**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 21/16

In the matter between:

**CITY OF CAPE TOWN** Applicant

and

**AURECON SOUTH AFRICA (PTY) LTD** Respondent

and

**CONSULTING ENGINEERS SOUTH AFRICA** Amicus Curiae

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| **Neutral citation:** | *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5 |
| **Coram:** | Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J |
| **Judgments:** | Mbha AJ (unanimous) |
| **Heard on:** | 3 November 2016 |
| **Decided on:** | 28 February 2017 |
| **Summary:** | Judicial review — 180-day period — Promotion of Administrative Justice Act 3 0f 2000 — condonation — true discretion — unsatisfactory explanation for delay — leave to appeal refused |

## ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is refused.
2. The application is dismissed with costs, including the costs of two counsel.

## JUDGMENT

MBHA AJ (Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring):

*Introduction*

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA).[1] The matter started as a review application in the High Court of South Africa, Western Cape Division, Cape Town (High Court).[2] The applicant, the City of Cape Town (City), seeks to review its own decision in terms of which the respondent, Aurecon South Africa (Pty) Ltd (Aurecon), was awarded a tender for the decommissioning of the Athlone Power Station. Relying on the provisions of the Promotion of Administrative Justice Act (PAJA),[3] the City contends that its decision ought to be set aside on the basis of procedural irregularities in its award of the tender to Aurecon.

[1] *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) (SCA judgment).

[2] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2014] ZAWCHC 51 (High Court judgment).

[3] 3 of 2000.

[2] Consulting Engineers South Africa (CESA) was admitted as *amicus curiae* (friend of the court). CESA is a voluntary association of independent consulting engineers in private practice. It has about 540 members. Given its involvement in the consulting engineering industry, it sought to advance submissions in promotion of the public interest and the interests of the industry.

*Factual background*

[3] In 2008, the City's Spatial Planning and Urban Development Department published an invitation to tender for the performance of a high-level pre-feasibility study in respect of the redevelopment of the site on which the defunct Athlone Power Station is situated. The tender was awarded to a joint venture which comprised Aurecon Engineering International (Pty) Ltd (a wholly-owned subsidiary of Aurecon), and ODA Consulting (Pty) Ltd. The brief given to the joint venture involved a study of the site for redevelopment, a compilation of a scope of work and specifications for the decommissioning of the power station. In 2010, the joint venture completed its draft scope of work.

[4] Initially, the City considered expanding the joint venture's brief to include preparation of tender documents for the decommissioning of the power station. However, City officials established that the City had the necessary skills to perform the task internally and the idea was aborted. Ultimately, the joint venture did not assist in compiling the tender documents. It appears that there was an expectation that Aurecon would tender for the project management of the decommissioning works. During a meeting which was held in the Electrical Services Department of the City on 1 April 2010, and in subsequent email correspondence, the City's head of electricity generation, Mr Davidson, informed Aurecon's project manager, Mr Webb, of that assumption. Mr Davidson added that this would not give rise to a conflict of interest so long as Aurecon did not provide input regarding the "structure of preference", and so long as it was not represented on the City's Bid Evaluation Committee (BEC) or Bid Adjudication Committee (BAC).

[5] Two invitations to tender for the project management of the decommissioning works were advertised by the City after the completion of the joint venture's pre-feasibility study: tender 266C/2010/11, which was advertised on 11 February 2011 and cancelled on 13 May 2011; and tender 459C/2010/11, which was advertised shortly thereafter. Aurecon tendered for the project on both occasions. Five other tenders were submitted to the City. However, the BAC found them to be non-responsive to the tender requirements. Only Aurecon's tender was deemed responsive.

[6] On 31 October 2011, the BAC resolved to accept Aurecon's tender in the amount of R9 748 973.15, subject to the conclusion of the process contemplated in section 33 of the Local Government: Municipal Finance Management Act (MFMA).[4]

[4] 56 of 2003. Section 33 provides:

> "(1) A municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if—
>
> (a) the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved—
>
> (i) has, in accordance with section 21A of the Municipal Systems Act—
>
> (aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and
>
> (bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and
>
> (ii) has solicited the views and recommendations of—
>
> (aa) the National Treasury and the relevant provincial treasury;
>
> (bb) the national department responsible for local government; and
>
> (cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national department;
>
> (b) the municipal council has taken into account—
>
> (i) the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;
>
> (ii) the impact of those financial obligations on the municipality's future municipal tariffs and revenue;
>
> (iii) any comments or representations on the proposed contract received from the local community and other interested persons; and

Aurecon was duly notified of the BAC's decision. The award was subject to a 21-day appeal period as envisaged by the Municipal Systems Act[5] pursuant to which Aurecon would be notified if any appeals had been lodged against the decision. A few days later, Aurecon was informed that an appeal had been lodged against the award, but it was being resolved and Aurecon would be informed of the commencement date of the contract once that process was finalised.

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(iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a)(ii)(cc); and

(c) the municipal council has adopted a resolution in which—

(i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;

(ii) it approves the entire contract exactly as it is to be executed; and

(iii) it authorises the municipal manager to sign the contract on behalf of the municipality.

(2) The process set out in subsection (1) does not apply to—

(a) contracts for long-term debt regulated in terms of section 46(3);

(b) employment contracts; or

(c) contracts—

(i) for categories of goods as may be prescribed; or

(ii) in terms of which the financial obligation on the municipality is below—

(aa) a prescribed value; or

(bb) a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded.

(3) (a) All contracts referred to in subsection (1) and all other contracts that impose a financial obligation on a municipality—

(i) must be made available in their entirety to the municipal council; and

(ii) may not be withheld from public scrutiny except as provided for in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

(b) Paragraph (a)(i) does not apply to contracts in respect of which the financial obligation on the municipality is below a prescribed value.

(4) This section may not be read as exempting the municipality from the provisions of Chapter 11 to the extent that those provisions are applicable in a particular case."

[5] 32 of 2000.

[7] On 17 January 2012, Aurecon received two letters from the City's Director of Supply Chain Management, Mr Shnaps. The first advised that the appeal against the award of the tender had been resolved and that Aurecon would be contacted by the project manager for implementation of the project. The second reiterated that the commencement of the contract was subject to the conclusion of the process under section 33 of the MFMA, and that Aurecon would be notified once that process had been completed.

[8] On 29 August 2012, and in compliance with the provisions of section 33 of the MFMA, the approval of the award served before the City's council meeting. Concerns were raised by some council members that the tender process was tainted by corruption and irregularities.[6] These concerns stemmed from Aurecon's involvement in the pre-feasibility study, as well as its participation in drafting the applicable scope of work. It was alleged that Aurecon's involvement gave it an unfair advantage over the other tenderers who had taken part in the procurement process. Following these developments, the City's Mayor commissioned Ernst & Young (auditors) to investigate and make appropriate recommendations regarding both the process followed in Aurecon's appointment and whether, during the course of the tendering process, there was compliance with the relevant legislation and procurement policies of the City.

[9] On 22 October 2012, the auditors submitted a forensic report. The report recorded a number of irregularities that had allegedly taken place during the procurement process. It concluded that Aurecon had received an unfair advantage over the other tenderers. This was owing to a number of reasons including the fact that: Aurecon was included in the City's internal email communication concerning the tender; an unauthorised member of the BEC participated in the scoring which was in breach of the Rules of Order;[7] the correct evaluation stages were not adhered to in

[6] No allegations of corruption were in fact made. See [50] below.

[7] Clause 200 of the Supply Chain Management Policy requires that BEC meetings be conducted in accordance with the applicable Rules of Order regulating the conduct of meetings of the Bid Specification Committee (BSC), BEC and BAC.

scoring the bids; and the BEC meeting of 5 August 2011 had no chairperson and was therefore not properly constituted and in breach of clause 200 of the Supply Chain Management Policy (SCMP).

[10] Once the City received the forensic report, it furnished a copy to Aurecon and notified Aurecon that it was precluded from bidding for that tender and any future tenders based on the draft scope of work prepared by the joint venture. Furthermore, the City invited Aurecon to make representations as to why the award should not be invalidated. Aurecon submitted representations on 31 January 2013, but it never received a response. Instead, what followed was the launch of review proceedings on 16 April 2013.

*Litigation History*

*High Court*

[11] The City sought the following relief in the High Court:

> "1. an order, insofar as it may be necessary, condoning the applicant's failure to adhere to the 180-day period prescribed in section 7 of the Promotion of Administrative Justice Act 3 of 2000 for the institution of these proceedings;
> 2. an order reviewing and setting aside the award dated 31 October 2012 by the [City's] Supply Chain Management Bid Adjudication Committee of *Tender No. 459C/2010/11: Provision of Professional Services: Decommissioning of Athlone Power Station to the respondent*;
> 2A. in the event of an order being granted in terms of paragraph 2 above, an order that any contract that may have come into existence between the applicant and the respondent as a result of the award, be declared void ab initio; alternatively, that any such contract be set aside."

[12] Aurecon's opposition was based on several grounds. It instituted a counter-application, in which it sought a declaratory order that it was not precluded in terms of clause 95 of the SCMP from bidding for that tender or for any other tender

relating to the decommissioning of the Athlone Power Station.[8] The City opposed the counter-application.

[13] The High Court granted the City's application and dismissed Aurecon's counter-application. It held that Aurecon should have been precluded from tendering for the contract due to its involvement in the preparation of the draft scope of work. As such, the inclusion of its tender rendered the procurement process unfair and constituted a ground for review under section 6(2)(c) of PAJA.

[14] The High Court found that the BAC failed to take relevant considerations into account and that the decision to award the tender thus fell to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA.[9] Regarding clause 95 of the SCMP and regulation 27(4) of the Supply Chain Management Regulations (SCM Regulations), the High Court held that—

> "whilst members of the Bid Specification Committee and the Bid Evaluation Committee may have bona fide believed that allowing the respondent to participate in the procurement process does not violate clause 95 and Regulation 27(4), such approach, in my view, is not only incorrect, wholly unreasonable, but [is] also inconsistent with the value underpinning fairness."[10]

[15] The High Court also found that the City's application had been instituted within the 180-day period prescribed by sections 7(1) and 9 of PAJA.[11]

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[8] Regulation 27(4) of the SCM Regulations and clause 95 of the SCMP both provide:

> "No person, advisor or corporate entity involved with the bid specification committee, or director of such a corporate entity, may bid for any resulting contracts."

[9] High Court judgment above n 2 at para 77.

[10] High Court judgment above n 2 at para 60.

[11] Section 7(1) of PAJA provides:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

*Supreme Court of Appeal*

[16] In the SCA, Aurecon contested all the findings of the High Court and disputed that it had enjoyed an unfair advantage over the other tenderers. In anticipation of a possible finding that its application was late, the City contended that it had made a proper case for the extension of the time period prescribed in PAJA. It also submitted that the High Court's interpretation of regulation 27(4) of the SCM Regulations and clause 95 of the SCMP was correct in that the provisions disqualified Aurecon from bidding for the tender due to its previous involvement in the pre-feasibility study. Aside from this, the City submitted that the irregularities in the procurement process warranted the review and setting aside of the tender that was awarded to Aurecon.[12]

[17] After scrutinising the provisions of PAJA, the SCA observed that judicial review proceedings must be instituted without undue delay and before 180 days have elapsed since the date of the administrative action in issue.[13] This is subject to the proviso that PAJA empowers a court to extend the stipulated period if the interests of justice so require.[14] The SCA noted that the City had launched its application 532 days after the decision to award the tender to Aurecon was made.[15]

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(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

Section 9 of PAJA, in relevant part, reads:

"(1) The period of—

. . .

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[12] SCA judgment above n 1 at para 12.

[13] Section 7(1) of PAJA.

[14] Section 9 of PAJA.

[15] SCA judgment above n 1 at para 14.

[18] The SCA dispelled the High Court's suggestion that the 180-day period begins to run only once the party seeking the review becomes aware of the fact that the administrative action is tainted by irregularity.[16] In considering whether the City had made out a case for condonation, the SCA stated that whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case. Ultimately, the SCA held that the City had not made out a proper case for condonation and that that was dispositive of the matter.[17] Nevertheless, it proceeded to analyse each of the alleged procedural irregularities.

[19] Turning to the question whether clause 95 of the SCMP and regulation 27(4) of the SCM Regulations were contravened, the SCA had regard to the uncontroverted evidence of Mr Silbernagl, an engineering consulting expert. His evidence was that preventing engineers, who have an intimate knowledge of a particular project because of their prior involvement, from tendering would lead to unnecessary and wasteful expenditure. This would be to the detriment of taxpayers and organs of state. The SCA said that this approach had support in the Treasury Guidelines, which allow for consultants, who were involved in previous work, to participate in any competitive process for "downstream" assignments.[18] The SCA then interpreted the words "involved with" according to their ordinary grammatical meaning. It held that the provisions were meant to ensure a fair, equitable, transparent and competitive procurement process to combat nepotism and corruption. In its view, the City's wider interpretation was commercially unsound and contrary to standard engineering practice.[19]

[20] The SCA meticulously assessed each of the grounds under review. These included: the issue of the bids not being evaluated collectively; the participation of a

[16] Id at para 16.

[17] Id at paras 19-20.

[18] The SCA used the example of paragraph 5.9.5.5 of the National Treasury MFMA Circular No 53: Amended Guidelines in respect of Bids that include Functionality as a Criterion for Evaluation dated 3 September 2010.

[19] SCA judgment above n 1 at para 41. The City preferred an interpretation of the term "involved with" to the effect that any involvement by a potential bidder in a project would result in its disqualification from the tendering process. The SCA termed this a "wider interpretation".

non-member in the BEC meetings; the withdrawal of the indemnity qualification by Aurecon; the initial reluctance by Aurecon to provide financial statements; the irregular extension of the validity period of Aurecon's bid; and the alleged material defects in the report prepared by the BEC for the BAC's consideration. The SCA held that none of the alleged irregularities constituted irregularities at all. Aurecon's tender was the only one found to be responsive and the alleged irregularities only occurred after all the other tenders had been found to be ineligible. No other tenderer could have been prejudiced and it was only Aurecon that suffered prejudice due to the City's missteps.[20] The SCA upheld the appeal and set aside the High Court's decision.

*In this Court*

*The City's submissions*

[21] The City contended that the SCA should have dismissed Aurecon's appeal with costs, particularly when looking at (i) whether the City required condonation in terms of section 9, read with section 7 of PAJA, and (ii) whether Aurecon had been entitled to tender for the contract in terms of clause 95 of the SCMP. The City also appealed the findings of the SCA in respect of the various grounds of review, and relied substantially on the same reasons it had advanced in the SCA.

[22] In addressing its first point, the City contended that the High Court was correct in finding that the 180-day period, contemplated in section 7, only began to run once the City had become aware of the irregularities through the Ernst & Young report on 22 October 2012. Therefore the City did not need to apply for condonation because the time period had not yet lapsed.

[23] On the second point, the City persisted with its contention that, on a proper interpretation of clause 95 and regulation 27(4) of the SCM Regulations, it was not necessary to show that a tenderer actively participated in the actual proceedings of the Bid Specification Committee (BSC); or actively attempted to influence the design or

[20] Id at para 44.

content of the specifications; or even that the tenderer intended or hoped to influence the outcome of the tender process, let alone that the outcome was indeed so influenced. To establish that the tenderer was "involved with" the BSC was a sufficient bar to that tenderer's participation which, read within the statutory and constitutional context, ensured transparency, equity and fairness. In the City's view, allowing a party to bid for a contract when the same party had, to a significant extent, determined the specifications of that contract would subvert the requirements of fairness and lawfulness.

*Aurecon's submissions*

[24] In addition to a point *in limine* (preliminary issue),[21] Aurecon further submitted that the review application was brought 532 days after the decision was made and the reasons for the decision were (or ought to have been) within the City's knowledge the moment the decision was taken by the BAC to award the tender to Aurecon. The application was therefore brought after the expiry of the 180-day period prescribed by section 7(1) of PAJA. The City's contention that the 180-day period only commenced when it was provided with full details of the irregularities which had allegedly been committed in the tender process, as opposed to the reasons for the decision was, according to Aurecon, without merit.

[25] According to Aurecon, given that the City did not contend that the SCA erred or misdirected itself in refusing the extension it applied for in terms of section 9(1) of PAJA, that should be the end of the enquiry. Aurecon submitted that should this Court find it necessary to address the issue of condonation, the City had failed to provide a full and reasonable explanation for its delay. Thus it failed to make out a proper case for condonation as envisaged in section 9(1) of PAJA. Aurecon further denied that any irregularities were committed by the City during the tender process that culminated in the decision to award the tender in question to it.

[21] See [29]-[30] below.

*CESA's submissions*

[26] CESA contended that clause 95 of the SCMP and regulation 27(4) of the SCM Regulations are capable of two interpretations. In terms of the strict interpretation, it is always unlawful for a tenderer that was involved in preparatory work which is incorporated into a subsequent tender to be awarded the tender. On the other hand, the flexible interpretation requires the relevant municipality to determine, on a case-by-case basis, whether a tenderer who did preparatory work should be disqualified from being considered for a subsequent tender.

[27] CESA submitted that on a correct interpretation the provisions do not entail a strict rule of disqualification. A strict interpretation would be inimical to section 217 of the Constitution[22] because it produces results which are unfair, inequitable, anti-competitive and not cost-effective. It requires the disqualification of tenderers who may be able to provide an excellent service, at competitive prices, and who have not in any way been advantaged by their involvement in the preparatory work. CESA argued that the provisions require municipalities to make a flexible, fact-specific determination of whether involvement in preparatory work requires the disqualification of a tenderer from consideration for the subsequent tender. In CESA's view such an interpretation accords with section 217, and the purpose of the provisions. It contended that the flexible approach advances competition and cost-effectiveness because a case-by-case determination of whether a tenderer should be precluded from bidding for the subsequent contract will foster fair competition, which

[22] This section provides:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

will ultimately benefit the municipalities and the public. CESA submitted that this flexible approach also gives better expression to the constitutional values of fairness and equity. The European Court of Justice has also endorsed the flexible interpretation in the context of a similar provision.[23]

[28] CESA concluded that in the interests of certainty, it would be appropriate for this Court to pronounce on the proper interpretation of the provisions even if it dismisses the appeal on the grounds of the City's unreasonable delay in launching the review application.

*Preliminary issues*

*Condonation*

[29] Aurecon raised a point *in limine* regarding the City's non-compliance with rule 19(2) of this Court's rules. It stated that the SCA's decision was handed down on 9 December 2015. In terms of rule 19(2) of the Rules of the Constitutional Court—

> "[a] litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

Thus, according to Aurecon, the *dies* (period) expired on 4 January 2016. Since the City filed its application on 18 January 2016, and in the absence of an application seeking condonation from this Court, Aurecon contended that this procedural defect was dispositive of the matter.

[30] However, it should be noted that in accordance with rule 32(2), this Court issued a practice directive specifying that the period between 16 December 2015 and

[23] See *Fabricom SA v État Belge* [2005] ECR I-1559, ECJ; [2005] All ER (D) 67 (Mar).

13 January 2016, inclusive of both dates, was not counted for *dies non* (effluxion of time periods). Taking the practice directive into account, the *dies* expired only on 18 January 2016. Therefore the City was within time in filing its application and an application for condonation was not necessary. Aurecon's point *in limine* therefore fails.

*Leave to appeal*

[31] Jurisdiction in this Court is determined according to section 167(3)(b) of the Constitution which provides that this Court may hear either (i) a constitutional matter; or (ii) any other matter which raises an arguable point of law of general public importance that this Court should consider. It must also be in the interests of justice for the Court to hear the matter.[24]

[32] From the submissions made by the parties, it is evident that two issues arise in this matter, namely, (i) the calculation of the 180-day period contemplated in section 7 of PAJA; and (ii) the prior involvement of a prospective tenderer (which, on the City's submissions, also implicates section 217 of the Constitution). The first issue raised is a constitutional matter given that it requires the interpretation of PAJA which was enacted to give effect to section 33 of the Constitution.[25] The second issue regarding prior involvement is an arguable point of law of general public importance.

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[24] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC) at paras 12-31.

[25] This section reads as follows:

> "(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.
>
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration."

[33] In order to determine whether leave should be granted, we have to consider the prospects of success and determine whether it is in the interests of justice for this Court to determine the matter.

*PAJA or legality?*

[34] An interesting question arose during the hearing: Is an administrator's right to review its own decision sourced in PAJA or the broader principle of legality? The position in our law on this question is presently uncertain.[26] Despite this, both the City and Aurecon were quite content to pursue the matter within the confines of PAJA. The litigants expressly relied upon PAJA in the High Court, the SCA and before this Court. In effect, this may be termed an "inadvertent legal concession". Several of this Court's decisions have held that it is trite that a court is never bound by a legal concession if it considers the concession to be wrong in law.[27] However, I am of the view that this case presents a certain nuance that militates against venturing into a judicial inquisition. The main reason is that it cannot be said for certain that the litigants' reliance on PAJA is "wrong in law" because the law on the issue has not been settled.

[35] While it is tempting to launch a legal expedition and settle the question, I am of the view that this case is an inappropriate channel through which to do so. As was aptly put in *Ferreira*, "it is important that this Court should not be required to deal

[26] In *Khumalo v MEC for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC), this Court considered the nature of an application that was made in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 to review the administrative acts of decision-making officials. At para 28, the majority found that the "true nature of the application [was] one for judicial review under the principle of legality". The minority, on the other hand, at para 92, found that "the procedure for bringing [the] application to Court was governed by the PAJA". More generally, the interplay between review under PAJA and legality review has been extensively discussed and has, at times, given rise to differing interpretations in this Court's jurisprudence. See the cases of: *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC); *Minister of Health v New Click South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC); *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC); *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[27] See for example *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 16; *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67.

with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it".[28] It would be undesirable for this Court to attempt to answer this important administrative law question without the benefit of legal argument from the litigants. To proceed unaided with complex legal questions is likely to give rise to unpredictable and altogether unintended consequences. In *Albutt*, this Court observed:

> "Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so."[29]

[36] The benefit of full argument is indispensable in the decision-making process. I am therefore of the view that the issue ought to be left open until the opportunity properly presents itself. For now, determining the matter within the strictures of PAJA, without deciding whether the litigants' reliance on it is appropriate, is the way in which this judgment proceeds.

[37] While it is so that the case cannot be decided on an assumption of the appropriateness of PAJA as a regulatory framework if legality review might yield a different result, this need not be an insurmountable hurdle to disposing of the present matter within the confines of PAJA. It may well be that there are differences, even significant differences, between condonation in terms of section 9 of PAJA and unreasonable delay under legality review in some cases, but this is not so here.[30] In

[28] *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 165.

[29] *Albutt* above n 26 at para 82.

[30] This may be because of the wording of section 7(1) of PAJA which reads:

the present matter, for reasons set out below, the delay is found to be both unreasonable and outside of the 180-day time limit.[31] The practical implication is that, on these particular facts, it is essentially the same enquiry conducted by the Court as would be the case if assessing the application for condonation within the framework of legality review. The delay in instituting review proceedings in terms of the principle of legality would have been unreasonable and would not have been met with condonation, for the same reasons that are set out below. *Khumalo* confirmed that unreasonable delay in legality review proceedings must be considered in the broader context of the matter, including the prejudice that would result for other parties and the consequences of setting aside an action or decision.[32]

*At what point does the 180-day period begin to run?*

[38] During the hearing, the City submitted that it no longer stood by the concession that it had made before the SCA, i.e. "that it could not be argued that [the City] was unaware of Aurecon's involvement in the pre-feasibility exercise from the onset".[33] The City contended that knowledge by the BEC of Aurecon's involvement in the pre-feasibility study could not be imputed to the BAC and subsequently to the City. On its own admission, it nailed its colours to this mast. The City conceded that should this Court find that the BAC was vested with the knowledge of the BEC, then the City's contention fails.

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> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and no later than 180 days . . ."

Courts, when assessing "unreasonable delay" under PAJA may be guided by the outer-limit of 180 days set in section 7(1), while no such limit exists under legality review.

[31] See [45]-[53].

[32] See this Court's approach to unreasonable delay in the context of legality review in *Khumalo* above n 26 at para 52. In *Gqwetha v Transkei Development Corporation Ltd* [2005] ZASCA 51; 2006 (2) SA 603 (SCA), the majority of the SCA held that when considering a plea of undue delay, the Court should assess: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.

[33] SCA judgment above n 1 at para 15.

[39] The SCMP defines the "City" as "the municipality of the City of Cape Town or any person(s) *or committee delegated with the authority to act on its behalf*".[34] The distinction that the City attempts to draw between what is within its own knowledge and what is within the knowledge of its committees is superficial. It is common cause that the BEC and the BAC are committees mandated by the City for purposes of the tender procurement process. These committees form part of an internal arrangement by the City. Accordingly, it may reasonably be expected that all information regarding the tender process which is within the knowledge of the BAC or BEC, may be deemed to be within the City's knowledge. In my view, that is a weak attempt by the City to deny knowledge of what it ought reasonably to have known.

[40] The City also attempted to distinguish its knowledge of "reasons" from its knowledge of "irregularities". In this regard, the City was of the view that the reference to "reasons" in section 7(1)(b) of PAJA does not refer to formal reasons furnished in terms of section 5 of the Act but merely to "the relevant events giving rise to the particular decision and which render it susceptible to review".

[41] On a textual level, the City's contention confuses two discrete concepts: *reasons* and *irregularities*. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.

[42] On a purposive level, the City's interpretation would give rise to undesirable outcomes. As the SCA pointed out, the City's interpretation would—

> "automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity,

[34] Clause 1.6 of the SCMP.

> whenever that might be. This result is untenable as it disregards the potential prejudice to [Aurecon] and the public interest in the finality of administrative decisions and the exercise of administrative functions."[35]

[43] In my view, the City cannot suggest that it "was not aware of the reasons for the decision prior to receipt of the [Ernst & Young] report". The decision was taken by the BAC which approved the BEC's report without qualification. The resolution of the BAC records that it awarded the tender to Aurecon "for the reasons set out in the [BEC's] report". Since the BEC's report served before the BAC, the BAC must have been aware of those reasons when it made its decision.

[44] What emerges from this discussion is that the City clearly brought its application outside the 180-day period prescribed by section 7(1) of PAJA. However, this does not necessarily mean that its review application cannot be entertained. Section 9 of PAJA allows the Court to shorten or extend the periods relating to non-compliance with the stipulated time periods "where the interests of justice so require". What follows is an assessment of the City's case for condonation.

*Condonation in terms of section 9 of PAJA*

[45] The City launched its application 532 days after the decision to award the tender to Aurecon was made. Taking the 180-day period into account, its application was 352 days late. The question is whether the City has made a proper case for condonation. This will invariably require determining whether the City offered a satisfactory explanation that necessitates a relaxation of the rules in the interests of justice.

[46] Section 237 of the Constitution sets out that "[a]ll constitutional obligations must be performed diligently and without delay". In a similar vein, section 7(1) of PAJA states that "[a]ny proceedings for judicial review . . . must be instituted *without*

[35] SCA judgment above n 1 at para 16.

*unreasonable delay*". The SCA, relying on this Court's decisions in *Van Wyk*[36] and *eThekwini*,[37] adeptly set out the factors that need to be considered when granting condonation as follows:

> "Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."[38]

[47] In considering whether condonation should be granted to the City, the following principle enunciated in the majority decision of *Kirland* should be borne in mind:

> "There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."[39]

[48] The City's application was nearly a year late. The City was questioned during the hearing specifically on the seven month delay from 17 January 2012 to 29 August 2012. The former was the date on which Aurecon was informed that a pending appeal against the award of the tender had been resolved. The latter was the date on which the City tabled the award for consideration in terms of section 33 of the MFMA. Its counsel could not offer any reason for the delay other than ascribing it to bureaucratic governmental processes. Suffice to say, this explanation is unsatisfactory.

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[36] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

[37] *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2014 (3) SA 240 (CC); 2013 (5) BCLR 497 (CC) at para 28.

[38] SCA judgment above n 1 at para 17.

[39] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 82.

[49] Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success. In this case, that means considering the significance of the alleged procedural irregularities that were raised in the Ernst & Young report. It should be borne in mind that, when carrying out a legal evaluation a court must, where appropriate, "take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision".[40]

[50] The SCA held that the procedural irregularities as alleged were not in fact irregularities at all and, before this Court, the City did little to assuage that finding.[41] If the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this Court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention. However, this is not such a case and a weighing of factors leans decidedly against granting condonation.

[51] Over and above the City's inadequacies on the merits of its condonation argument, it also failed to root its discretionary challenge properly. Although the City asked for condonation in its notice of motion, it does not challenge the SCA's exercise of discretion to refuse the granting of condonation in its papers before this Court. In proffering an explanation for the delay, the City merely states that "it will be in the interests of justice to grant condonation". The rest of the condonation argument is effectively a disavowal of the SCA's interpretation. No doubt, this explanation is completely inadequate and unsatisfactory. Since the City does not suggest that the SCA erred in refusing to grant condonation that is the end of the enquiry. On this ground too, the appeal should be dismissed. Although the matter has been decided on

[40] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 28.

[41] SCA judgment above n 1 at para 43.

the basis of PAJA, the City's claim would have nevertheless failed under legality because, even on those terms, the delay was unreasonable.[42]

[52] On an aside, the City also tried to persuade us that the SCA had unduly interfered with what it termed the "true discretion" of the High Court in refusing condonation when the High Court would have, in counsel's terms, granted it. This submission was incorrect. The High Court had found it unnecessary to consider condonation since, on its interpretation, the 180-day period had not yet lapsed. There can be no question of undue interference by the SCA where no discretion to grant condonation has been exercised by the High Court. If anything, the SCA had exercised a narrow discretion in refusing to grant condonation.[43] As was recently held by this Court, "[i]nterference on appeal in a lower court's exercise of a discretion is possible only if the discretion was not judicially exercised".[44]

[53] In the result, the City has not advanced any persuasive submission that the SCA's discretion was not exercised judicially.

*Prior involvement of a prospective tenderer*

[54] Given that this matter is disposed of on the basis that the City was out of time and failed to make out a proper case for condonation in terms of section 9 of PAJA, it is not necessary to venture into the arguable point of law raised, namely the prior involvement of a prospective tenderer. Although the applicant and CESA implored this Court to pronounce on the proper meaning of "involved with" as contained in regulation 27(4) of the SCM Regulations and clause 95 of the SCMP, the general principle as set out by this Court in *National Coalition* is that this Court does not

[42] See *Wolgroeiers Afslaers v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) and more recently, *Khumalo* above n 26 at para 44 where this Court held that "it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings".

[43] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

[44] *Psychological Society of South Africa v Qwelane* [2016] ZACC 48 at para 42.

pronounce on issues which are moot (which essentially would equate to providing an advisory opinion).[45] The question of "involved with" becomes moot by virtue of the fact that the City failed to make a case for condonation. However, the determination by the Court that a matter is moot is a discretion that must be exercised taking the interests of justice into account.[46] In *Independent Electoral Commission*, the Court held as follows:

> "This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues."[47]

[55] I accordingly will not be venturing into any discussion on prior involvement. In the result, the application falls to be dismissed.

*Costs*

[56] Since the City is unsuccessful in seeking leave to appeal, the ordinary *Biowatch* principles apply.[48] Aurecon is entitled to its costs, including the costs of two counsel, which are warranted given the complexity of the matter.

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[45] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (*National Coalition*) at para 21 footnote 18.

[46] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 17.

[47] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11.

[48] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 43.

*Order*

[57] In the result, the following order is made:

1. Leave to appeal is refused.
2. The application is dismissed with costs, including the costs of two counsel.

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| For the Applicants: | A Katz SC and P S van Zyl instructed by Cliffe Dekker Hofmeyr |
| For the Respondent: | A Cockrell SC and J A van der Westhuizen instructed by Weavind & Weavind |
| For the Amicus Curiae: | N Ferreira and L Nyangiwe instructed by Hogan Lovells (South Africa) Inc |