THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1104/2019

In the matter between:

ALTECH RADIO HOLDINGS (PTY) LIMITED	**FIRST APPELLANT**
THOBELA TELECOMS (RF) (PTY) LIMITED	**SECOND APPELLANT**
ABSA BANK LIMITED	**THIRD APPELLANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**RESPONDENT**

Neutral citation: *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* (1104/2019) [2020] ZASCA 122 (5 October 2020)

Bench: PONNAN, WALLIS, DAMBUZA and MOLEMELA JJA and SUTHERLAND AJA

Heard: 24 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 5 October 2020.

Summary: Legality review – delay – whether delay unreasonable – whether delay should be condoned.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baqwa J sitting as court of first instance):

(a) The appeal is upheld with costs, including those of two counsel.

(b) The order of the court below is set aside and replaced by:

'The application is dismissed with costs, including those of two counsel.'

JUDGMENT

Ponnan JA (Wallis, Dambuza and Molemela JJA and Sutherland AJA concurring)

[1] State self-review is a novel, but burgeoning, species of judicial review that has occupied the attention of our courts in a number of recent decisions.[1] Although it seems axiomatic that unlawful conduct must be undone, to borrow from Dr Seuss 'simple it's not'. Particularly worrisome are public procurement cases, where, as here, an organ of state seeks to undo its own prior decisions.

---

[1] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (4) SA 331 (CC) para 111.

[2] In this matter, the respondent, the City of Tshwane Metropolitan Municipality (the City), has sought to review its own decisions, because, so it asserts, it failed to comply with its own rules, misinterpreted certain statutory prescripts and maladministered its own tender process in respect of the appointment of a service provider for a municipal broadband network project (the project).

[3] As at 2013 the City owned an existing communications network infrastructure of approximately 500 km of fibre. However, that was considered inadequate. The City accordingly embarked upon the project with a view to developing a smart city. The primary objective of the envisaged smart city was to improve service delivery as well as lower the costs of government services and operational requirements. According to the City, the purpose of building a carrier grade broadband network (the network) was to support and accelerate the delivery of municipal services, provide socio-economic development and bridge the digital divide.

[4] The project was spearheaded by Mr Jason Ngobeni, the then City Manager, and Mr Dumisani Otumile, the Chief Information Officer of the City. At a special Mayoral Committee meeting held on 15 May 2013 a business case for undertaking the project was presented and approved. The initial public tender, which was advertised on 27 May 2013, had to be aborted. During August 2014 the tender process for the project re-commenced. On 3 September 2014, Mr Otumile sent a draft Request for Proposal (RFP) to the chair of the Bid Specification Committee and on 15 September 2014 the RFP together with an invitation to bidders was published.

[5] By the closing date for the submission of tenders, namely, 14 October 2014, eight submissions were received by the Bid Evaluation Committee (BEC) of the City. On 11 May 2015 the BEC resolved to recommend the first appellant, Altech Radio Holdings (Pty) Limited (Altech), as the successful bidder. The City awarded the tender to Altech on 9 June 2015. That very day, Mr Ngobeni recorded in a letter to Altech that any agreement 'will likely be through a special purpose vehicle to be incorporated . . . for [the] successful funding of the project'. In due course, a special purpose vehicle (SPV) was established for the project in the guise of the second appellant, Thobela Telecoms (RF) (Pty) Limited (Thobela).

[6] Upon the award of the tender, the third appellant, ABSA Bank Limited (ABSA) and the Development Bank of Southern Africa (the DBSA) (the lenders) committed to providing Thobela with financing for the project. On 30 March 2016, ABSA, Thobela and the City's attorney, Kunene Ramapala Inc (KR Inc) held a conference call with a view to the preparation of a draft agreement. ABSA thereafter furnished KR Inc with certain suggested revisions to the draft agreement, whereafter the Council of the City (the Council) approved the draft agreement. On 28 April 2016 the Council passed a resolution approving the conclusion of a Build Operate and Transfer agreement (the BOT agreement) with Thobela. On 20 April 2016, KR Inc provided ABSA with the final version of the BOT agreement. The BOT agreement was signed by the City and Thobela on 5 May 2016.

[7] In the meanwhile, KR Inc had provided ABSA with a draft Tripartite agreement (the Tripartite agreement) on 18 April 2016. The next day, the City, KR Inc, Thobela and ABSA met to negotiate and finalise the terms of the Tripartite agreement. On 4 August 2016, and following extensive negotiations,

ABSA, Thobela and the City concluded the Tripartite agreement, in which ABSA (with the support of the DBSA) agreed to grant loans and make funds available to enable Thobela to meet its obligations under the BOT agreement to the City.

[8] The BOT and Tripartite agreements provided for the funding, construction, operation and maintenance of 1500 km of fibre-optic cable known as the Tshwane broadband network. In accordance with the City's developmental goals, the network was intended to cover currently underserviced areas, which are principally in the poorer parts of the City. The duration of the project was to be for 18 years, split into a 3-year build phase and a 15-year maintenance phase. In terms of the BOT agreement, Thobela was required to build, operate and maintain the network for a period of 18 years from the effective date of the agreement (namely 31 August 2016) and to fund the capital cost of doing so. Ownership of the network would transfer to the City for R1 at the end of the 18-year period or on termination of the BOT agreement, if terminated earlier. In the event of early termination, payments might be due depending on the reason for the termination as set out in the early termination clauses of the BOT agreement.

[9] The capital costs were to be principally funded by loans from the lenders. The total funding for the project was R1,335 billion. The total senior debt funding commitment by ABSA and the DBSA on the project was R934 million (being 70% of the total funding), the balance being equity and loan funding to the tune of R401 million.

[10] There were two key aspects to the project's commercial viability. The first was that the City had committed to being the 'anchor customer' of the network. It

had agreed to pay a service fee to Thobela for the duration of the BOT agreement in exchange for the level of service specified therein. The fee was described as the 'offtake amount', being an annual service fee of R244 million, payable on a monthly basis once all 400 of the City's designated service sites, termed CPEs, had been installed. The service fee was to be phased-in in proportion to the number of CPEs installed. The second key aspect was the potential for the future commercialisation of the network's surplus capacity.

[11] On the day prior to the signing of the Tripartite agreement, the 2016 South African municipal elections were held to elect councils for all district, metropolitan and local municipalities in each of the country's nine provinces. Although the ruling political party, the African National Congress (ANC), secured the highest number of votes overall nationally, it lost control of three metropolitan municipalities, including the City. The official opposition party, the Democratic Alliance (the DA), became the head of a coalition government of the City's municipality. The municipal elections ushered in a new Municipal Council, Speaker, Mayor and Mayoral Committee. On 19 August 2016 the new municipal councillors were sworn in and Mr Solly Msimanga of the DA became the Executive Mayor of the City.

[12] Having won control of the City, the DA set its sights on a number of procurement contracts, including the BOT agreement, which, so it stated, had been targeted for 'review and possible cancellation'. But at least a year was to pass before the City applied on 22 August 2017 to the Gauteng Division of the High Court, Pretoria for an interdict coupled with a review application. Relief was sought in two parts. Under Part A, the City sought to urgently interdict the implementation of the

agreements. Under Part B, the City sought to review certain decisions taken by its own officials over the period September 2014 to April 2016. The target of the application under Part B was the tender process and the subsequent contracts concluded by the City including the BOT and Tripartite agreements. Altech, Thobela and ABSA, who were cited by the City as the first to third respondents respectively, opposed the application. The remaining respondents, who were cited by virtue of their interest in the matter, took no part in the proceedings.

[13] The urgent application served before Brenner AJ on 19 and 21 September 2017. On the latter date, the learned judge struck the application from the roll for want of urgency and ordered the City to pay punitive costs on the scale as between attorney and client.

[14] Part B was enrolled as a special motion and heard by Baqwa J over a period of four days from 22 to 25 May 2018. The application succeeded. On 16 July 2019 the learned judge issued the following order:

'1) The award of the tender, with tender number GICT 01/2014/15, for the provision of a municipal broadband network project to ARH, which decision was communicated to it on 11 June 2015 in a letter dated 9 June 2015 including any purported amendment of such letter is declared invalid and set aside.

2) The decision of the Municipal Council of the Tshwane Metropolitan Municipality, in its entirety to *inter alia*, approve the terms and sign-off of the build, operate and transfer agreement ("the BOT agreement") of the Tshwane Broadband Network for the City of Tshwane taken on 28 April 2016 is declared invalid and set aside.

3) The decisions of the erstwhile Group Chief Information Officer and City Manager to amend clause 4.1 of the BOT Agreement which was subsequently entered into between the City of Tshwane and Thobela on 5 May 2016, the effect of which was to extend the period

provided for the fulfilment of the suspensive conditions alternatively, their purported waiver of such conditions is declared unlawful and set aside.

4) The following contracts concluded pursuant to the tender award have lapsed and are unenforceable, alternatively, are invalid and are set aside, -

4.1 the BOT agreement

4.2 The Tripartite Agreement entered into between the City of Tshwane, Thobela, and Absa Bank Limited, signed on 4 August 2016.

5) The first, second and third respondents are ordered to pay the costs of the application, which costs include the employment of three counsel.'

[15] The appeal by Altech, Thobela and ABSA is with the leave of Baqwa J granted on 17 September 2019. Their case is that the delay by the City in launching the review application is so manifestly and egregiously unreasonable that it cannot be overlooked or condoned. That, so the argument goes, is dispositive of the appeal in their favour. In the alternative, it is contended that if the delay falls to be condoned and if any of the grounds of review advanced by the City are upheld, then it would not be just and equitable for the BOT and Tripartite agreements to be set aside and that in the exercise of our remedial discretion under s 172 of the Constitution, we should decline to do so.[2]

[16] The delay rule is a principle that flows directly from the rule of law and its requirement for certainty. The Constitutional Court has held that there is a strong public interest in both certainty and finality.[3] The City asserts that it was compelled

---

[2] See inter alia *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* (*Asla Construction*) [2019] ZACC 15; 2019 (4) SA 331 (CC) paras 65-71.

[3]*Khumalo and Another v Member of Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 47.

as a matter of constitutional duty to bring the review application. Whilst this may be so, there nonetheless was a duty on it to do so expeditiously.

[17] Despite concerns having been expressed about the increasing reliance on legality review at the expense of the constitutionally mandated legislation, the Promotion of Administrative Justice Act of 2000 (PAJA), it is now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA.[4] Prof Hoexter observes that 'the development of the principle of legality is another illustration of the vigour and fecundity of the rule of law'. She does add however that 'in short, the courts made the principle of legality mean whatever they wanted it to mean as they went about creating a sort of common law for the constitutional era'.[5]

[18] A legality review, unlike a PAJA review, does not have to be brought within a fixed period. However, whilst the 180-day bar set by s 7(1) of PAJA (which may be extended under s 9) does not apply to a legality review, in both, the yardstick remains reasonableness. 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 either overlook the delay or refuse a review application in the face of an undue delay.[6]

---

[4] *Gijima* fn 2 above.
[5] C Hoexter 'South African Administrative Law at a Crossroads: The Paja and the Principle of Legality' adminlawblogorg 28 April 2017.
[6] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 44.

[19] The test for assessing undue delay in the bringing of a legality review application is: first, 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); and, second, if the delay is unreasonable, whether the court's discretion should nevertheless be exercised to overlook the delay and entertain the application.[7]

[20] As it was recently put in *Valor IT v Premier, North West Province and Others*:[8]

'Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.'

[21] The City appears not to dispute that there has been a delay, but suggests that the delay is not unreasonable. The application was launched more than two years after the decision to award the tender to Altech, some 16 months after the Council had approved the BOT agreement and a year after the Tripartite agreement had been signed.

---

[7] Ibid.

[8] *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA) para 30; See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 17; *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC) para 46.

[22] It was incumbent on the City to provide a full explanation covering the entire period of the delay.[9] The explanation, such as it is, for the most part, is superficial and unconvincing. The City does not raise any allegations of corruption or fraud. Although various conjectural and speculative hypotheses of malfeasance were initially advanced in the founding affidavit, the City appears to have confined itself in reply to complaints of 'serious mismanagement'. But it makes no case that any of the appellants are responsible for or connived in such maladministration or mismanagement. The procurement process commenced during September 2014. Many of the City's key personnel, who had been involved in the tender process and the conclusion of the agreements, remained in the employ of the City after the August 2016 Municipal elections. They were thus in a position (and ought) to have provided explanations for the delay.

[23] The City does not rely on a cover-up or contend that documents or information was destroyed or concealed by officials loyal to the previous administration. There is no evidence of what steps, if any, were taken in order to obtain the necessary information; on what dates and by whom such steps were taken; what sources were accessed or why any of these attempts proved unsuccessful. Nor, when, how and who allegedly did not co-operate. The City chose not to ask officials such as Mr Ngobeni or Mr Otumile to assist with their investigation. It says that it decided not to ask them for any information because the investigation was 'sensitive' and consulting with them 'may well compromise the investigation'. Those two individuals, who deposed to confirmatory affidavits in support of the appellants'

[9] *Asla Construction* para 80.

case, said that they were available and willing to assist the City, but were never contacted.

[24] The core contention advanced by the City is that the delay is justified because the DA only won control of the City in August 2016 and thereafter required time to investigate the alleged irregularities perpetrated under the previous ANC-controlled administration. That contention appears to have found favour with Baqwa J, who held:

'. . . officials of the previous administration who vacated their positions with the [City] were no longer there to account for their omissions and the new officials had to find their way virtually in the dark to establish the correctness or otherwise of the decisions of their predecessors. . . .'

[25] I cannot agree with the learned judge. At the level of law, a change in political control of an organ of state, such as the City, is irrelevant. The City is a single juristic entity. It accepts that the change in political administration did not make it a different juristic entity. In any event, at the level of fact, as I shall show, in this case much of the evidence relied on was known (or ought to have been known) to the DA well before it assumed control of the City.

[26] As early as 25 February 2015, Mr Msimanga had labelled the project 'a dodgy deal'. On 16 February 2016 he and the DA spokesperson for finance, Mr Lex Middleberg, declared at a press conference that the BOT agreement and broadband project were irregular. On 28 April 2016 a comprehensive report spanning 288 pages was tabled before the Council. It highlighted many of the issues subsequently relied upon by the City in its review application. Those issues were debated during the Council meeting, whereafter the BOT agreement was approved.

The DA participated in the debate and its councillors, including Mr Middleberg, requested that their dissenting votes be recorded.

[27] During December 2014, the City engaged a firm of external consultants, SekelaXabiso (SkX) to conduct an assurance review of the procurement process followed for the project. It has since emerged that even prior to the award of the tender, on 6 March 2015, the City had received a draft probity report prepared by SkX. In the report, SkX identified issues that, as it was put, may have a negative impact on the next stage of the tender process, which could pose reputational damage or financial risk to the City.

[28] Despite this, on 26 May 2015 the BEC recommended that Altech be appointed as the successful bidder for the project. The recommendation came after SkX had published its final probity report on 20 March 2015, which recorded that the concerns raised could be addressed during the contractual negotiation phase. Notwithstanding the two SkX probity reports, the City proceeded to the next phase of the project. Importantly, the City retained SkX as it advisors on the project even after the DA took over the administration.

[29] Shortly after the DA took over the administration of the City, KR Inc was mandated in August 2016 to conduct an in-depth due diligence exercise in relation to the procurement process. KR Inc produced a detailed 161-page due diligence report. In the meanwhile, on 30 June 2016 the Auditor General (AG) had prepared a report as part of the annual audit of all state entities. This report was communicated to the City on 14 November 2016. As the City has pointed out ‘the report is extremely critical of the broadband project to the point that it states that all

expenditure on the project constitutes irregular expenditure.' There is no doubt that the DA was aware of the report, which it publicised on 15 December 2016.

[30] On the basis of the information that the City then had at its disposal, namely, the council report, the SkX probity report, the KR Inc due diligence report and certainly by no later than the receipt of the AG's report in November 2016, all of the grounds ultimately relied upon in the review application, were well within the DA-led City's knowledge. Despite this, the City continued with the project.

[31] What is more, the City blew hot and cold. On 13 July 2016, KR Inc addressed a letter to Thobela indicating that the City regarded the finalisation of the project as critical and that it would not allow any further extensions of the date for the fulfilment of the suspensive conditions beyond 31 August 2016. This caused Thobela to waive the outstanding suspensive conditions in the BOT agreement, which had been inserted for its benefit.

[32] On 14 October 2016 the then Acting City Manager, who had been appointed under the new DA regime, addressed a letter to Thobela emphasising that the BOT agreement was binding on it and took issue with the delays in ordering equipment necessary for the project. The letter stated that 'both parties have contractual obligations imposed on them by the BOT agreement which was entered into after 10 months of intense negotiations. The BOT agreement was then signed . . . after both parties were satisfied with its terms and we can confirm that no party signed under duress'.

[33] On 21 November 2016 the City wrote to Thobela demanding that it 'commence performance and proceed in terms of the agreement immediately' and threatened cancellation of the agreement if it failed to do so. However, less than a month later, in the course of his 100-day speech on 12 December 2016, Mayor Msimanga announced that the City would 'submit the broadband contract to a transactional advisor to check legality and value for money of the contract'.

[34] Following on Mr Msimanga's announcement, on 14 December 2016, a DA member of Council, Mr Brink, directed a letter to the Acting City Manager that 'the broadband contract be placed on hold pending the outcome of the aforesaid transactional audit' and required confirmation 'that this instruction will be given, and executed'. On 20 December 2016 Mr Brink issued a similar instruction to the new Acting City Manager. Whilst his first instruction had not been acted upon, his second had the desired effect. The new Acting City Manager instructed Mr Otumile to ensure that the 'decision of the Executive Mayor is adhered to and implemented and that the broadband rollout is immediately put [on] hold until such time that the said audit is completed'.

[35] Mr Otumile, in turn, informed Altech that the project had to be put on hold until the transactional audit had been completed. On 21 December 2016 Thobela responded to Mr Otumile's email. It indicated that whilst it supported the transactional audit, it would not consent to the suspension of the agreements. On the same day, the City proceeded to deny Thobela, Altech and their sub-contractors access to the sites. This continued into January 2017. On 13 January 2017 Thobela served a notice of breach on the City itemising damages and demanding that the

latter forthwith allow it access to the site for the purposes of performing its contractual obligations.

[36] Whilst this was playing itself out, Mr Brink despatched an email to various councillors and City officials on 15 January 2017 in which he inter alia stated that: he had 'put the brakes on the project'; 'the direct parties to the agreement are tenderpreneurs' and when 'we were in opposition we had serious reservations about this agreement'.

[37] The City eventually only agreed to allow Altech and Thobela to return to the site after they had threatened on 1 February 2017 to institute urgent proceedings to enforce their rights under the BOT agreement. On 9 February 2017 the City advised that Thobela 'may immediately continue with the project and that it will be granted access to the premises to enable it to continue with the implementation of the Tshwane broadband network'. The letter was attached to an email from Mr Brink dated 10 February 2017, in which he recorded that a meeting had been held between the administration officials of the City and representatives of Altech and Thobela the previous day and the City had decided to allow the project to continue 'in tandem' with the audit.

[38] Minutes of a steering committee meeting held four days later record that the City required the project to be fast-tracked to make up for the two months lost. The project then proceeded with only minor disruptions, but evidently not fast enough for the City. On 22 May 2017, the City directed four letters to Thobela. It was clear from these letters that the City wanted the project expedited and demanded a revised fast-track plan from Thobela for this purpose.

[39] The fact that the City had commenced with the preparation of its review application was not disclosed to any of the appellants. When precisely it resolved to do so, is unclear. As the City put it: 'at the end of April 2017, and pursuant to persistent demands by Thobela, the City decided that it had little choice but to seek legal redress' and briefed its attorneys in 'about May 2017'.

[40] That notwithstanding, at the management and steering committee meetings of 6 and 7 July 2017, the City agreed to a new expedited schedule, which provided for the completion of the project by 31 March 2019. During July 2017, when there were delays caused by community unrest, which prevented contractors accessing the site, the City requested Thobela to 'redirect work to a different site in the interim while the City endeavours to resolve the community unrest issue in order to avoid delays on the project'.

[41] By 31 August 2016 all of the conditions precedent to the BOT agreement had been fulfilled or waived. The BOT agreement accordingly became unconditional. Financial close, namely the stage when all of the conditions have been met or waived and the lenders authorise the drawdown of the funds, occurred on 9 December 2016. Before allowing Thobela access to the funds, the lenders specifically required comfort from KR Inc. Without such comfort, they would not have allowed Thobela access to the funds. On 9 December 2016, KR Inc provided ABSA with the comfort sought, in the form of an opinion, which, inter alia, stated that the BOT and Tripartite agreements 'constitutes legal, valid and binding obligations of the [City] enforceable against the [City] in accordance with its terms' and that the [City]

complied with all relevant laws, regulations and policies, including but not limited to, its procurement framework and policies . . . in connection with the tender'.

[42] As a direct result of KR Inc's opinion, the lenders signed the financing agreements relating to the project and, on 15 December 2016, ABSA provided Thobela with the first drawdown to fulfil part of its obligations to the City under the BOT agreement. According to Thobela, to facilitate the fast-tracking of the project demanded by the City, it was forced to draw down on the facility with the lenders.

[43] The appellants were not privy to the various reports or the internal workings of the City and had arranged their affairs on the strength of the fact that the tender had been lawfully awarded and the BOT agreement validly concluded. As at 15 January 2018, Altech and Thobela had incurred costs and liabilities to the tune of approximately R610 million. And, by the time that the review application was launched, the build phase of the project was 34% complete.

[44] The project has since been frozen. It cannot be salvaged or repurposed because it was specifically designed to meet the City's requirements. What has been constructed thus far can provide no service to the City and is effectively useless. Altech and Thobela have also parted with possession of the equipment and materials installed at the various sites. There is every possibility that some of the equipment may since have been lost or damaged or simply diminished in value. Given that the equipment is specifically marked and branded for the City, to the extent that it may be recoverable, it is likely to be of little or no value to Altech and Thobela. The prejudice to the appellants as well as the residents of the City, who remain saddled with a dysfunctional municipal IT network for which the City currently pays

R226 million per annum, is manifest. The City is forced at a substantial additional annual cost to supplement its existing network, because its ability to render services on the existing network is severely restricted.

[45] The high court failed entirely to have regard to the position of the lenders. The lenders had no involvement until the award of the tender. They only became involved after Altech's appointment. There then followed extensive negotiations, before the Tripartite agreement was concluded. At no stage did the City disclose any concerns to the lenders. The City's failure to communicate with the lenders is important because in the event of a material adverse effect event, including the threatened cancellation of the tender or BOT agreement by the City, the lenders would have been entitled to refuse to extend further financing to Thobela. The City was aware of these terms affording the lenders protection but did nothing to alert them that it entertained concerns and was contemplating challenging the BOT agreement. The City thereby denied the lenders the opportunity to mitigate the potential adverse consequences of the cancellation of the BOT or Tripartite agreements.

[46] The position of the DBSA is most telling. On 8 December 2016 the DBSA wrote to the Acting City Manager, noting with some concern the statements that had been attributed to the new Mayor regarding transactions that may be up for review by the City. The letter stated:

'[W]e . . . request that you please advise the DBSA should there be any reason for the bank not to proceed with its financing of this project in its current form. Should such grounds exist we would highly appreciate, given that drawdown on the project facility is imminent, if the DBSA could please be finished therewith within the next week.'

That letter went unanswered.

[47] On 22 February 2017 the DBSA despatched another letter to the City, in which it recorded that: (i) a further drawdown on the loan facility was imminent; (ii) it had, in the past received and relied on various communications from or on behalf of the City that the tender and BOT agreement was valid and enforceable; (iii) the works were progressing under the BOT agreement, lending further support to the view that the BOT agreement and underlying procurement processes were valid; and (iv) seeking confirmation by 24 February 2017, before it advanced the second drawdown, that the City still regarded the BOT agreement as valid, binding and enforceable and that there were no threatened administrative law challenges and no other reason for it not to continue.

[48] Once again there was no response from the City and so the DBSA despatched yet a further letter on 27 February 2017, which recorded that, in addition to the prior assurances received from the City, the DBSA would also rely, in effecting payment to Thobela, on the City's failure to respond negatively to the earlier letter of 22 February. On 28 February 2017 the DBSA received a response, in which the Acting City Manager said no more than he had received the DBSA's letter of 22 February and would reply by 3 March 2017. On 1 March 2017 the DBSA wrote again drawing attention to the City's failure to respond timeously to its correspondence and intimated that, in consequence, it had effected payment of the second tranche due to Thobela, as it was obliged to do.

[49] Eventually, on 8 March 2017 the DBSA received a response from the City, which was dated 3 March 2017. The City did not provide the DBSA with the requested assurances. What it said was the following:

'1. The current administration of the [City] has commissioned an audit of all major existing procurement contracts awarded by the [City]. The contract between the [City] and Thobela is one of the contracts currently under audit.

2. There is currently no pending judicial review of the decision by the [City] to award the contract to Thobela and/or the contract concluded between it and the [City].'

[50] There appears to be no acceptable explanation for the City's excessive delay, as well as inconsistent and vacillating conduct, which has caused extensive hardship to the appellants and other interested parties. On the City's own version, the facts relevant to some of the grounds of review were known to the City and its new political masters long before the BOT agreement was even signed. The facts relevant to most of the other grounds of review were known to them before the rollout of funds on the project commenced in December 2016. It is not correct that a bright line can simply be drawn between what happened before the municipal elections and what happened thereafter.

[51] Moreover, despite having knowledge of some of the alleged irregularities for more than two years, the City both encouraged and demanded that Altech and Thobela accelerate the project and make up for lost time, thereby causing them to take a multitude of steps and to incur huge expenditure. It is noteworthy that in his correspondence, Mr Brink identified a number of the grounds relied upon by the City in support of its review application, which did not require investigation of the sort undertaken by the City over the course of the next nine months. He also emphasised

the position of innocent third parties as well as the constitutional obligation resting on the City to act immediately.

[52] The City was also fully aware of the involvement of ABSA and the DBSA as lenders, the terms on which they were lending money and the possible risk of loss to them. At no stage prior to 22 August 2017, when the review application was launched, did the City give any indication to the lenders that the award of the tender was tainted with irregularities or that the transactions in which the lenders had become involved were susceptible to being impugned. This, despite the fact that the City knew of the alleged irregularities of which it now complains either at about the time of their occurrence or, at the very latest, certainly before any of the funds were advanced. Had the City acted with proper expedition and been candid about its intention to review the award of the tender, the bulk of the expenditure incurred could have been avoided.

[53] It nonetheless remains to consider whether the prospects of success on the merits, tips the scales in the City's favour. The City's grounds of review turned, in the first place, on alleged irregularities and discrepancies in the tender documents and the evaluation of the bids and, in the second, on the alleged failure in concluding the BOT agreement to follow the mandatory processes required by the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA), particularly s 33 and the provisions regulating public-private partnerships.

[54] Search hard enough in public procurement cases, such as this and one will surely find compliance failures along the way. There will seldom be a public procurement process entirely without flaw. But, perfection is not demanded and not

every flaw is fatal. Nor does every flaw in a tender process amount to an irregularity, much less a material irregularity. Public contracts do not fall to be invalidated for immaterial or inconsequential irregularities. Indeed, as it has been put, '[n]ot every slip in the administration of tenders is necessarily to be visited by judicial sanction'.[10]

[55] In this case, counsel for the City appeared to accept the difficulty in setting aside the BOT agreement on the basis of the original irregularities in the tender process. It is accordingly only to the second leg, namely the City's failure to comply with s 33 of the MFMA, that one need turn.[11] The high court held that the City had

---

[10] *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* [2010] ZASCA 13; 2010 (4) SA 359 (SCA) para 21.

[11] Section 33 of the MFMA headed 'Contracts having future budgetary implications', 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

(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);

not understood that the BOT agreement did not include Altech/Thobela assuming responsibility for the existing network and the financial implications of this. But, the draft BOT agreement that was considered by the City plainly stated as much. The high court held that 'the best way to afford the new network was for the service provider to be responsible for both the existing budget to be "reprioritised" and the extended network'.

[56] The City currently pays R226 million per annum for its outdated and dysfunctional network. In the course of his 100-day speech, Mr Msimanga acknowledged that '[t]he ICT infrastructure we inherited was dilapidated and overrun with outdated software, service out of warranty, and the city's entire network left vulnerable and exposed'. The project committed the City to an annual cost of R244 million for a network that would replace the dysfunctional existing network and greatly extend its capacity and range of coverage. The BOT agreement provided the City with a 30% share of the net profit after tax that Thobela would derive from the commercialisation of the excess capacity on the network. It was envisaged that this would materially reduce the actual cost and might even allow the City to offset the offtake amount in its entirety. It would almost inevitably cover the

---

(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.

difference of R18 million between what the City was paying for its dysfunctional network, which ought to have been replaced years ago, and the R244 million offtake amount.

[57] The fact that the offtake amount had been provided for in the City's budget was specifically confirmed in a letter dated 14 October 2016, which was addressed by the Acting City Manager to Thobela. The letter pointed out that the 'costs have already been fixed and factored into the budget'. Further, KR Inc expressly recorded in the due diligence report that: (i) the tender was correctly awarded; (ii) the project had been budgeted for; and, (iii) the City would not seek special funds for the project, but leverage funds from its existing budget. The City adduced no acceptable factual evidence to dispute the correctness of these previous communications. Importantly, the City was not paying for the build phase of the project. It is thus unclear how they were supposed to budget for the future in respect of the project, any more than they budget for other future items of expenditure. It follows that on this score the high court erred.

[58] A consideration that appeared to have weighed with the high court in setting aside the BOT agreement, is that Altech 'failed to identify itself appropriately in its bid documents'. It is plain from the documents that Altech had submitted a bid on the basis that if successful, the project would be performed by a project company or SPV established for that purpose. There was no confusion or ambiguity in that regard. The then City Manager, Mr Ngobeni, understood as much.

[59] Altech framed its bid in that fashion, because it anticipated that in a project financing transaction of this kind, it would inevitably be necessary to house the

project in a project company or SPV. Thobela and ABSA explained in their affidavits why this was necessary and that this is the usual practice, even in contracts with organs of state arising from public procurement processes. As a special purpose project finance vehicle, Thobela's sole purpose and business was the building and operating of the network for the City and the ultimate transfer of that network to the latter. The lenders confirmed that this is common in BOT and similar project finance type transactions, including transactions involving state owned enterprises and organs of state.

[60] The draft BOT agreement circulated for comment expressly provided that the envisaged service provider would be a project company and not Altech itself. The proposed shareholding in the project company was specified in the report that served before the Council on 28 April 2016. The City took no issue with this. Nor, did the other role players including the National and Provincial Treasury, who commented on the draft agreement during the s 33 process.

[61] Further, KR Inc recorded in the due diligence report that:

'. . . the project was eventually awarded to Altech . . . Who indicated in their tender response letter that in order to run the project, they would form a consortium which may consist of individuals from [various named entities] It envisaged at the tender stage that the parties would form a SPV for purposes of the project. Subsequently, the SPV was formed and finally named Thobela Telecoms Proprietary Limited.'

Well aware that the BOT agreement was with Thobela and not Altech, KRI Inc certified that the agreement constituted 'legal, valid and binding obligations of the City'. This disposes of the s 33 ground.

[62] Turning to the public-private partnership (PPP) ground: In terms of the MFMA Regulations –

'public-private partnership means a commercial transaction between a municipality and a private party in terms of which a private party –

(a) performs a municipal function for or on behalf of a municipality, or acquires the management or use of municipal property for its own commercial purposes, or both performs a municipal function for or on behalf of a municipality and acquires the management or use of municipal property for its own commercial purposes; and

(b) assumes substantial financial, technical and operational risks in connection with –

(i) the performance of the municipal function;

(ii) the management of use of the municipal property; or

(iii) both; and

(c) receives a benefit from performing the municipal function or from utilizing the municipal property or from both . . . .'[12]

[63] The project was not a PPP because it did not involve the performance of a municipal function or the provision of a municipal service, and it did not involve the use of municipal property for commercial gain. Municipalities have no constitutional competence in relation to telecommunications.[13] The obligation of Thobela to build and operate the network and to provide services to the City did not therefore amount to the performance of a municipal function or the provision of a municipal service.

[64] The BOT agreement did not involve the management or use of municipal property for Thobela's own commercial purposes. Under the BOT agreement, Thobela would use its own network. It is only at the end of the operating period that

---

[12] 'Municipal Public-Private Partnership Regulations GN R309, *GG* 27431, 1 April 2005.'

[13] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29; 2015 (6) SA 440 (CC) para 186.

the network would be transferred to the City. At no stage whilst Thobela would be deriving commercial profit, would the network be municipal property. Nor does the fact that the network would run on or over municipal land bring it within the definition of a PPP. It follows that the high court erred in finding that the City ought to have followed the procedures for a PPP.

[65] The high court failed to weigh-up the consequences of setting aside, against not setting aside, the BOT and Tripartite agreements. As this court observed in *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others*:[14]

> 'The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*, is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'

[66] It is so that in *Millennium Waste* this court ordered that the tender be evaluated afresh. It did so, because a tender had been unlawfully disqualified and had not been evaluated. Importantly, this is not as simple a contract as was the case in *Millennium Waste*. It is a substantial contract, with implications for millions of the City's residents. *Millennium Waste* recognised that following upon the acceptance of a

---

[14] *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA); para 23.

tender, parties usually proceed to implement the tender and that further agreements are concluded. That is precisely what has occurred here. The high court failed to consider the indivisible nature of these arrangements, which renders the setting aside of the BOT agreement completely impracticable.[15]

[67] The high court ignored the fact that the build phase of the project was 34% complete and that in excess of R610 million had already been expended on the project. It also ignored the fact that following upon the conclusion of the BOT and Tripartite agreements, further agreements had to be concluded for the engineering, procurement, construction, operation and maintenance of the network. During December 2016, three batches of equipment with a total value of R184 million arrived in South Africa, the first on the 13th, the second on the 19th and the third on the 21st. On 14 December 2016, Thobela purchased 850 km of fibre duct from Dark Fibre Africa Proprietary Limited for an amount of R114 million. These are by no means exhaustive. When the proceedings were brought, Thobela owed Altech R220 million in respect of work done by the latter on the project and its capital exposure to the lenders stood at R258 million. These debts attract interest. Thobela will no doubt be confronted with claims from the lenders and, in turn, will presumably look to the City to make good those losses. Should the lenders come short, they may well also set their sights on the City. The upshot of all of this is that one way or another the setting aside of the BOT and Tripartite agreements will not be the end of the matter.

---

[15] *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* [2010] ZASCA 13; 2010 (4) SA 359 (SCA) paras 16 – 20.

[68] I think that the court was far too receptive to the City's case. In focusing as closely as it did on the asserted irregularities, it lost from sight that it was engaged in a 'multi-factor and context-sensitive' enquiry. The court accordingly ignored almost entirely the other considerations alluded to in *Valor IT v Premier, North West Province and Others*.[16]

[69] When all is said and done, there is no escape from the facts. Even though armed with the evidence upon which it now relies, the City, both under its previous administration and also the present administration, sat back over a protracted period, but wants this indifference to be disregarded entirely. The City had several opportunities to have alerted the appellants to its misgivings or brought review proceedings. It did neither. This inaction has left the appellants, financially exposed. The appellants, who were entirely removed from the tender, could not second-guess the regularity of the procurement process of an organ of state. The funders and the other appellants were entitled to assume that the City would have acted in a manner that is fair in all the circumstances.[17] They were also entitled to assume that the City would have complied with its own internal arrangements and formalities.[18]

[70] There seems much to be said for the suggestion that the City is not truly trying to vindicate the rule of law, but using the review to evade, rather than assert its constitutional obligations. The City has not jettisoned the idea of a broadband

---

[16] *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA) para 30; See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 17; *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC) para 46.

[17] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC) paras 152 -155.

[18] *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) para 12.

project. What it envisages, should the BOT and Tripartite agreements be set aside, is 'the provision of a network as envisaged by the BOT Agreement, but on such terms [as] are more favourable to the COT and the conclusion of which would be lawful'. In a similar vein, in his email of 15 January 2017, Mr Brink stated: '[t]he end result is to provide an auditing firm with a concise brief as to what suspicions to confirm, and questions to answer as to the validity of the agreement, and its possible renegotiation'. The City thus seemed intent on invoking administrative law remedies to strike what it hoped would be a better bargain for itself. In this regard it is noteworthy that none of the unsuccessful tenderers challenged the outcome. In any event, the expert evidence adduced by the appellants was that the Altech 'solution offered provides the City with the best value proposition'. It is indeed so that the evidence of an expert, tendered because of his (or her) special knowledge, skill or experience, must of course be regarded with a measure of caution. But here, there was simply nothing to gainsay the evidence.

[71] The objective of state self-review should be to promote open, responsive and accountable government. The conduct of the City renders the delay so unreasonable that it cannot be condoned without turning a blind eye to its duty to act in a manner that promotes reliance, accountability and rationality and that is not legally and constitutionally unconscionable.[19] Here, the delay is stark and the egregious conduct on the part of the City, even starker. The City has a 'higher duty to respect the law'. It is not 'an indigent and bewildered litigant, adrift in a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline'.[20]

---

[19] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC) paras 57 and 63.

[20] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82.

[72] Given the excessive delay, the absence of a reasonable and satisfactory explanation for the delay, the unconscionable and highly prejudicial conduct of the City and the lack of merit in the review the court below ought not to have condoned the delay.

[73] Before closing it is necessary to pass some comments about: first, the role of KR Inc; and, second, the record and the approach of the legal practitioners in compliance with the rules of this court. Of the first: The conflict is plain. KR Inc has acted throughout for the City. They were immersed in the procurement process from the outset. They represented the City with regard to the award of the tender, the conclusion of the BOT agreement and the conclusion of the Tripartite agreement. Throughout that process, they engaged on behalf of the City with Thobela, Altech and the lenders.

[74] They had also undertaken an in-depth due diligence exercise and signed off on the project in a detailed report and furnished the lenders with the comfort that they had sought. It was obviously furnished in the knowledge that it would be acted upon. Indeed, it was. The lenders proceeded to advance funds to Thobela for the project. KR Inc were particularly well placed to provide the assurances sought. And, as officers of the court, they would undoubtedly have been aware of the implications and weight of their opinion. This is especially so, since they specifically acknowledged that:

'the opinion . . . may be disclosed by [ABSA] in connection with any due diligence or other defence advanced or made by you in any court proceedings, arbitration, action or other legal proceedings .

. . arising in relation to the proposed financing provided to the Service Provider as set out in the [BOT agreement]'.

For all this, KR Inc continues to act for the City in these proceedings. It should not have done so especially as members of the firm were clearly potential witnesses in the proceedings.

[75] As to the second: The parties evidently made no real attempt to comply with the rules of this court in preparing the record. How else can one make sense of a record in excess of 5000 pages, consisting of 12 volumes, sixteen 16 core bundle volumes and two index volumes? Inexplicably, the core bundle exceeds the main record of the proceedings by some 750 pages. 'Sub-rule 8(7)(c) makes it plain that the core bundle is to be prepared as an adjunct to the appeal record.'[21] It should have consisted of a conveniently arranged and accessible collection of those documents to which it was anticipated special reference would be made during the hearing of the appeal. Although the correspondence exchanged between the attorneys in purported compliance with Rules 7, 8 and 9 was included in the record, it is difficult to discern how they fixed on the portions considered essential to the determination of the appeal.

[76] Those rules are augmented by the requirement of a practice note in terms of rule 10A(ix). One of the items to be dealt with in the practice note, which is to accompany counsel's heads of argument, is 'a list reflecting those parts of the record that, in the opinion of counsel, are relevant to the determination of the appeal.' As

---

[21] *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) paras 39 to 45. Sub-rule 8(7) provides as follows:
'(7)(a) A core bundle of documents shall be prepared if to do so is appropriate to the appeal.
(b) The core bundle shall consist of the material documents of the case in a proper, preferably chronological, sequence.
(c) Documents contained in the core bundle shall be omitted from the record, but the record shall indicate where each such document is to be found in the core bundle.'

Harms JA explained in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*:[22]

'The object of the note is essentially twofold. First, it enables the Chief Justice in settling the roll to estimate how much reading matter is to be allocated to a particular Judge. Second, it assists Judges in preparing the appeal without wasting time and energy in reading irrelevant matter. Unless practitioners comply with the spirit of this requirement, the objects are frustrated and this in turn leads to a longer waiting time for other matters.'

[77] In addition, rule 10A(b) requires 'a certificate signed by the legal practitioner responsible for the heads of argument that rules 10 and 10A(a) have been complied with'. Although certificates in accordance with rule 10A(b) were filed in this matter, it was clear that rule 10A(ix) had initially been observed only in the breach.[23] It was accordingly, necessary to call for revised practice notes to be filed by counsel. Counsel were informed that they were required to indicate with greater specificity the portions of the record considered necessary for the determination of the appeal. The revised practice notes filed in response to the directive from the judges hearing the appeal are instructive. Three of the four counsel, made no reference whatever to the main record. The fourth referred only to a total of 76 of the 2327 pages. The upshot is that, on any basis, little regard could have been had to the rules of this court in the preparation of the record.

[76] Should there be a sanction? This court has previously emphasised that practitioners may in appropriate circumstances be penalised if the rules are ignored.[24] Whilst the primary obligation to prepare the record rested with the appellants, in this

---

[22] *Caterham Car Sales & Coachworks Ltd. v Birkin Cars (Pty) Ltd. and Another* 1998 (3) SA 938 (SCA) para 36.
[23] *Van Aardt v Galway* [2011] ZASCA 201; 2012 (2) SA 312 (SCA) paras 32-38.
[24] *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA) paras 40-44.

case it is apparent that all parties were equally to blame for the non-compliance. I have considered whether some or other punitive order for costs should not be made, but in view of the fact no one party can be singled out and that all parties were at fault in respect of the preparation of the record, it seems to me, on reflection, that a special cost order is not clearly warranted. I am also alive to the fact that, on account of the project having been brought to an abrupt halt because of the litigation, a significant measure of urgency attached to the appeal, which had to be heard on an expedited basis.

[77] In the result:

(a) The appeal is upheld with costs, including those of two counsel.

(b) The order of the court below is set aside and replaced by:

'The application is dismissed with costs, including those of two counsel.'

_____

V M Ponnan
Judge of Appeal

APPEARANCES

For First Appellant:	A Subel SC (with him E Kromhout) Instructed by: Lowndes Dlamini Attorneys, Sandton Phatshoane Henney, Bloemfontein
For Second Appellant:	M Chaskalson SC (with him I Currie) Instructed by: ENSafrica, Sandton Webbers, Bloemfontein
For Third Appellant:	G Marcus SC (with him M Musandiwa) Instructed by: Norton Rose Fullbright, Sandton Webbers, Bloemfontein
For Respondent:	M Rip SC (with him R Raubenheimer and L Nyangiwe) Instructed by: Kunene Ramapala Inc., Braamfontein Blair Attorneys, Bloemfontein