaced with positive sentiment, and reasons for excluding other suppliers were inserted. And urgency around the 2010 World Cup was inserted and used as a pretext to exclude other suppliers. The urgency became the paramount consideration in subsequent communications.

54.4 Mr. Gantsho wrote an email to Mr. Montana on 15 March 2010 stating that his instruction to the respondent "bears no commitment of any form" but "applicant, sooner than later, will have to make a commitment", "to formally appoint them"

and "craft a way forward in terms of other stations". As stated above, Mr. Montana had already directed Mr. Gantsho to place the work with the respondent. This e-mail is intended to be misleading to the extent it pretends no commitment existed.

54.5 An undated motivation and recommendation report was prepared and sent to Mr. Montana. The content of the report is materially different to the initial report and subsequent letter. The report purported to recommend *inter alia* that "SCM be further engaged to formalise the procurement process", "[a] Letter Of Intent is given to respondent ... to proceed", and "ESS be appointed as the preferred supplier".

54.6 Mr. Montana purported to approve the recommendation. The approval is undated. The approved motivation and recommendation report was thereafter used to support the decision.

54.7 The report was sent to Mr. Gantsho on 16 March 2010 at 11:45 am. The final quote by the respondent was received the following day, on 17 March 2010 at 8:35 am, after a site inspection at seven sites in three different provinces. This indicates that the respondent was aware of the decision and had acted on it prior to the communication of the approval to Mr. Gantsho.

[55] In the final quote, the respondent expanded on the scope of work, reduced the functionality of the existing work and increased the price of its proposal:

55.1 The scope of work was expanded to include the ISAMS.

55.2 The functionality of the system was reduced. The installation would not operate as an AAFC as, despite the requirement that the contract should be based on the existing contract and therefore the SARCC specification, the access gates would only be AAFC "ready" and would be operated manually. The access gates do not operate as an AAFC and, as a result, do not satisfy the need identified by the applicant. Access gates installed in the subsequent phases, at great expense in more than 220 stations, suffer from the same defect. The gates are being stripped of parts and damaged, and the applicant is being put to further expense to repair and maintain access gates that are not serving any purpose. The objective of the gates was frustrated at a great wastage and cost.

55.3 The price of the work was increased from R62 million to R90 million, and maintenance and a guarantee were included which dramatically increased the cost of the work to R196 million without finance costs and R225 million in terms of a payment plan.

55.4 Mr. Ferreira and Mr. Montana met on the same day as the final quote (17 March 2010). There is no record of this meeting. Mr. Ferreira required a formal acceptance of the proposal, which exceeded R225 million, "by no later than" 19 March 2010. The respondent does not disclose the response from Mr. Montana.

[56] The concerns raised by the applicant's employees were either ignored or the employees who raised those concerns were sidelined:

56.1 Mr. Gantsho raised various issues concerning funding and the procurement process. Mr. Gantsho said finance should advise, a request should be submitted to the CTPC for confinement, legal and compliance should clarify contractual issues and SCM should follow "due process". Mr. Sindane replied, "[y]our motivation report and the LoA are fine."

56.2 Mr. Sebola raised various "imperative" issues relating to the motivation report and the procurement process. Mr. Sebola raised the absence of a submission to Finance for a capital budget, the price discrepancy, the absence of a strategy and implementation plan, the irregularity of the funding model, the absence of a submission to the CTPC from the engineering department, and the lack of certification and registration.

56.3 Mr. Gantsho replied and accepted that there was an increase in the scope, there was no planning, no analysis of the funding model and the guidance from finance and SCM was required. In relation to the vetting of the respondent, Mr. Gantsho responded that it was assumed that this had been done. Mr. Gantsho did not specifically respond to the failure to involve the CTPC.

56.4 Mr. Mchuba, on being requested by Mr. Sindane to approve the recommendation, raised a number of concerns about the authority of Mr Montana, the requirement for board approval, the absence of a budget and the certification of the respondent. Mr. Mchuba in effect refused to grant the approval. The report was amended to substitute Mr. Montana for Mr. Mchuba as a signatory, and the reference to the request from Mr. Montana was removed. In this way dissenting voices were silenced.

[57] Mr. Montana (according to Mr. Gantsho) approved the appointment of the respondent and instructed the implementation of the decision.

[58] A letter of appointment was issued to the respondent:

58.1 The letter of appointment is dated 30 April 2010. The amended report which is not signed, was sent the same day. There is no indication that the four signatories approved the recommendation prior to the letter of appointment.

58.2 The letter of appointment required a "formal contract". After "consensus had been reached", that contract was not concluded.

[59] The conduct that resulted in the awarding of work to the respondent became a blueprint for the award of work in excess of R6bn to the respondent.

PHASE ONE

[60] The expansion of ISAMS beyond the World Cup 2010 stations was not planned by the applicant, there was no approval from the executive and the work was not budgeted for in the allocation of funds:

60.1 The initial intention was to install an ICS on a limited basis for a specific purpose (information dissemination) and to retain and incorporate existing equipment. The expanded ICS was required in order to satisfy FIFA. The need for the expanded ICS (beyond the requirements of FIFA) was not assessed.

60.2 The access gates were intended for new stations and future designs, and where possible the World Cup 2010 stations. The access gates were intended to form part of an AAFC. The extent of the need for an AAFC was not assessed.

60.3 Mr. Gantsho accepted at the time that "a national rollout project for key and all other stations in the coming Financial Years ... would require a thorough project scoping and business case. This was not planned for this financial year; hence there is no process and project plan in place."

60.4 A considered planning process required:

60.4.1 An investigation that demonstrates that the extension of ISAMS was both efficient and cost effective. There is no indication that this was done.

60.4.2 An "end-user" to request the involvement of SCM in the acquisition of ISAMS, obtain budget approval and maintain records to support the request. There is no indication that this was done.

60.4.3 A needs assessment, particularly where applicant already had such or similar equipment. There is no indication that this was done.

60.4.4 A motivation for and approval of the investment by the board (prior to procurement), and a request to invest and for a budget directed to the

board and the executive. The phase 1 tender was not included in the budget.

60.4.5 A submission containing detailed information and a comprehensive appraisal and approval of the project by national treasury. There is no indication that this was done.

60.4.6 An expenditure projection and a corporate plan including the project. The preparing and submission of particulars for the treasury and executive authority. There is no indication that this was a done.

[61] In the event that the applicant intended to proceed with such a project after a considered planning process, the work should have been designed and a RFP and specification compiled to address the needs identified in the assessment and to evaluate the bids. The work had to be done by a properly constituted CFSC, and had to satisfy the requirements of the procurement policy. This was not done. In the result, the need for an integrated access control system that automated fare collection, and the need for the entire suite of ISAMS at every station, was not addressed.

[62] The access gates installed by the respondent were not integrated with the other access functions and did not function as an automated fare collection system. The access gates served no purpose and constituted a safety hazard.

[63] Despite the absence of this fundamental groundwork and the defects in the work, SCM proceeded to plan for further installations and attempts were made to divert that work to the respondent without a procurement process:

63.1 Mr. Gantsho was sent an email by Mr. Ferreira. The respondent had taken "the liberty of designing" two stations and attached the design and bill of quantities. Mr. Ferreira requested a meeting to "discuss if we could extend the current contract to include these stations or what should we do."

63.2 The respondent does not contest that it agreed.

[64] A perception that there was no need to comply with the procurement policy in regard to an extension of the work, and the appointment of the respondent was established. The perception resulted in a failure to implement the procurement policy

and manage the procurement process. Mr. Gantsho instead managed the procurement process.

[65] The nature, extent and cost of the work was not considered:

65.1 The absence of any consideration of the work is evident in the failure to institute a competitive bidding process despite the cost exceeding the threshold which rendered it mandatory. There was a lack of appreciation for the nature, extent and cost of the work or a blatant attempt to reduce the competitiveness of the procurement process.

65.2 The stations concerned and the components of the installations were unknown and ignored when the procurement process commenced. The importance of identifying the stations appears from the SARCC specifications and the nature of the work.

65.2.1 The respondent requested the specification for the ICS for the purpose of the bid preparation, and Mr. Gantsho and Ms. Mosholi replied that, "there is no need for them to have the specification of ICS as we are not asking for them to supply that." This is an indication of how the left hand was ignorant of what the right hand was doing. This type of confusion is indicative of how the controls which are designed to create a team, which would all participate in the process, were ignored.

65.2.2 The quantities of the components required in the installations were not measured. The decision to proceed with a restricted procurement process in the absence of such information was not rational.

[66] The failure to consider the nature, extent and cost of the work, and the absence of any management of the procurement process by SCM, particularly the appointment of a CFSC, resulted in a confused presentation of materially different bid requirements to the potential bidders:

66.1 The invitation to the compulsory briefing session referenced the supply and installation of access gates (speeds stiles). There was no indication in the initial documents provided to the potential bidders that ICS was required. Respondent could not have known from the documents that ICS was included. Yet respondent requested "the specs for the ICS". It was informed that ICS was not required.

66.2 Mr. Ferreira accordingly telephoned Ms. Mosholi. The conversation is recorded in an email from Mr. Reddy. Ms. Mosholi sent the email to Mr. Gantsho, who

immediately and without question or reference to a CFSC provided information relating to the ICS.

[67] The documents provided to potential bidders selectively included and manipulated the contents of the broader, more general SARCC specification to the exclusive benefit of the respondent. The documents did not comply with the procurement policy.

[68] The respondent's bid included a list of stations, offered integration and included a funding option and warranty.

[69] The bids were not checked for compliance. They were evaluated by laypersons against criteria prepared after receipt of the bids, and on the basis of a points system that was unlawful; a scoring system that did not provide any means of distinguishing between the submitted bids; and without the prior involvement of a properly constituted CFSC. In the evaluation, mandatory requirements were unfairly applied and points were misallocated. The evaluation criteria and application did not comply with the procurement policy, and favoured the respondent. The BEC recommended the bid by the respondent, despite the bid being approximately 60% more than the competing bid, and the excessive rates charged by the respondent.

[70] The flaws in the procurement process were concealed. The minutes of the meeting of the BEC were manipulated to remove irregularities and bolster the recommendation of the respondent, and the employees who were interviewed attempted to conceal the absence of an RFP.

[71] The recommendation by the BEC was rejected by the GCEO and, more importantly, by the CTPC:

71.1 As the GCEO, Mr. Montana had general responsibilities regarding procurement and approval of capital expenditure and was accountable for procurement regarding investments in infrastructure. In particular, Mr. Montana was responsible for appointing the CTPC, and making recommendations to the FCIP.

71.2 The CTPC is responsible for considering the procurement process and value for money, and making recommendations to the GCEO.

71.3 The tender should have proceeded to the CTPC after the BEC meeting but instead the tender was diverted to Mr. Montana.

71.4 Mr. Montana rejected the recommendation to appoint the respondent (in December 2010). The reasons for the rejection by Mr. Montana are not known other than that concern "over a wide range of issues was expressed".

71.5 Mr. Gantsho committed to getting the recommendation to appoint respondent "right the second time around."

71.6 A couple of months later in February 2011, the tender was revived and placed before a CTPC.

71.7 A report was prepared for the CTPC. The different draft versions of the report evidence the manipulation and misrepresentation of information in the procurement process to the benefit of the respondent.

71.8 The tender was not on the agenda and the CTPC was not informed of the rejection of the recommendation of the BEC by the GCEO.

71.9 The CTPC nevertheless also rejected the recommendation and resolved to refer the tender back to SCM. The CTPC raised concerns about the absence of a list of stations, the cost in relation to the period for completion: per station, between the bidders and compared to the pilot project, the budget and the certification of the respondent.

71.10 The transcript of the CTPC meeting indicates that the concerns extended to a contravention of the PFMA, the funding model and the restriction of the procurement process, and the members considered the information placed before them to be misleading.

71.11 The CTPC decided to reject the recommendation despite the misleading information that was presented.

[72] In the aftermath of the CTPC decision, there was a concerted effort to manipulate or create documents in an attempt to conceal the decision of the CTPC and the irregularities in the procurement process:

72.1 The minutes of the CTPC meeting were subsequently altered to reflect that the CTPC, "noted the recommendation", "recommended a clean-up of the following matters", and "[c]oncurred with the recommendation to award business to the respondent in an amount of [R1.1 bn]". And the matters raised by the CTPC were sanitised.

72.2 The circumstances under which the altered minute was prepared has not been explained by either of the signatories.

72.3 Mr. Gantsho sent a document to Mr. Mbatha that purported to be from the CFSC justifying the acceleration of the "Access Control (Speed Gate) project" and promoting the contents of the offer by the respondent.

72.4 The document identified that there was a need for "revenue protection" and the purpose of the access gates was to prevent or bring about a decrease in "fare evasion" by introducing an "integrated ticketing, automatic fare collection system", the very function that the access gates installed by respondent did not serve. The document contains material misrepresentations.

[73] The CTPC was simply by-passed and the tender placed before the FCIP, contained inaccurate, incomplete and misleading information:

73.1 The FCIP was established to assist the board. The FCIP was required to consider the recommendation by the GCEO and procurement process, particularly the procedure followed by the CTPC, and take cognisance of substance and value for money.

73.2 The draft reports demonstrate the extent to which information was manipulated in order to obtain a decision.

73.3 In particular, the recommendation report motivates the appointment of respondent (at a cost to the applicant of R1.95 bn) on the basis that the access gates project was "network wide" and will achieve the objective of improving "control and revenue protection in the rail system", as the identified system (respondent's system) incorporated automatic fare collection systems and security control. The authors of the report stated that the project, "will ... improve access control and decreasing (sic) of fare evasion". The project was not network wide and the installed gates do not achieve either objective.

73.4 The placing of the tender before the FCIP indicated that the CTPC had recommended the appointment to the GCEO who had considered and agreed with the recommendation.

73.5 The documents also demonstrate that the intention was to mislead the FCIP. Mr. Mbatha caused the number of stations to be deleted. The inference is that Mr. Mbatha did so because he was of the view that the price was "too much for such a small percentage, I agree".

73.6 The minutes of the FCIP meeting further concealed the irregularities. The minutes record that an "open tender was embarked upon by Intersite". The statement is false.

[74] The tender proceeded to the board of control. However, there is no indication that the board made a decision to contract with the respondent:

74.1 The report that was prepared for the FCIP was amended to recommend the appointment of the respondent to the board of control. The report contained the misrepresentations referred to above. In addition, the content of the report had been amended. The scope of work was altered, as was the period for performance and the report now stated that the members of the CTPC "support the recommendation".

74.2 The board, according to the minutes, approved a budget of R317 million for the national speed gates project as the modernisation of assets was a relatively low priority. There was no discussion about funding the shortfall of R1.3 bn for the appointment of the respondent.

74.3 The minutes record only that the board approved the appointment of the respondent. In context, the appointment was as a "preferred bidder", which has a specific meaning and requires further decisions for a contract.

74.4 The respondent was informed of the appointment as a "preferred bidder", no price was included, and the appointment was subject to negotiation of the price, terms and conditions, appointment as a final bidder and signing of a contract.

74.5 The resolution, signed a month after the meeting, recorded the intention to appoint the respondent as the "preferred bidder" and (erroneously) inserted the amount of R1.95 bn.

[75] In order to conclude a contract, prior approval had to be obtained from the Minister of Transport and approval of the contract had to be obtained from the board, none of which occurred:

75.1 The board required shareholder's approval (from the Minister of Transport) to conclude the transaction. The approval was neither sought nor granted.

75.2 The board could not lawfully delegate the decision and accordingly the signing of the contract could not be delegated. The board did not purport to do so, and did not approve the respondent as the final bidder or approve the terms of the contract.

75.3 The GCEO had no authority to sign a contract.

75.4 Mr. Montana nevertheless signed a JBCC agreement.

75.5 The contract was signed despite:

75.5.1 Reservations about the cost of components of the contract that, in the opinion of Mr. Mbatha, was "too high and threatened to make the project unaffordable" and "was too high and did not yield any value to applicant"

75.5.2 a request for respondent to "reconfigure its offering", and

75.5.3 the negotiations being incomplete.

75.6 The contract included unlawful payments, and expanded the scope of work.

75.7 The contract was not suited to the work, was inchoate, and irrational, and not implemented.

75.8 As a result, the respondent was permitted to make claims for payment without regard to the contract and on suspicious supporting documents. More than eighteen months after the appointment of the respondent as the preferred bidder, and after the respondent had been paid huge sums of money and at a time when the parties still had not finalised the terms of the contract.

75.9 Mr. Montana purported to restructure the contract without reference to the board of control.

[76] The flawed process was concealed:

76.1 The unsuccessful bidders were misinformed.

76.2 The contract purported to record that the contract constituted a tender that was accepted by applicant and was complete.

76.3 The contract was back-dated to coincide with an early payment to the respondent, and selectively used to make payments to the respondent, prior to the respondent performing any work.

76.4 The documents used to justify the payments to the respondent misrepresented the terms of the contract.

76.5 The Public Protector was impeded and misinformed.

[77] The process that resulted in the awarding of work to the respondent in phase one failed to comply with the constitutional, legislative and regulatory requirement stipulated for a valid procurement process, and contravened the applicant's own procurement policy.

[78] The signatory to the JBCC contract was not authorized to sign it. The JBCC contract was a document containing terms, which were inappropriate to the works in question and as described (or in fact not described). The contract provides a mechanism to measure and pay for works as and when completed. EssentialC:\essential to the contract is the inclusion of a set of tightly framed works, a bill of detailed quantities and the appointment of a highly skilled and neutral principal agent. There were none of these features in the present matter. Any procurement official worth his salt would have immediately seen the problems and would have advised against the conclusion of the contract. The conclusion of the contract was irrational and unreasonable. The contract, framed as it is, allows for all the unlawful activities, which eventuated. As the works and quantities are not identified, there is no control over them and it is open for persons to claim that they were different as it suits them. As they are not identified, the measurements cannot be undertaken with certainty or accuracy. Unwarranted claims of performance can easily be made and will likely be met. Most importantly, the principal agent appointed had no skills, was not independent and simply could not do the work required of a principal agent. There is evidence of claims being made on the basis of certification provided by persons who, to the knowledge of the respondent, do not have the skills to certify. The respondent to this day insists that the certificates are validly issued and resolve any disputes on the issues certified.

PHASE TWO

[79] The second phase had two sub-phases. The first attempt to implement phase two faltered when the FCIP essentially rejected the recommendation to appoint the respondent to phase two which resulted in an extension of phase one. However, in due course, ISAMS was extended to phase two at a cost of R2 536 327 633.60.

[80] The extension of phase one and phase two suffers from the same flaws as those found in phase one.

[81] The method used to secure the appointment of the respondent was the same as the extension of the pilot project and phase one: an unsolicited bid from the respondent, a requirement for the respondent's specific brands, the restriction of the

procurement process, deviation from the required process, ignoring of adverse decisions, misrepresentation, misinformation and concealment of the material facts.

[82] The extension of ISAMS in phase two should be found in the budget for 2013/2014. The absence of a budget for phase two indicates that there was no planning, and the board, Department of Transport and national treasury did not approve of the project prior to the procurement process. There was no needs assessment, no appraisal by national treasury and the CFSC was not constituted or involved.

[83] Despite the absence of any planning, an unsolicited offer from the respondent was entertained and acted upon. The offer envisaged two sub-phases.

[84] The procurement process favoured the respondent:

84.1 The procurement was restricted or closed; the scope of work is a copy of the scope of work contained in the unsolicited bid from respondent, including, "Access Gates - future ready for Automatic Fare Collection"; the RFP required certification and accreditation with the brands of specific manufacturers.

84.2 A technical evaluation threshold of 70% was established based on evaluation criteria that included (as the main requirement) certification and accreditation with the brands of specific manufacturers, and was scored based on compliance.

84.3 The "Technical Evaluation" did not include a technical evaluation of the equipment offered by the bidders.

84.4 The BEC did not include any experts.

84.5 The impact on the scoring is evident from the scoring sheets. The respondent scored a near perfect score (37.6 out of 40) on the section concerning the brands, and was the only bidder of six to achieve the technical threshold with a total of 87%. The closest competing bid achieved approximately 25% on accreditation and a total of only 35%. The remaining bidders achieved a total score of less than 20%.

84.6 The CTPC was not engaged. (The CTPC is responsible for assessing value for money and making a recommendation to the GCEO who would make a recommendation to the FCIP. The CTPC had rejected the phase 1 tender.)

84.7 The GCEO is required to consider the recommendation by the CTPC. The CTPC did not make a recommendation. The GCEO nevertheless made a recommendation to the FCIP.

[85] The board was required to approve the appointment of the respondent, the terms of the contract and any subsequent variation. The board did not do so. Mr. Montana did so without authority.

[86] The appointment of respondent was portrayed as a variation to phase one. However, there was no attempt to vary the JBCC agreement that the parties had purported to conclude. The confusion about the terms of the agreement appears from the respondent's allegations, and the confusion about the price appears from the notices of appointment.

[87] In the course of the (phase two) extension to phase one, documents were created that contained misrepresentations, misinformation and concealed material facts:

87.1 The preparation of a document purporting to be a recommendation to CTPC, there was no intention to ever appoint a CTPC. The absence such an intention is evidenced by the preparation of a materially similar document purporting to be a recommendation from the GCEO to the FCIP. The documents were signed by all the signatories on the same day (19 July 2013).

87.2 The documents purporting to be recommendation reports were wrong in material respects and the content of the minutes of the meeting of the FCIP were manipulated. There are materially different versions of the minutes of the meetings. However, the express or implied decision in all the versions of the minutes was that the recommendation to appoint the respondent was not supported by the FCIP.

87.3 Another version of the decision is recorded in a report recommending the appointment of the respondent to the GCEO. Mr. Montana records another version of the decision in a handwritten note and in which he purports to record a decision to appoint the respondent in an amount R351 million excluding VAT. (The appointment of the respondent was subsequently reduced to R300 million). Mr. Montana represents in his note that the board had adopted the recommendation of the FCIP. This was untrue.

[88] The unsuccessful bidders were misinformed. The attempts to expedite the appointment of the respondent to phase two of the works continued. The tender was simply renewed and on this occasion the FCIP was avoided. The procurement process was, once again, unlawful and irregular:

88.1 The RFP was similar to the first. The bias in favour of the respondent was retained, despite complaints by other bidders, and the result was the same. The respondent was, once again, the only bidder to achieve the technical threshold. The respondent scored 87%. The nearest competitor achieved 25%.

88.2 As with the first sub-phase, all the bidders, save for the respondent, were disqualified because they were unable to provide accreditations for the branded equipment.

88.3 Although the tender was placed before a BEC and proceeded to a CTPC, the process was re-started before a reconstituted BEC and the CTPC avoided. The CTPC that was initially convened, expressed dissatisfaction with the submission (from the BEC), and conditionally supported the recommendation. The tender did not proceed to the FCIP and instead the BEC was reconstituted.

88.4 The decision of the reconstituted BEC was not considered and procurement process was not followed. The GCEO merely recommended the appointment of the respondent to the board. The GCEO did so based on documents purporting to be recommendations by the GCEO to the FCIP and by the FCIP to the board, which did not occur.

[89] In the course of the phase two procurement process, documents were created that contained misrepresentations, misinformation and concealed material facts:

89.1 A report purporting to be a recommendation from the CTPC to the FCIP was prepared, when the FCIP did not have a quorum and there could have been no intention of referring the tender to the FCIP. The covering email contemplates submission to the Governance Committee, an entirely separate committee.

89.2 A similar report purporting to be a recommendation report from Mr. Montana to the FCIP was prepared. The report recommends the appointment of the respondent.

89.3 The submission to the board misrepresented that the FCIP recommended the appointment of the respondent. In other words, read with the paragraph above, it was reported to the board that the FCIP had accepted Mr. Montana's recommendation.

89.4 The submission and reports to the FCIP and board contained similar misrepresentations to the reports referred to above. In particular, the recording of the decision is inaccurate.

89.5 The presentation to the board was misleading:

89.5.1 The resolution of the board was altered. The minutes record that, "[t]he Board following the presentation and deliberation of the above recommendation" (by Mr. Montana), resolved to appoint the respondent.

89.5.2 The resolution that was prepared inserted the following, "[t]he board having considered the submissions from the Governance and Performance committee, regarding the approval of [ISAMS] Phase 2", resolved to approve the appointment of the respondent.

89.5.3 The Governance and Performance Committee is not responsible for making submissions on tenders to the board, and did not make any submissions to the board regarding the tender in issue.

[90] The board relied on the information provided and presentation by Mr. Montana to appoint the respondent (as the preferred bidder). In addition, the board authorised Mr. Montana to negotiate and sign the agreement. The respondent was informed of its appointment as the preferred bidder subject to negotiation on various issues and that the process was not complete until the appointment of a final bidder.

[91] The board did not authorise the GCEO to agree to the terms of the agreement, which, as stated above, is a function that cannot be delegated and required vetting by legal. In any event, there is no indication that the GCEO purported to agree to the terms that were offered and accepted by the respondent. Mr. Montana signed a JBCC agreement.

[92] There was an additional allowance of R905 million mainly for maintenance and a warranty that was already included in the notice of appointment for phase two that was accepted by the respondent but not included in the JBCC agreement. This add-on was referred to as the addendum:

92.1 The addendum was initiated by the respondent.

92.2 The unsolicited offer was irregularly entertained by Mr. Montana and Mr. Phungula.

92.3 The respondent provided a bid.

92.4 Mr. Montana signed the addendum agreement.

[93] There was no procurement process.

[94] The contract and its implementation resulted in works, which were not fit for purpose. The cause for this is:

94.1 Under design.

94.2 Underfunding.

94.3 Inadequate contractual framework.

94.4 Scope for corruption and non-compliance by the contractor.

94.5 Scope for unscrupulous employees of the applicant to amend the works, prices, terms of payment and generally corrupt the intended contractual relationship.

94.6 The ability to manipulate the relationship of the applicant and the respondent, the contract and the works.

[95] The works were far beyond budget which meant that what originally was contemplated had to be adjusted to meet budget. In addition, uncontrolled variations could be brought about to benefit unscrupulous persons.

CORRUPTION

[96] The applicant discovered that persons and entities connected to the respondent and persons within the applicant (Mr. Montana and Mr. Gantsho) were involved in various property transactions. On the face of it, the participants must explain these transactions. They raise serious concerns that there was wrongdoing, which needs to be investigated. The property transactions, at the very least, contravene the professional and ethical standards required to be maintained in public administration and those obligations with which all officials and other role players in the procurement system (including the respondent) must comply in order to promote mutual trust and respect, and an environment where business can be conducted with integrity.

[97] Corruption erodes the spirit, values, institutions and objectives of the Constitution. It undermines the ability of the State to deliver on many of its obligations notably but not limited to those relating to social and economic rights.[29]

[98] Persons who are complicit in maladministration, impropriety or corruption should not be permitted to profit from an unlawful tender. They should be forced to make full restitution even if this results in financial loss to them.[30] The existence of corruption is to be inferred from the fact that a multitude of irregularities exist, that there is an absence of a candid explanation from the tenderer. This can lead to the inescapable conclusion that the participants were not innocent. See *Passenger Rail Agency of Africa v Swifambo.*[31] See also *Eskom Holdings SOC Ltd. v McKinsey and Company Africa (Pty) Ltd. and Others* where it was held:

> 'it is indeed just and equitable that such monies be returned to Eskom. To prove that indeed crime, no matter what euphemism is used in describing such unlawful conduct, does not pay stop that indeed the cancer of corruption can be eradicated and those who benefit from ill-gotten gains, will be deprived of such gain stop... This would encourage good and ethical behaviour in public procurement matters and thus entrench the rule of law.'[32]

[99] The fiscus is poorer as it did not receive fair value for what it paid.[33]

[100] The respondent permitted Mr. Gantsho to stay at a certain property in Durban. The property was acquired for his exclusive occupation and an arrangement was in place that it could be transferred to him even although he did not have the money to extend his bond to pay the price. The respondent also told him that it had a place in Ballito. The issue of Mr. Gantsho staying in a place owned by the contractor was

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[29] See *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] 2 All SA 493 (SCA) at para 26; *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 833 (CC) at para 4; and *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at paras 83 and 166.
[30] See *Millennium Waste Management (Pty) Ltd. v chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at para 26.
[31] 2017 (6) SA 223 (GJ).
[32] [2019] ZAGPPHC 185 at para 66.
[33] See *Corruption Watch (NPC)(RF) v CEO of South African Social Services and Others* [2018] ZAGPPHC 7 at para 35.

considered as a reason why there should be some hidden arrangement. This is what Mr. Gantsho had to say:

> "So we really got interested in this particular apartment.
> Then I approached Mr. Murphy to say that I would like to buy this.
> As I said, you know, we would go in there with the colleagues....
> He said: You look very much interested in this.
> So I said: Yes, I am, but I think it's too steep for me to be acquiring it.
> He said: Okay, but do you like the flat?
> I said: yes, I do. You know anyone would like to have a flat but I don't think my bond would be – because I'm also paying a bond wherever I am.
> Then he said: Okay, no, that's fine.
> Then the next day I went in...
> ....Alvin [said] that: you [meaning Mr. Gantsho] can get the flat, and then when you're ready – because Murphy was saying he was selling the flat and then he was not going to hold it for anyone.
> He said: Okay, we [meaning respondent] can buy the flat and then we will get it to be acquired by the company.
> He said: No it's fine then as you said we will keep the flat for you.
> I said: But how do I do that because I have to pay for it?
> He said: No, ... it won't be a problem for us... to acquire the flat and then maybe at some point when you're ready for it then we can talk"

[101] As such, Mr. Gantsho subsequently made use of the flat and even allowed a religious advisor to stay there. Mr. Gantsho referred to the property as being his own when he wrote to the Reverend. He said "my apartment is C7 – 10". It appears as a probable inference that the flat was acquired for the use of Mr. Gantsho by the respondent and that some other hidden arrangement existed as to its actual visible ownership. He clearly had use rights and a claim to it.

[102] There is evidence that the flat was sold during 2011 for a total value of R3, 050 million. The negotiations were between Mr. Gantsho and Mr. Murphy after Mr. Gantsho had visited the unit several times. At the time when it became necessary to reduce the sale to writing, Mr. Gantsho indicated that a Mr. van der Walt would contact him to provide further details. Mr. van der Walt in fact did so. Although the terms and conditions of the sale were negotiated with Mr. Gantsho, the person who was the

purchaser was a company whose name was provided. In due course, the flat was occupied from time to time by Mr. Gantsho. There were no rentals charged to or paid by the person who occupied it.

[103] Mr. Montana was involved with property dealings, which had unusual features. An amount of R2 million was paid by a company for no apparent purpose in one of the transactions. Mr. Montana did not have sufficient funds to purchase the Hurlingham property, which he negotiated to buy. It is apparent that the funds for the property were not to be sourced in the hands of Mr. Montana. This being so, where were they to be sourced? The inference is irresistible that the funds are being provided by a third-party for an unknown reason. Individuals do not normally provide funding in the millions for no apparent reason. This being so the evidence is irresistible that the respondent was providing the backing. The same personalities were involved as were involved in the Durban property namely Mr. van der Walt.

[104] The precise ambit of the corruption is always difficult to establish in detail by reason of the steps taken by the participants in the corrupt activity to hide their activities away. In our view, there is sufficient detail available to lead to the inferences which are drawn above. Mr. Montana was involved with numerous property dealings. These activities are not consonant with this activity as a senior employee of the applicant. In the ordinary course, the funding available should not readily have been available. Mr. Montana sought to change the purchase of the property from himself to some other entity and in due course where the funding did not come in the entities could not be changed and Mr. Montana could not proceed.

DELAY

The Parties' Contentions

[105] The respondent submits that the issue of delay has to be considered first. It contends that it is only if it is found that there has not been an undue delay (or if there was that it is in the interest of justice to condone it) that it will become necessary for this Court to consider the merits. Put differently, if there has been an undue delay and

it is not condoned then the Court is not entitled to enter upon the merits of the review application.[34]

[106] On the contrary, the applicant submits that this matter is not an instance in which preference should be given to finality and the delay should be raised as a subsidiary concern to be considered and provided for in the context of a remedy that is just and equitable in the circumstances.[35]

[107] It is necessary to mention that the *amicus* does not deal with the issue of delay in its affidavits or pleadings as well as in the heads of argument.

The Delay Rule Principle

[108] The delay rule was laid down in *Woolgrowers Afslaers (Edms) Bpk V Munisipaliteit van Kaapstad.* [36] The rule was further developed in *Gqwetha v Transkei Development Corporation Ltd and Others.*[37] Both judgments deal with the purpose and function of the delay rule. The rule is there to promote the efficient functioning of public bodies, which is undermined by prolonged uncertainty over the validity of their decisions, and to safeguard a public interest in the finality of administrative decisions, which arises from a necessity to alleviate the inherent potential for prejudice to those who rely on their decisions. The underlying principle being that "an inordinate delay induces a reasonable belief that the decision has become unassailable."[38]

[109] In *Gqwetha,*[39] the Court held further that the enquiry into whether a delay had been undue entailed a factual investigation and a value judgment based on all the relevant circumstances, including any explanations, the nature of the decision

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[34] *SANRAL v Cape Town City* 2017 (1) SA 468 (SCA) at paras 79-81 and *Aurecon SA (Pty) Ltd v Cape Town City* 2016 (2) SA 199 at para 16.

[35] Applicant's Heads of Argument at para 119.

[36] *Wolgroeiers Afslaers (Edms) Bpkv Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at para 39 B-D and 41E.P.

[37] *Gqwetha V Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at paras 22 - 3.

[38] *Vomi V Unitas Hospital and Another* 2008 (2) SA 472 CC para 31.

[39] *Gqwetha supra* n 37 at paras 24 at 613 B-C.

challenged and the potential for any prejudice resulting from the decision being set aside.

[110] In *Khumalo and Another V MEC for Education, Kwazulu-Natal,*[40] the Constitutional Court recognised the importance of public interest in both certainty and finality. The Court per Skweyiya J held as follows:

> '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. 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 action on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.'

[111] However, the same Court has also recognised that delay is not necessarily decisive because, whilst finality is a good thing, justice is better. See *South African National Road Agency Ltd v Cape Town City.*[41] Hence in *Oudekraal Estates (Pty) Ltd v City of Cape Town,*[42] the Court held that an analysis of the problems that arose in relation to unlawful administrative action recognised the value of certainty in a modern bureaucratic State, a value that the Legislature should be taken to have in mind as a desirable objective when it enacted enabling Legislation, and it also gave proper effect to the principle of legality, which was fundamental to our legal order. While the Legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictated that the coercive power of the State could generally be used against the subject unless the initiating act was legally valid. A public authority could not justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act. It was required to take action to have it set aside and not simply to ignore it.

[112] In *Gqwetha*, the Court held that the rationale for formality is less evident too when the matter involves public procurement in respect of which clear governance

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[40] 2014 (5) SA 579 CC at paras 46-8.
[41] 2017 (1) SA 468 SCA at para 108.
[42] 2004 (6) SA 222 (SCA) at para 37.

would require judicial intervention. A tolerance for delay where corruption is found was discussed in *City of Cape Town v Aurecon South Africa (Pty) Ltd*,[43] in which the Constitutional Court observed that if the irregularities raised in the report had unearthed manifestations of corruption collusion or fraud in the tender process, the Court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention.

[113] In his minority judgment in *State Information Technology Agency v Gijima Holdings (Pty) Ltd*,[44] *Bosielo* JA made it clear that Section 7(2) of the Constitution states in peremptory terms that organs of State have a constitutional obligation to respect, protect and fulfil our constitutional obligations. Courts are a constituent part of the State. Like all organs of State, they also have a constitutional obligation to ensure that constitutional obligations are respected and fulfilled. It would be subservice of this constitutional obligations to use the Courts to thwart a party or deny it the opportunity to assist, protect and promote the principle of legality. There is no reason in law, logic or principle that can justify a court to deny an organ of State its right to attack the constitutionality of a contract which is admitted to be unconstitutional simply because it opted for an attack based on the principle of legality and not through PAJA.- otherwise that would amount to a slavish adherence to formalism and compromising substance. Generally, the law is about justice. And justice should not be defected or sacrificed on the matter of formalism.

[114] In this regard, the applicant correctly submits that State institutions should not be discouraged from ferreting out, and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution. Refusing to hear such matters would shield the perpetrators, encourage the commission and concealment of egregious conduct of the nature found in this matter and discourage prosecution by State institutions. This also negatively impacts on the administration of justice.

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[43] [2017] ZACC 5 at para 50.
[44] 2017(2) SA 63 SCA at para 55.

[115] The Constitutional Court in *Khumalo*[45] observed that the passage of a considerable length of time may weaken the ability of a Court to assess an instance of unlawfulness on the facts. It is also important to note that in the same judgment, the Court noted that a legality review has no fixed period within which the review must be launched. The Court also set out the test for assessing undue delay in bringing a legality review application as follows:

115.1 Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter.

115.2 Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.

The test laid down in *Khumalo* was confirmed in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd.*[46]

[116] Furthermore, in *Buffalo City*, the Constitutional Court emphasised that the approach to delay in the context of a legality challenge necessarily involves a broader discretion than the approach under PAJA. The Court also stated that the discretion to overlook an unreasonable delay must be exercised in a "factual, multi-factor, context-sensitive framework" which entails a legal evaluation taking into account a number of factors:

116.1 The potential prejudice to affected parties and the possible consequence of setting aside the impugned decision, and whether that can be ameliorated by the power to grant a just and equitable remedy;

116.2 The nature of the impugned decision, which in essence requires a consideration of the merits and the extent and nature of the impugned decision may be a crucial factor, and

116.3 The conduct of the applicant. There may be a basis to overlook undue delay if the functionary acted in good faith or with the intent to ensure clean governance.

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[45] *Supra* n 40 at para 48.

[46] 2019 (4) SA 331 (CC) at paras 48 and 50.

[117] Some of the factors to the extent to which the delay rule is connected to the merits are tabulated in *Aurecon* which include:

(i) the nature of the relief sought;

(ii) the extent and cause of the delay;

(iii) its effect on the administration of justice and other litigants;

(iv) the reasonableness of the explanation for the delay; and

(v) the importance of the issue to be raised; and the prospects of success.

[118] As already indicated above in this judgment, the respondent submits that section 237 of the Constitution requires that "all constitutional obligations must be performed diligently and without delay". The respondent is also of the view that the delay is inordinate and therefore the Court must not grant condonation for such delay, which will necessitate the Court not hearing the merits.

[119] The applicant submits that the decision is based on the interests of justice. In considering whether to extend the period in terms of PAJA, a Court will be guided by what the interests of justice dictate and in order to determine that question, regard should be had to all the facts and circumstances, which equates with how judicial discretion was exercised before the advent of PAJA.

[120] The applicant implores the Court to deviate from the decision in *Opposition to Urban Tolling Alliance V South African National Roads Agency Limited,*[47] (OUTA) but to follow the *dicta* in SANRAL,[48] in which the Court held that the question as to whether a considerable lapse of time between the relevant decision and the application for review being brought should be condoned is, "inextricably connected to the nature and consequence of the decision as well as with the degree, if any, of non-compliance with statutory prescripts," and whether the non-compliance was egregious. The Court explained that OUTA could not be read as signalling a clinical excision of the merits of the impugned decision as the merits were a "critical factor" in considering all the circumstances of the case in order to determine the dictates of the interests of justice. The totality of the circumstances to be considered involved, *inter alia*, a consideration

[47] [2013] 4 All SA 639 (SCA) at para 22.
[48] *Supra* n 34 at paras 81 and 84.

of the merits of the review application, the prejudice to SANRAL and the public interest. We agree that this is the approach that must be applied in this case.

The Respondent's Argument Why The Delay Is Inordinate

[121] The issue of delay must be determined based on the context of the factual matrix in this matter.

[122] The regurgitation of the respondent's facts giving rise to the delay are as follows:

122.1 The JBCC agreement in respect of Integrated Security Management System (ISAMS) phase 1 was entered on 31 March 2011;

122.2 The JBCC agreement in respect of ISAMS Phase 2 was entered into on 1 July 2014; and

122.3 The JBCC agreement in respect of the Addendum was entered into on 19 September 2014.

[123] According to the respondent, this application was instituted on 5 March 2018, nearly 7 years after the ISAMS Phase 1 was entered into and some 3 and a half years after the ISAMS Phase 2 and addendum were signed. The applicant, being a party to all the agreements, and which relies on its own internal irregularities, was at all times aware of the fact that decisions had been taken, and what the reasons for the decisions were. The delay accordingly falls to be measured from the date on which each of the impugned contracts was concluded.

[124] In support of its stance on the inordinate delay the respondent relies on the following chronology of events:

124.1 On 12 October 2015, the respondent instituted arbitration proceedings against the applicant in respect of respondent's unpaid invoices in ISAMS Phase 1.

124.2 The applicant launched the first review application on 2 February 2016. That review application was predominantly concerned with the review and consequential setting aside of the applicant's administrative decision or actions in awaiting and subsequently concluding the Phase 1 Agreement, the Phase 2 Agreement and the Addendum with the respondent.

124.3 On 1 May 2017, the respondent instituted arbitration proceedings against the applicant in respect of ISAMS Phase 2, in which it pursues payment from the

applicant in respect of the respondent's unpaid invoices that make up the outstanding Phase 2 considerations.

124.4 On 26 May 2017, the respondent instituted arbitration proceedings against the applicant in respect of the unpaid invoices that make up the outstanding Addendum considerations.

124.5 The first review application served before Sutherland J on 2 May 2017. Sutherland J dismissed the review application with costs. The Judge held that the applicant's application was defective for want of compliance with PAJA and that "there is no application before this Court as contemplated in section 9 of PAJA."

124.6 The applicant applied for leave to appeal against the order of Sutherland J, which application was dismissed on 7 July 2017.

124.7 On 21 July 2017, the applicant petitioned the SCA for leave to appeal the judgment of Sutherland J. This application was dismissed on 22 August 2017.

124.8 The arbitration hearings were set down to commence before retired Judges Goldstein and Joffe on 2 and 5 October 2017 respectively.

124.9 On 21 September 2017, the applicant delivered an application to the President of the SCA in terms of section 17(2) (f) of the Superior Court Act 10 of 2013 for reconsideration.

124.10 On 22 September 2017, the applicant launched urgent proceedings before this Court in terms of which it sought an order staying the arbitration proceedings pending the outcome of the reconsideration application and, failing the reconsideration application, a fresh application ("the stay Application").

124.11 The stay application was granted by Brenner AJ on 29 September 2017. On the basis of this order, the arbitrations did not proceed in October 2017.

124.12 The reconsideration application was dismissed by the President of the SCA on 7 November 2017.

124.13 On 19 February 2018, the respondent issued its application under case number 13314/18.

124.14 On 3 March 2018 the applicant launched these proceedings, which were set down together with the respondent's application.

[125] In its main heads of argument, the respondent submits that nearly 7 years after the ISAMS Phase 1 was entered and some 3 and half years after the ISAMA Phase 2 and Addendum were signed, the applicant instituted its application only on 5 March 2018. According to the respondent, the first review application was launched 1817

days and 795 days respectively after the impugned decision in respect of Phase 1 and Phase 2 were taken.

[126] In this regard, we deem it prudent to mention that at the hearing of this application the respondent backtracked from its original assertions of 3 years, and 7 years, 1817 days and 795 days delay to a mere 10 months delay. Despite the change of tack, and capitulating to a delay of only 10 months, the respondent still persists in its contention that the delay is inordinate and that the Court should not grant condonation. We are of the view that all steps taken by the applicant were necessary legal processes.

The Applicant's Explanation For The Delay

[127] The applicant submits that while there was a delay in launching these proceedings, the application was not inordinately delayed. To the extent that the Court should find that the application was inordinately delayed, such delay should be condoned.

[128] It is now trite that the delay rule is connected to the merits of the relevant factors in the enquiry into the interest of justice, as is evident in the exposition in *Aurecon*. Consequently, based on the factors provided by the applicant, although a delay of 10 months may be found to be unreasonable, the said delay is justified by the explanation provided by the applicant.

[129] We have already, elsewhere above in this judgment, dealt with the applicant's detailed explanation of the extent of corruption and unlawfulness involved in the awarding of tenders to the respondent and, the improper conduct by certain officials within the management structure of the applicant. Therefore, only a synoptic recount of those events suffices.

[130] The previous management of the applicant (certain of whom are implicated in the unlawful conduct) ignored concerns and irregularities about the award of the tender and instead demonstrated a single- minded and devoted determination to proceed with the process that resulted in the awarding of work to the respondent, and to

mislead various committees and the board as to the nature and gravity of the irregular conduct at PRASA. The applicant's management at the time simply failed to disclose the impropriety.

[131] The discovery of the corruption was also impeded by the tyrannical manner in which the applicant was controlled by the erstwhile GCEO, Mr Montana. As a result, the applicant was characterised by a culture of conscious ignorance of any wrongdoing and a deliberate avoidance of controversy. A concerted effort was made by certain individuals to prevent anyone from discovering, disclosing and taking action to expose the irregular and unlawful conduct.

[132] Mr. Montana, who is implicated in the irregular and unlawful decision to award the work to the respondent, managed to frustrate the dissemination and communication of relevant information while he was at PRASA, and thereafter through associates who were collaborating with him.

[133] The reconstituted board faced remarkable enmity and extraordinary resistance, including attempts to conceal information and obstruct the unearthing of facts relating to activities and relationships that the board suspected were corrupt or irregular. The Public Protector experienced similar obstacles when conducting her investigation. The Public Protector summarised the attempts to frustrate her investigation in the "Derailed Report". During her investigation, the Public Protector had to piece together the truth as information had to be clawed out of the applicant's management.

[134] The applicant was accordingly compelled to employ exceptional measures in order to expose those facts that were material to this application. The board took the unusual step of appointing forensic investigators. The investigators sourced approximately 1.2 billion documents. These needed to be searched for relevance through keyboards, reviewed for relevance and distributed to the relevant person in the investigation team. A number of people within the applicant were uncooperative and actively hampered the investigation by removing hard copies of the documents from the applicant's premises and deleting electronic copies from their computers in an attempt to protect Mr. Montana and themselves.

[135] The reconstituted board required time to understand the nature of the applicant's business, the various areas in which the business was deficient, and each of the complaints to the Public Protector, make enquiries and obtain information relating to the complaints, ascertain the nature and extent of the irregular activities and expenditure. What made the board's work even more difficult, is that, as a result of the victimization they suffered, certain members of the applicant's board resigned.

[136] Most of the irregularities which underlay the application occurred prior to the tenure of the reconstituted board in August 2014, and during the tenure of the previous executive management committee, controlled by Mr. Montana.

[137] We are of the considered view that, although the delay period of 10 months may render the application to have been inordinately delayed, the circumstances under which the delay occurred, as explained by the applicant, persuade this Court to grant condonation.

CONDONATION

[138] We are in agreement with the submission by the applicant that the matter raises issues of fundamental public importance and if there would be any prejudice, such may be compensated in the form an appropriate remedy. Moreover, the only remedy that the respondent alleges relates to the prejudice if the contract is set aside, not prejudice if the matter is heard. The alleged prejudice should be dealt with at the level of remedy as the Constitutional Court decided in *Gijima*.

[139] We need to reiterate that the approach to delay in the context of a legality challenge necessarily involves a broader discretion than the approach in PAJA. Consequently, in the exercise of our discretion, condonation is granted to the applicant for the late filing of this application.

REMEDY

Relief sought by the parties

[140] Essentially, the relief sought by the applicant is to obtain a declaration that the signing of the agreements dated 31 March 2011 and 1July 2014, together with the addendums thereto and inclusive of the agreements to arbitrated, which were unauthorised, ought to be reviewed and set aside. In the alternative, the arbitration agreements were to cease and have no force or effect. Further, reviewing and setting aside the decision to grant the ISAMS tender to the respondent.

[141] In the event that this court decided that the respondent ought to be compensated, the applicant seeks that the parties be ordered to agree to the appointment of an independent engineer to determine the value of the works already conducted by the respondent. The applicant and respondent are directed to agree on the value of the works and if they fail to, the court will be approached. In addition, as at the date of the order, payments made by the applicant are to be set off against the value of the works conducted and if there is a deficit the applicant shall pay, alternatively the respondent shall pay the excess.

[142] #Unitebehind on the other hand, seeks a declaration of that the contracts are void ab initio and that the respondent be directed to make full restitution of any considerations received. Alternatively, to pay back any profit received. Further, that the respondent be directed to make full and proper account of the implementation of the agreements. In addition, a declaration is sought that the dispute between the applicant and respondent is not arbitrable and that it ought to be referred to a court for oral evidence.

[143] The respondent seeks that the applicant's application for review be dismissed. If they are not successful, the respondent seeks a declaration that an assessment on the value of the work already completed be conducted on a specific rate or as PRASA proposes on a value basis.

[144] In their counter-application the respondent contends that if a declaration of invalidity is made in terms of section 172(1)(b) of the Constitution then they seek an

order that is just and equitable in line with that granted in the *Gijima* case. Thus, the respondent will not be divested of its rights in the contracts as a result of the declaration of invalidity nor are the second and third respondent to be divested of their rights to determine the pending arbitrations.

The Legal Framework

[145] The starting in the crafting of a remedy in this instance is section 172(1)(a) of the Constitution. This section directs a court to declare invalid any law or conduct that is inconsistent with the Constitution. The delay has been declared non-consequential as a satisfactory explanation has been advanced by the applicant. On the undisputed facts, the contracts were unlawful as no procurement process was followed. In addition, the structures erected were not fit for purpose and were beyond the allocated budget. These are sufficient reasons to necessitate a declaration of invalidly in terms of section 172(1)(a). Thus, logic dictates that the contracts have to be set aside after a declaration of invalidity.

[146] That being said, this court is now enjoined to make an order and this is where the prescripts of section 172(1)(b) come to the fore. This section provides that upon a declaration of constitutional invalidity a court:

> '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.'

[147] It is now well established that the powers ascribed by section 172(1)(b) are very wide and remedial. It must be borne in mind that once there is a remedy to be prescribed invariably there had to be an encroachment of a right. 'It is a settled and invariable principle in the law ..., that every right when with-held must have a remedy, and every injury its proper redress'. Put differently for every right, there is a remedy.

[148] In *Fose v Minister of Safety and Security*, Ackermann J enunciated on this maxim and stated:

'... without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or entrenched'.[49]

[149] Pertinently, the Constitutional Court's pronouncement regarding the approach in sanctioning a remedy was echoed in *Steenkamp NO v Provincial Tender Board, Eastern Cape* where Moseneke DCJ held:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. ... Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law'.[50]

[150] To this end the principle of legality and the rule of law has prescribed a default position, to either correct or reverse the import of invalid administrative action. This was affirmed by Froneman J in *Allpay II* who pointed out that:

'Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.'[51]

[151] Critical to the setting aside of the invalid administrative action is the principle of legality and in approaching this, a just and equitable remedy is pivotal. To achieve such 'will depend on the kind of challenge presented; direct or collateral; the interest

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[49] *Fose v Minister of Safety and Security* 1997 (3) SA 786 at para 69.
[50] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 29.
[51] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (Corruption Watch and Another as amici curiae) (No 2)* 2014 (4) SA 179 (CC) at para 30.

involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case'.[52]

[152] Hence, it is imperative to have regard to section 33 and 217 of the Constitution. Section 33 dictates that any administrative action failing to comply with its prescripts of being lawful, reasonable and procedurally fair, is unlawful and must be declared invalid. Section 33 provides:

'Just administrative action:

(1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

[153] Likewise, there has to be compliance with section 217 which decrees the purpose of public procurement as being 'fair, equitable, transparent, competitive and cost-effective' in order to comply with lawfulness and validity.

[154] If a court has established grounds of unlawfulness and invalidity, it is crucial to remember that a court does not have a discretion, but must make a declaration of invalidly. However, it is only when a court is imposing an appropriate remedy does a discretion come into play, which is a wide discretion.

[155] Once the constitutional invalidity has been established it is a requisite that the administrative action be declared unlawful. The employment of the default position in correcting the invalidity involves the imposition of just and equitable relief to serve as a remedial purpose. This 'corrective approach' accords with the principles of legality and the rule of law.

Remedial or Corrective Action

[156] It is evident from the reasons above, where the administrative action is being declared unlawful, this a classic case where remedial or corrective action is the

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[52] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 85.

appropriate and only remedy to be sanctioned. We hasten to add though that such remedial action must be in line with the prescripts of section 172 (1)(b).

[157] We are mindful when approaching this task that it is imperative that remedial action to be employed or imposed must be appropriate and effective in order to redress or undo the prejudice, impropriety, unlawful enrichment or corruption which has occurred. It must be binding to effectively address the complaint or transgression.

[158] The Constitutional Court aptly stated in *Fose*:

> '(A)n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.'[53]

[159] In these circumstances, just and equitability of a remedy are paramount to this court as the purpose of the applicant to operate for the vulnerable communities has taken a toll. This is as a result of the fact that the sustainable development and economic growth within which the applicant operates has been adversely affected to the detriment of the public rail users at large.

Relief

[160] We deem it appropriate that the relief sought by the respondent is an appropriate place to commence. Their relief originates from the premise that the applicant has conceded that they have performed the work and such work has value. Hence, the respondent contends they ought to be paid for such work undertaken in terms of the impugned agreements.

[161] As the respondent has been unsuccessful in this review, it in the alternative agrees with the applicant on the aforesaid score. However, the disagreement between the two lies within the question of the rate or value to be ascribed to the work done in

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[53] *Fose supra* n 49 at para 69.

order to compensate the respondent. The respondent seeks the 'contract rate' rather that the 'value of the works' assessment sought by the applicant. To this end the respondent places reliance on the ratio of *Gijima* to qualify their claim.

[162] The undisputed fact that cannot be ignored is that the respondent did the work according to the instructions of the applicant. Even so, one should not lose sight of the fact that the agreements were unlawful. That being said, it must be borne in mind that the work was executed on the applicant's instructions and as such it would be just and equitable for the respondent to be paid for the work they had executed on those instructions. However, it must be qualified, that the case for the respondent to be paid on a rate as contracted is clearly distinguishable from *Gijima*, as the circumstances in the case of *Gijima* differ from the present case.

[163] In this case the respondent at no stage questioned the validity of the agreements prescribed and entered into. In fact, they were complicit to the corruption, impropriety and maladministration of said agreements. Hence, they cannot now seek to gain from these agreements in respect of the 'contract rates', for it would clearly amount to the respondent profiting from unlawful agreements.

[164] #Unitebehind argues that there ought to be full restitution by the respondent on the impugned agreements. The stance taken by #Unitebehind, with regards to restitution, is not be practical. This is so as one cannot shy away from the fact that work has been conducted by the respondent and this has been conceded by the applicant. Whether it was in terms of the agreements, which are impugned, as according to these agreements the respondent determined its own deliverables. The latter is an issue to be determined in the future.

[165] Turning to the applicant, on its own version, it allowed the agreements to have no delineation of the works, and even after the realisation of this dispute, it still allowed the design of the works to be administered by the respondent. Hence, an independent mechanism to verify the value of works was never implemented. To the contrary, the respondent's version is that it was an innocent party and it complied with the applicant's instruction in fulfilling its contractual obligation to the applicant. In addition,

the applicant basically allowed the respondent to be diligent and proactive as it dictated, and still did until this case, the specification of the works to be conducted on behalf of the applicant. Having done so, the respondent proceeded to do the work and in some instances has completed same, whilst the applicant sat back and merely endorsed same.

[166] In our view, the impracticality of the relief of restitution has been clearly negated above and cannot be authorised in the particulars of this case.

[167] The applicant argued that though the respondent had participated in the maladministration, it conducted the work knowing full well that the necessary procurement procedures were not followed. The structures they built were not fit for purpose, which amounted to fruitless and wasteful expenditure. In our view, the applicant was not an innocent party and had played an active role in the maladministration by abandoning their constitutional obligation in allowing the respondent to benefit from state resources which culminated in public fraudulence.

[168] In the alternative, #Unitebehind seeks relief which, in our view, is akin to that sought by the applicant. The gist thereof being an evaluation of the 'value of the works' already conducted by the respondent. Notably, according to our view, the safe guard placed by the applicant is the appointment of an independent expert to conduct the verification and determine the value of work done. This in essence culminates to all parties having been granted a just and equitable, fair, and realistic resolution.

COSTS

[169] The costs are to follow the result inclusive of the costs of two counsel where so employed.

ORDER

[170] Consequently, the following order is made:

[170.1] (a) The signing of the JBCC agreement, dated 31 March 2011, is declared to be unauthorised.

(b) The signing of the JBCC agreement, dated 1 July 2014, is declared to be unauthorised.

(c) The signing of the addendum agreement, dated 19 September 2014, is declared to be unauthorised.

[170.2] (a) The decision of the applicant to approve the appointment of the first respondent for the Supply and Installation of Integrated security Access Management System (ISAMS) phase 1 tender, is reviewed and set aside.

(b) The decision of the applicant to approve the appointment of the first respondent for the Supply and Installation of Integrated security Access Management System (ISAMS) phase 2 tender, is reviewed and set aside.

(c) The decision to appoint the first respondent for the guarantee, maintenance and upgrading of the equipment, as provided for in the addendum agreement, dated 19 September 2014, is reviewed and set aside.

[170.3] (a) The JBCC agreement, dated 31 March 2011, is set aside.

(b) The JBCC agreement, dated 1 July 2014, is set aside.

(c) The addendum agreement, dated 19 September 2014, is set aside.

[170.4] (a) The arbitration agreement contained in Clause 40 of the JBCC agreement, dated 31 March 2011, is set aside.

(b) The arbitration agreement contained in Clause 40 of the JBCC agreement, dated 1 July 2014, is set aside.

(c) The arbitration agreement contained in clause 40 of the JBCC agreements mentioned above, to the extent that such agreement is incorporated in the addendum agreement, is set aside.

[170.5] (a) The parties shall agree on an independent engineer within 30 (thirty) days of this order, failing which the court may be

approached on the same papers supplemented where necessary to appoint an engineer.

(b) The appointed engineer shall value the works performed by the first respondent and serve on the parties and file in court a report on such value within a reasonable period.

(c) The parties shall agree on the value of the works within 90 (ninety) days of receipt of the appointed engineer, failing which the court may be approached on the same papers supplemented where necessary to determine the value of the works.

(d) The payments made by the applicant to the first respondent prior to the date of this order shall be set-off against the value of the works as agreed or determined by the court.

(e) The applicant shall pay the deficit, if any, after the set-off referred to above to the first respondent within a reasonable period.

(f) The first respondent shall pay excess, if any, after the set-off referred to above to the applicant within a reasonable period.

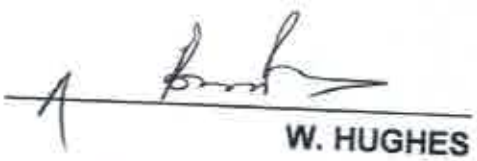
[170.6] The first respondent is ordered to pay the costs, such costs to include the costs of two counsel where so employed.

C. G. LAMONT
JUDGE OF THE HIGH COURT
GAUTENG, PRETORIA

I agree

T.J. RAULINGA
JUDGE OF THE HIGH COURT
GAUTENG, PRETORIA

I agree



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