IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case No: 041563/2024

DELETE WHICHEVER IS NOT APPLICABLE

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

18 September 2024

DATE SIGNATURE [redacted]

In the application between:

DATACENTRIX (PTY)LTD	**APPLICANT**
and	
SANPARK	**FIRST RESPONDENT**
GIJIMA	**SECOND RESPONDENT**
REIKEMETSE PROJECTS CC.	**THIRD RESPONDENT**
WIRE SPEED SYSTEMS (PTY)LTD.	**FORTH RESPONDENT**
NEC XON SYSTEMS (PTY) LTD	**FIFTH RESPONDENT**
TRY LIL BYTES -THEMOLO JV	**SIXTH RESPONDET**
BUSINESS CONNEXION (PTYLTD	**SEVENTH RESPONDENT**

JUDGMENT

NHARMURAVATE AJ

Introduction

[1] This is an opposed urgent review application brought in terms of section 7(1) of the Promotion of Administration of Justice Act 3 of 2000 (PAJA) wherein the Applicant (Datacentric) seeks the following relief in terms of the notice of motion:

"1. Dispensing with the forms and services provided in the uniform rules of court and directing that the application be heard on an urgent basis in terms of the uniform rules 6(12)(a)

2. Reviewing and setting aside the requests for bids relating to the tender GNP 005-23 for the appointment of a service provider for the outsourcing of information and communication technology services, a single services service aggregator including network services construction for a period of ten years.

3. Reviewing and setting aside the first respondents' decision to award the tender GNPS- 005-23 for the appointment of a service provider for the outsourcing of information and communication technology services, a single service aggregator including network services and infrastructure, for a period of ten years, to the second respondent.

4. Setting aside and declaring invalid any contract that may have been concluded between the first respondent and the second respondent pursuant to the first respondent's decision to award the tender GNP-005-23 for the appointment of a service provider for the Outsourcing of Information and Communication Technology, Services, a Single Service Aggregator including network services and infrastructure for a period of 10 years for the second respondent"

[2] ……

[3] The review application is opposed by both Respondents that is the First Respondent South African National Parks and the Second Respondent Gijima Holdings (PTY) LTD.

[4] This judgement will only be dealing with the points in *limine* raised by the Respondent regard being had to prayer number 2 of the notice of motion and the amended notice of motion filed on the 5th of August 2024.

The Applicants Presentation

[5] Upon, the Applicant presenting its case in relation to prayer number 2 of the notice of motion concerning the review and the setting aside of the request for bids (RFB), it submitted that the question of condonation in relation to the first leg of the review, if necessary, would be addressed during the argument. The reason argued by the Applicant was because the point in *limine* concerning condonation was bound up with the merits. When the court considers the condonation application it would be bound up with the facts and how meritorious or lacking in merit the application was. Therefore, condonation would be addressed as part and parcel of the debate on the merits.

[6] The above prompted an urgent objection from the Respondents who raised a point in *limine* and argued against such presentation regard being had to condonation. They further raised another point being the amended notice of motion filed without following proper process in line with the uniformed rules of court. This was supported with an SCA decision which clearly delineates that condonation issues needs to be decided outright before the court can decide on the merits of the issues that are before it[1].The Respondents argued that the Applicant did not comply with the statutory requirements of PAJA regard being had to prayer number 2 which concerned a review and a setting aside of the request for bids(RFB) issued on the 4th of September 2023. In that the Applicant failed to seek condonation as the review, was brought outside the 180-period prescribed by PAJA as the period was calculated from time the RFB was advertised.

[7] In this regard the Applicant's view was it can argue condonation bound up with the merits as part of good *cause* is to show strong merits which it believed it has.

[1]Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality 2017 (6) SA 360 (SCA)

Additionally, that it was well within the time prescribed and therefore did not need to seek condonation. Alternatively, the Applicant did seek "*conditional"* condonation considering their replying affidavit read together with the amended notice of motion which this court is obliged to consider, should it deem it necessary that condonation was required.

[8] This court was thereafter called upon to make a ruling whether condonation should be heard first without hearing the matter in its entirety. This court thereafter ruled that it should be addressed on condonation by the Applicant which is a norm if not a standard in our courts.

[9] Section 7(1) of PAJA provides that "*proceedings for a judicial review*" of an administrative act must be instituted "… *without reasonable delay and not later than 180 days*" after the date of the reasons furnished for the decision appreciate it[2]. Should a party not be able to comply with the 180-day requirement, such a party may apply to a court for an extension thereof as provided for in section 9 of PAJA, which extension may be granted "*where the interests of justice so require*".

[10] In my view, the question of condonation in relation to PAJA specifically section 9[3] requires that the condonation be sought outright. The delay must be explained to the court it cannot be ignored by the Applicant who seeks to review the administrator's decision. Condonation in this regard and as rightfully argued by the Respondents is a statutory requirement it is not your normal common law requirement which at times come before the court where in parties must show good cause and strong merits[4].

[11] In the *Opposition to Urban Tolling Alliance* Brand JA said (para 26):

`*At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned… Up to a point, I think, s 7(1) of PAJA requires*

[2] Section 7(1) any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date.

[3]Section 9(1) in turn provide that: " (*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*.

[4] Mostert v Registrar of Pensions Funds 2018 (2) SA 53 para 34

the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all[5]*.'*

[12] In fact, before the court can even consider the merits of the matter the question of condonation has to be fully addressed on the papers which are before court[6].

The First Argument

[13] The Applicant argued that the Respondents have not raised or complained in their answering papers that they were prejudiced by the conduct of the Applicant in not explaining the delay that was caused in seeking the review. The question of condonation was only addressed by the Respondents on their heads of argument. In rebuttal both Respondents argued that it was not for the Respondents to raise the question of condonation in their answers, but it was for the Applicant to satisfy the statutory requirements wherein the Applicant has exceeded the period of 180 days as required by the statute.

[14] The Respondents supported this argument with a full court decision wherein the court pronounced that:

"This brings me to the question whether the court a quo erred in allowing the Minister to raise the point when he had not done so in his papers. Where it appears from the applicant's papers that there had been a delay of more than 180 days, and there is no application for an extension of the period, a respondent is in my view entitled to raise the point in argument that the court has no power to hear the review. This is not raising a defence – it is a submission that, on the applicant's own papers, the court has no power to entertain the review. If the court is entitled to raise the point mero motu then

[5] 2011 (4) SA 42
[6] City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 233 (CC) para 46

there can be no reason why the respondent should not be allowed to raise it. It was in any event dealt with by both parties in their heads of argument, and the appellant elected not to seek leave to file a further affidavit."

[15] Therefore, the first point argued by the Applicant that the issue of condonation was not addressed by the papers filed by the Respondents is put to bed by the ***Mostert*** decision. It is common cause that both Respondents clearly raised this issue on their heads of argument. Mr. Maritz for the Second Respondent even highlighted that he did inform the Applicants Counsel Mr. Subel that the issue for condonation will be taken as a *point in limine* as it was not addressed on paper which was well before the courts hearing.

[16] In my view, the Applicant as *dominus litis* and they must meet the requirements set by PAJA. It is not for the Respondents to raise the question so that it can be attended to by the Applicant. In fact, the Applicant has a duty to comply with Section 7(1) read together with section 9(1)(b) of PAJA. Section 7(1) directs that a review must be instituted without delay, the language used does not give a discretion to a litigant to comply as and when he/she deems it fit. However, the usage of the word "*must"* impose a legal obligation upon the Applicant that compliance is mandatory not only when the Respondents have raised it as a point of law in their papers. The usage of the word "*must"* in section 7(1) denotes a minimum requirement for the Applicant to conform to the specification which was not met by the Applicant.

The Second Argument

[17] The second argument raised by the Applicant is that it does not need to seek condonation simply because the RFB was an ongoing process wherein the court needs to go on an inquiry of when these irregularities would have taken place starting from the 3rd September 2023 up to the bid closing stage which was the 31st of October. The argument was that different irregularities in the processes up to and including the closing date would have given different results considering the dates. However, the Respondents argued that this was not the

case made on paper let alone addressed in the reply that the court was directed to rely on in the interest of justice.

[18] In my view the applicant raised a terrible argument which is in contradiction with the allegations made on the reply. The court cannot be expected to deal with issues not raised on the founding inclusive of the supplementary papers[7]. To closely examine this issue Mr Bham for the First Respondent directed the court to para 11 of the Applicants reply which expressly reads as follows:

[19] "*The applicant will apply for leave to amend its amended notice of motion by introducing an additional prayer for an order extending the time period of 180 days provided for under section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") in relation to the relief sought in paragraph 2 of the amended notice of motion.* ***The RFB was published on 4 September 2023 and the applicant's review was instituted on 17 April 2024. The 180 days calculated from 4 September 2023 expired on 2 March 2024. The applicant will seek the court's leave to condone the late delivery of the review in relation to the relief sought in paragraph 2 of the amended notice of motion (ie. the order reviewing and setting aside the RFB)****. I am advised that the court may extend the time period of 180 days if the interests of justice require it. It will be submitted that it is in the interests of justice that the time period of 180 days be extended by the honourable court. The delay did not cause prejudice to the respondents and they have not complained of any prejudice. The reasons for the delay has been explained in the founding and supplementary affidavit.*"(own emphasis)

[20] In the Applicants own words, the 180 days started on the 4th of September 2023 when the RFB was published, and the period of 180 days expired on the 2nd of March 2024. The replying affidavit contradicts the argument raised by Mr Subel

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7 *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*,[7] the court held that: -"*Consequently, the applicant must set out sufficient facts in the founding affidavit to disclose a cause of action, that is, the founding affidavit must be self-contained. The replying affidavit (and in this instance the supplementary affidavit) cannot be used to augment the applicant's case*."

for the Applicant, that the irregularities stretch beyond the closing date of October 2023 as this is not the case made out on paper. The basis used by the Applicant to support why it did not require condonation was that there were several irregularities in the pre-closing stage. There were also several irregularities in the post-closing stage the court had to deal with the merits of the RFB *as one* cannot avoid inquiring into what those irregularities were at the publication of the RFB, during the bid closing stage and the documents in between that occurred on the 7th and 10th of November 2023.

[21] The Applicant submitted that if you calculate the 180 days from the 10th of November the review was filed well within time. These were submission made by Mr Subel for the Applicant from the bar without any of these facts being prevalent on the papers filed which amounts to gross prejudice to the Respondents who did not get an opportunity to deal with such allegations.

[22] A review must be brought within 180 days, this is a statutory requirement if it is not brought within the 180 days then an application for condonation must be brought. Therefore, the argument raised by the Applicant that this court needs to decide when the irregularity of the RFB started and ended is flawed regard being had to the reply. Accordingly, paragraph 11 of the replying affidavit concretized the 4th of September 2023 as being the date when the 180 days period started running. The court enquired where all these submissions were made on the founding or the supplementary in this regard let alone the reply which the court was asked to consider in relation to condonation. It was met with a concession from Mr Subel for the Applicant that these were not addressed on paper, but the court could consider same in light of the heads of argument filed read together with the affidavits filed. The court sought authority in this regard which it did not receive at that stage except for being erroneously referred to the Mostert decision.

[23] The elasticity of the dates as rightfully argued by Mr Bham for the First Respondent does not apply herein as the issuing of a request for bids is an administrative action and if there is a problem with it, it is challenged right at the

time that it is issued[8]. In the Imperial matter the court held that "*I am thus satisfied that, on the facts of this case, the RFB constituted an administrative action that was ripe for a judicial challenge. Imperial was therefore perfectly entitled to resort to judicial review without having to await the formal notification of the outcome*."

[24] The case law above supports the date of the 4th of September 2023 as being the date when the period of 180 days started running. This seemingly was also supported by the deponent to the Applicants papers. It was not clear why the contrary was argued.The RFB was not based on a continued process neither was the case made out on paper that indeed this was the case. The case made out on paper was that the RFB was a tender document published on the 4th of September 2023. Considering, the Imperial decision the court does not need to entertain issues not raised anywhere on paper. Let alone where the Applicant admits on his own through the reply that the period of 180 days started running from the 4th of September expiring on the 2ND of March 2024, acknowledging that they must apply for condonation which they subsequently do not do.

[25] The Respondent are correct in arguing that the Applicant understood that it needed to sought condonation but voluntarily elected not to attend to it appropriately if at all. Prayer number two is straight forward it is to *review and set* aside the requests for bids.

[26] In my view, the Applicant seek to set aside the actual RFB document which came to their attention as far back as the 4th of September 2023. There was a clear indication made by the Applicant in the replying affidavit that there was a delay in instituting the review therefore, the Applicant should have demonstrated that the delay was not unreasonable by seeking condonation in their founding papers alternatively in their supplementary affidavit dated the 1st of July 2024. This is because when the first founding papers were filed in April 2024 the Applicant was already out of time as per the admission on the replying affidavit. One may argue

[8] Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others (1306/18) [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) (31 January 2020)

that those papers were filed hastily due to the urgency of the matter, but the Applicant had ample time from April up to the 5th of August when he filed the supplementary papers to attend to the question of condonation in relation to prayer 2. This argument was clearly engaged in as a delaying tactic as the Applicant did not make out to such a case on its papers, intentionally so.

The Third Argument

[27] Peculiarly, the Applicant argues with vindication that the amended notice of motion sort condonation as a conditional remedy if the court so requires it. It is my view that condonation was not sought on the amended notice of motion "*conditionally* ". This was yet another unconvincing argument raised by the Applicant who on the face of the amended notice of motion did not word the prayer for condonation as being an alternative if the court so requires it.

[28] The prayer sort on the notice of motion reads as follows:

"7.In relation to the relief sought in paragraph 2 above, extending the time period of 180 days provided for in section 7(1)(b) of the Promotion of Administrative Justice Act, 2000 to the date when they review application was instituted, alternatively condoning the applicants failure to institute the review application for the relief sorting in paragraph 2 above within 180 days from the date of the publication of the request for bids".

[29] The Applicant was aware that the question of condonation had to be addressed but elected not to do so without probable reasons. Instead of admitting to the error made, unsubstantiated facts which were not averred anywhere on the Applicants papers were argued wasting valuable courts time. Therefore, the argument made that the Applicant did not need to make out a case for condonation is dis-ingenious. When the founding papers were filed the Applicants 180- period of reviewing the matter had lapsed. Therefore, they should have sought condonation in terms of section 9 of PAJA.

The Forth Argument

[30] My view is further fortified by the 4th argument raised by the Applicant that the court may *mero motu* give the Applicant an opportunity if it deems it fit to file a condonation application as that would be in the interest of justice. The Respondents rightfully rebutted that this option is only available if the court has *mero motu* raised the question of condonation which is not the case herein. Secondly, the Applicant's replying affidavit filed on the 3rd of August 2024 demonstrates a party who willingly proceeded with a review application knowing very well that it was out of time when the review application was filed regard being had to prayer number 2. There were no exceptional circumstances raised why the court must permit such an application under such circumstances.

[31] The Applicant is bound by the case made out in his or her founding affidavit[9]. The applicant must stand or fall by the allegations contained in its founding affidavit and it is not allowed to make out its case in the replying affidavit. The replying affidavit filed by the applicant contained new material that were not included in her founding affidavit. This causes gross prejudice on the Respondents who did not get an opportunity to address such allegations which is in contradiction to the *audi alteram partem rule* and which is in contravention of the Respondents constitutional right to a fair trial[10]. The constitution imposes a duty on the courts to hear a party who will be affected by the decision under such circumstances.

[32] In *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) Pty and Another*[11] Broome J held as follows:

"The correct approach to the problem was enunciated clearly by Caney J in Bayat and Others v Hansa and another 1955 (3) SA 547 (N) at 553D: "…the principle which I think can be summarised as follows… that an applicant for relief must (save in exceptional

[9] *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) at paragraph [177]; *WD v AD* (unreported, GJ case no 2019/41365 dated 18 October 2021) at paragraph [19]. See further the notes to subrule (5)(e) s v 'Deliver a replying affidavit' below.50 *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H–I; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 105

[10] Section 34 of the Constitution: *everyone has the right to have a dispute that can be resolved by the application of the law decided in the fifth public hearing before a court or, where appropriate, and other independent and impartial tribunal or forum.*

[11] 1980(1) SA 313 (D & CRD) at 315 E-H and 316A.

circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits.'

[33] The Applicant further argued that it was in the interest of justice that the court considers the condonation issue based on the averments made on their heads of argument inclusive of the entire founding and supplementary affidavit. This argument is unmeritorious as material facts which are in relation to condonation have not been addressed on the founding and the supplementary. Let alone the court being addressed on the interest of justice in this regard. Further, this was also in contradiction to the submission raised by the Applicant that the amended notice of motion was supported by the replying affidavit upon the courts enquiry on which document was supporting the amended notice of motion.

[34] This court further agrees with the rebuttal raised by Mr Maritz for the Second Respondents who contended that the amended notice of motion sought to rely on the founding and the supplementary papers which do not bear any single argument raised by the Applicant in relation to condonation. In fact, he argued for the dismissal of the entire review application as without condonation then there was no review before this court.

[35] Dismissing the review in its entirety in my view will be flawed regard being had to the date when the Applicant received the decision that the Second Respondent was awarded the tender GNP-005-23 which was on the 7th March 2024.Subsequent to that the review was filed around the 17th of April 2024.The review regarding the decision to appoint the Second Respondent was brought well within the 180 days period as prescribed by the PAJA. It would therefore be improbable to dismiss the entire review.

[36] The Applicant foresaw that it needed to apply for condonation, it was not clear why the explanation for the delay is not made out on paper and why papers were not supplemented accordingly to afford the Respondents an opportunity to

respond to the condonation issue and for the court to deal with same appropriately. Submissions were made by Mr Subel for the Applicant from the bar which were incongruity to the reply which supports the amended notice of motion. It is not acceptable for counsel to make submissions from the bar without material facts being made on paper by doing so he blurred the lines between being an officer of this court and being the litigant. Let alone arguing averments which are contrary to the papers filed this amount to falsity.

The Amended Notice of Motion

[37] This court was not addressed on the status of the amended notice of motion. It is trite law that for the Applicant to amend the notice of motion it should have followed the uniformed rules of court specifically rule 28(1)[12]. Rule 28 is explicit about the steps to be followed by a party intending to amend a pleading or a document other than a sworn statement in this regard the notice of motion falls within the ambit of rule 28(1).

[38] The Applicant without following the courts rules or seeking the courts permission amended the notice of motion on the 5th of August 2024.The Applicant had ample time to serve and file the notice as required to the Respondents within 10 days to afford them an opportunity to object if they so wished as the date of hearing of the matter was only on the 26th of August. One could argue that the Respondents should have objected. However, they were not given an opportunity to do so under rule 28(2)[13] read together with 28(3)[14]. This court is aware that there were other remedies which they may have raised in this regard to object to the amended notice of motion. However, permitting such an amendment will be flawed.

[12] **28 Amendments to pleadings and documents**
(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
(2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

[13] 28 (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

[14] (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

[39] Even during the hearing of this application no leave was sought to admit the amended notice of motion. The only submission which was made by the Applicant was that they did not need to apply for condonation as the review was brought timeously. The amendment was a *conditional* amendment should the court require same .

[40] In my view, amending the notice of motion in this manner is defective and such an amendment is not in the interest of justice as the same is unfair to the Respondents and therefore cannot be considered to be proper before this court. This is so simply because from this amendment several submissions were made which were not supported by any averments on paper regard being had to condonation. Admitting same will the admitting the non-existent condonation not expressly made out on paper which is not in the interest of justice as the delay is not explained if at all . In passing the Applicant mentioned the delay in the reply as the lack of knowledge or lack of legal awareness.

[41] However this court draws an inference that advice was sought from the Applicants legal representative before the first founding was file in April 2024 surely the Applicant was advised to seek condonation as they were out of time regard being had to prayer number 2 of the notice of motion. This viewed was also shared by the Respondents.

[42] This was an intentional disregard of the rules of this court and such an amendment is *pro non scripto* under the circumstances.

Conclusion

[43] The Applicant repeatedly implored this court to consider the merits of this matter as if the merits were stronger, condonation could be granted which it believed were under the circumstances. However, my view is there must be a case made out first for condonation as a first step in review proceedings where a matter was brought outside the 180 days. The Applicant cannot merely jump to the last step

which is a consideration of the merits without addressing expressly and reasonably the delay in line with condonation proceedings in line with section 9 of PAJA before this court can deal with the merits of the matter. The lack of dealing with condonation precludes this court from even considering the merits of this matter.

[44] The applicant in a PAJA review must explicitly seek condonation where it has failed to bring its review application within 180 days by doing so it has to provide a full explanation that covers the entire period of the delay to enable the court to assess the reasonableness of the delay. This clearly means it cannot hide the explanation for condonation in between the merits as the Applicant sought to do without addressing condonation properly.

[45] In my view, failure to seek condonation had nothing to do with the urgency of the matter or the lack of legal knowledge. The review application before this court has not been brought within the 180 days regard being had to prayer no 2 of the notice of motion. There is no basis in law for this court to deal with the merits the review application concerning prayer number 2 of the notice of motion.

[46] The rest of the prayers sought in the notice of motion alternatively the supplemented notice of motion except for prayer number 2 (two), this court is vested with authority to deal with under section 7(1) of PAJA. Costs should therefore follow the results.

[47] I therefore make the following order :

1. The Applicants application for condonation in relation to prayer 2 (two) of the notice of motion (alternatively the supplementary notice of motion) is dismissed with costs including those of two counsel where so employed on scale C.

NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Applicant : Adv A Subel SC with him
Adv T Prinsloo
Instructed by. : Lowndes Dlamini Inc.

For the First Respondent : Adv AE Bham SC with him
Adv L Brighton
Instructed by. : Cliff Dekker Hofmeyer Inc

For the Second Respondent: Adv NGD Maritz SC with him
Adv A Friedman
Instructed by : Nicqui Galaktiou Inc

Date of Hearing : 26 August 2024
Date of Judgment: 18 September 2024