Part 4 (2023)

Commercial Law Reports

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INFOVEST CONSULTING (PTY) LTD v LIBRA PARTNERS LLC

Grounds for breach of contract

Judgment given in the Western Cape High Court, Cape Town, on 3 May 2023 by Binns-Ward J

Infovest Consulting (Pty) Ltd brought an action against Libra Partners LLC for an order declaring an agency agreement concluded on 25 October 2018 invalid and of no force and effect. Libra opposed the action, and claimed in reconvention against Infovest for payment of monies alleged to be due in terms to it in terms of the agreement, or an equivalent verbal/tacit agreement should the agency agreement have been void, and also for damages consequent upon the alleged repudiation, alternatively breach of the whichever of the agreements applied.

Libra's claim in reconvention alleged that Infovest failed or refused to make payment to it of the amount of USD$408,545.45, being Libra's share of a licence fee payable in terms of clause 8 of the Agency Agreement.

It also alleged that as a result of Infovest's repudiation, alternatively breach of the agency agreement alternatively the verbal/tacit agreement, it suffered damages in the amount of US$ 17,749,454.60.

Infovest excepted to the claim in reconvention on the grounds that it contained no allegations as to the manner in which it breached the agreement. The sole allegation that it repudiated and/or breached the agreement did not in law give rise to a claim for damages calculated on the basis that Libra would have become entitled to 35% of licence fees of US$51 541 880 from sales which would have been generated by Infovest in the future, in the period May 2022 to 2028. Accordingly, the claim in reconvention lacked the averments necessary to sustain the claim for payment of the sum of US$17 749 454,60.

Infovest contended that for those reasons the pleading failed to make out a cause of action.

Held—

The sum of US$408,545.45 was an amount that Libra alleged that it had already become entitled to in terms of clause 8 of the agency agreement or the equivalent provision in the alternative contract. The breach concerned was Infovest's failure or refusal to pay the amount. It was a claim for specific performance, which explained why there was a distinction of the amount for the purposes of pleading from the balance, claimed as damages.

The position was different in respect of the second component, the subject matter of the relief claimed in terms of prayers 4 and 5 of the claim in reconvention. The correctness of the assertion in paragraph 7 of the notice of exception that 'an allegation, without more, that the first plaintiff

"repudiated" and/or "breached" the agreement does not in law give rise to a claim for damages calculated on the basis that the Defendant would have become entitled to 35% of licence fees of US$51 541 880 from sales which would have been generated by the First Plaintiff in the future, in the period May 2022 to 2028' could not be rejected.

Without some very unusual provision in the contract, enforcement of the contract would not entitle the innocent party to claim upfront an amount that it might anticipate becoming entitled to in the future during the remaining term of an executory contract. Yet, on one reading of the passage in Libra's claim in reconvention quoted, that is what Libra appeared to be seeking to do. If there was a basis for such a claim Libra had failed to plead it.

An election by the innocent party to accept the repudiation and terminate the contract would put it in a position to be able to claim damages. Ordinarily, the innocent party's damages would be in the sum necessary to place it in the position financially in which it would have been had there been proper performance of the contract. In the case of an executory contract, the computation of its damages would take into account payments that the innocent party would have received in the remaining term of the contract had it not been cancelled.

The claim in reconvention contained no allegation that Libra accepted a repudiation by Infovest. The language of paragraph 6 of the claim in reconvention was more consistent with a reliance on breach than on repudiation. On the other hand, if it was the pleader's intention to found the claim in prayers 4 and 5 on a cancellation of the contract pursuant to Infovest's failure to perform (ie breach) after having been placed in mora, the necessary allegations to support that were also lacking.

Accordingly, whether predicated on a breach or a repudiation of the agreement, the pleaded facts did not make out a cause of action in respect of the counterclaim for damages in the sum of US$ 17,749,454.60. The first ground of exception was therefore upheld.

Advocate I. J. Muller SC instructed by Bowman Gilfillan Inc, Cape Town, appeared for the plaintiff
Advocate D.J. Coetsee instructed by Adams & Adams Attorneys, Cape Town, appeared for the defendant

Binns-Ward J:

The plaintiffs, which are companies registered in South Africa, instituted proceedings against the defendant, which is a company registered in Massachusetts in the United States of America, in which an order is sought declaring an agreement purportedly concluded between the first plaintiff and the defendant in or about mid-

September 2016 to be invalid and of no force and effect, alternatively, setting the agreement aside. The purported agreement is referred to in the pleading as 'the Agency Agreement'. The defendant pleaded to the claim and delivered a claim in reconvention. Both pleadings have since been amended. The import of the plea is a denial that the Agency Agreement is void or liable to be set aside and the claim in reconvention includes a claim against the first plaintiff for payment of monies alleged to be due in terms to it in terms of the agreement (or an equivalent 'verbal/tacit agreement should the Agency Agreement have been void) and also for damages consequent upon the alleged 'repudiation, alternatively breach' of the whichever of the agreements applied. The defendant also claims an order declaring clause 20 of the Agency Agreement to be of no force or effect.

The first plaintiff has noted exceptions to the iterations of the defendant's aforementioned pleadings dated 25 May 2022 on the grounds that the amended claim in reconvention (misnamed 'counterclaim') 'contains insufficient allegations to establish a claim against the First Plaintiff' and both plaintiffs contend that the defendant's plea contains allegations that are vague and embarrassing. According to the notice of exception, the first and second exceptions described below were noted by the first plaintiff, whereas the third to sixth exceptions described below were noted by both plaintiffs. Mr Muller SC, who argued the exceptions, filed heads of argument that purport to be only on behalf of the first plaintiff.

The principles pertinent to the adjudication of exceptions are well-established and were not in any way in issue between counsel when the current matter was argued. Nothing about the matter requires them to be generally rehearsed in this judgment and accordingly, they will be referred to only to the extent necessary or convenient to support the conclusions I have reached on the various points taken by the excipients. Those points will be addressed in the order in which they were taken in the plaintiffs' notice of exception. I shall refer to them in numerical order as the first to sixth exceptions.

The first exception

The first exception falls to be understood in relation to the matter pleaded in paragraphs 5 – 9 of the defendant's claim in reconvention.

Paragraph 5 of the pleading sets forth what the defendant alleges to have been the material terms of the Agency Agreement. The pleading states that the terms set out 'were', rather than 'are', the material

terms. On its face, the wording thereby suggests an implication by the pleader that the agreement is no longer extant.

Paragraphs 6 – 9 of the claim in reconvention then proceeds as follows:

'6. The first plaintiff repudiated the Agency Agreement, alternatively the verbal/tacit agreement in that it failed or refused to:

make payment to the defendant of the amount of USD$408,545.45, being the defendant's share of the licence fee that is payable to the defendant in terms of clause 8 of the Agreement; and/or

keep the defendant apprised of all developments relating to the developments of Products and Services; and/or

provide pre-sale and sales support to the defendant; and/or

provide technical skills and information for technical implementation, support and implementation consulting to the defendant; and/or

inform the defendant of any technical issues involving or relating to the Products or Services as soon as the first plaintiff became aware of it; and/or

ensure that the defendant has access to resource support from the first plaintiff.

The defendant performed its obligations in terms of the Agency Agreement and the verbal/tacit agreement insofar as performance on its part was not made impossible by the first plaintiff.

ACCRUED RIGHTS

Pursuant to the conclusion of the Agency Agreement, alternatively the verbal/tacit agreement, and the defendant's performance of its obligations in terms thereof, contracts were concluded between and for the benefit of the first plaintiff and the following entities:

Triasima;

Atlantic Fund Services; and

FDP.

The first plaintiff, alternatively an entity nominated by the first plaintiff, received payment of licence fees from Triasima, Atlantic Fund Services and FDP pursuant to the defendant's performance and the aforementioned contracts concluded between such entities and the first plaintiff.

The conclusion of the contracts referred to in paragraph 8.1 above entitled the defendant to the payment of a share of the licence fees.

The defendant's share of the licence fees, calculated in terms of clause 8.1.1 of the Agency Agreement, alternatively the verbal/tacit agreement, is as follows and it became due, owing and payable on the dates pleaded below:

10 September 2018: Triasima: US$ 55 576.85
30 November 2018: AFS*: US$ 10 500.00
14 January 2019: FDP: US$ 19797.42
1 May 2019: AFS: US$ 10 500.00
10 September 2019: Triasima: US$ 55 667.15
29 November 2019: AFS: US$ 10 500.00
14 January 2020: FDP: US$ 20 998.65
29 April 2020: AFS: US$ 10 500.00
10 September 2020: Triasima: US$ 55 445.60
31 December 2020: AFS: US$ 10 500.00
15 January 2021: FDP US$ 27 837.28
29 April 2021: AFS US$ 10 500.00
15 September 2021: Triasima US$ 59,481.35
30 November 2021: AFS US$ 10,500.00
28 February 2022: FDP US$ 29,751.15
3 May 2022: AFS US$ 10,500.00
Total: US$ 408,545.45

(* I have used the acronym AFS in the table above in place of the pleading's reference to 'Atlantic Fund Services'.)

In the premises, the plaintiff is liable to the defendant for payment of licence fees in the amount of US$ 408,545.45 which amount the first plaintiff has failed to pay to the defendant.

DAMAGES

As a result of the first plaintiff's repudiation, alternatively breach of the Agency Agreement (25 October 2018), alternatively the verbal/tacit agreement, the defendant suffered damages in the amount of US$ 17,749,454.60 which amount is calculated as follows:

the first plaintiff would have received cumulative licence fees in the amount of US$ 51,541,880.00 from sales generated by the defendant during 2018 to 2028;

the defendant would, in terms of clause 8.1 of the Agency Agreement, alternatively the verbal/tacit agreement, have become entitled to 35% of such licence fees had it not been for the first plaintiff's repudiation, alternatively breach of the Agency Agreement, alternatively the verbal/tacit agreement; and

the defendant's share, i.e., 35%, of such licence fees paid to the first plaintiff or an entity nominated by the first plaintiff, less the accrued license fees set out in paragraph "8.4." above is US$ 17,749,454.60 ((US$51,541,880.00x35%)-US$408,545.45).

The damages pleaded herein above flow naturally from the breach of the agreements of the kind forming the subject matters of the counter-claim, alternatively were damages that were within the contemplation of the parties when the agreements were concluded and the agreements were concluded on the basis of such knowledge.'

The firsts plaintiff's first ground of exception is set out in the following terms at paragraphs 6 – 8 of the notice of exception:

'6. The amended counterclaim contains no allegations as to the manner in which the First Plaintiff "breached" the agreement.

7. In addition, an allegation, without more, that the First Plaintiff "repudiated" and/or "breached" the agreement does not in law give rise to a claim for damages calculated on the basis that the Defendant would have become entitled to 35% of licence fees of US$51 541 880 from sales which would have been generated by the First Plaintiff in the future, in the period May 2022 to 2028.

8. Accordingly, the amended counterclaim lacks averments necessary to sustain the Defendant's claim for payment of the sum of US$17 749 454,60, plus interest thereon.'

The first plaintiff contends that for those reasons the pleading fails to make out a cause of action.

The claim in reconvention has been carelessly drafted in certain respects but, as amply illustrated in the jurisprudence on exceptions, the court and the recipient parties are required to read the pleadings in a businesslike manner. A slipshod pleading will withstand scrutiny on exception so long as the facts pleaded make out a cause of action or cognisable defence and the case or defence, as the case might be, has been stated with sufficient clarity to inform the other party of the case it has to meet or plead to.

In my judgment it is clear enough, when the pleading is read as a whole, and in the pragmatic manner that is indicated, that the respects in which the defendant alleges the first plaintiff to have been in breach of the Agency Agreement or its equivalent oral or tacit agreement are set out in subparagraphs 6.1 to 6.6 of the claim in reconvention. I am not persuaded that the defendant's employment of the verb 'repudiated' in the introduction to paragraph 6 stands in the way of

such conclusion, as the plaintiffs' counsel sought to argue. On the contrary, the content of paragraph 6, read as a whole, is inconsistent with the import of repudiation and consistent, rather, with the concept of breach by way of non-performance.

It is well established that 'repudiation', whilst it is often characterised as a species of 'breach', is manifested in the indication by a contracting party of its intention not to perform or accept performance of the contract. That is a matter of intention; although the existence of an intention to repudiate is determined objectively, that is as outwardly manifested seen through the eyes of the innocent party; it is not dependent on the repudiating party's subjective state of mind. The other well recognised forms of breach of contract are succinctly described in GB Bradfield, *Christie's Law of Contract in South Africa* 8th ed. (LexisNexis) at p.619:

> 'The obligations imposed by a contract's terms are meant to be performed, and if they are not performed at all, or performed late, or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in mora, and, in the last case, to be guilty of positive malperformance.'

The instances of non-performance listed in paragraph 6 of the claim in reconvention are on their face all examples of the first plaintiff being in mora.

To the extent that the position is rendered confusing by the defendant's use, in conjunction with each other, of the terms 'repudiate' and 'refused', which is language more suggestive of 'repudiation' than it is of 'breach' in the sense described in the passage from Christie, the plaintiffs might have been entitled to complain that the pleading was vague and embarrassing. They did not. The first plaintiff's counsel made it clear, however, that its first ground of exception was directed only at the inadequate pleading of a case based on breach of contract and was not related in any way to the issue of repudiation.

There is more substance in the complaint articulated in paragraphs 7 and 8 of the notice of exception.

It is plain, when the claim in reconvention is read as a whole, that the sum claimed by the defendant is comprised of two components, viz. (i) US$408,545.45 in respect of its so-called 'accrued rights' in terms of the contract and (ii) the balance in respect of the share of

licence fees that the defendant 'would have received' or 'would have become entitled to' in terms of the contract during the period May 2022 to 2028 'had it not been for the first plaintiff's repudiation, alternatively breach of the Agency Agreement, alternatively the verbal/tacit agreement'.

The first mentioned component is pleaded in paragraph 8 of the claim in reconvention. The first ground of exception is not directed at the first component, advisedly so. It is clear, if paragraphs 6.1 and 8 of the claim in reconvention are read contextually, that the sum of US$408,545.45 is an amount that the defendant alleges that it had already become entitled to in terms of clause 8 of the Agency Agreement or the equivalent provision in the alternative contract. The breach concerned is the first plaintiff's failure or refusal to pay the amount. It is cognisably a claim for specific performance, which no doubt explains the pleader's distinction of the amount for the purposes of pleading from the balance, which is claimed as 'damages'. It might be clumsily pleaded, but there is no doubting that a cause of action has been made out in respect of the first component.

The position is different in respect of the second component (which is the subject matter of the relief claimed in terms of prayers 4 and 5 of the claim in reconvention). The correctness of the assertion in paragraph 7 of the notice of exception that 'an allegation, without more, that the First Plaintiff "repudiated" and/or "breached" the agreement does not in law give rise to a claim for damages calculated on the basis that the Defendant would have become entitled to 35% of licence fees of US$51 541 880 from sales which would have been generated by the First Plaintiff in the future, in the period May 2022 to 2028' cannot be gainsaid.

A repudiation puts the innocent contracting party to an election. The innocent party can elect to enforce the contract and claim specific performance, or it can choose to accept the repudiation and terminate the contract. That much is trite.

An election to enforce the contract would allow the innocent party to claim whatever payment was then due in terms of the contract plus the damages, if any, sustained as a result of the guilty party's delayed performance. Where the breach consists of a failure to make payment, the damages in question are ordinarily awarded by way of an order for

interest ex tempore morae.1 If the contract does not specify the due date for payment, the innocent party would have to place the defaulting debtor in mora by making a demand for payment. The position in respect of a claim for contractual damages of an innocent party who has elected not to accept a repudiation is indistinguishable from that of a party who claims damages for 'breach' of contract in any of the senses described in the passage in Christie quoted in paragraph 0 above. There is no allegation in the claim in reconvention that the defendant placed the first plaintiff in mora.

Absent some very unusual provision in the contract, enforcement of the contract would not, entitle the innocent party to claim upfront an amount that it might anticipate becoming entitled to in the future during the remaining term of an executory contract. Yet, on one reading of the passage in the defendant's claim in reconvention quoted above, that is what the defendant appears to be seeking to do. If there is a basis for such a claim (very out of the ordinary as it would be) in the current matter, the defendant has failed to plead it. I was unable to find any in the terms of the Agency Agreement (an incomplete copy of which was annexed to the plaintiffs' declaration), and none was pointed out to the court during argument.

An election by the innocent party to accept the repudiation and terminate the contract would put it in a position to be able to claim damages. Ordinarily, the innocent party's damages would be in the sum necessary to place it in the position financially in which it would have been had there been proper performance of the contract. In the case of an executory contract, the computation of its damages would take into account payments that the innocent party would have received in the remaining term of the contract had it not been cancelled. The use of the subjunctive tense in paragraph 9.1 of the claim in reconvention suggests that this is the type of scenario that the pleader had in mind. There is, however, no allegation in the pleading that the defendant accepted a repudiation by the first plaintiff, assuming such had been adequately pleaded. As noted earlier, the language of paragraph 6 of the claim in reconvention is in any event more consistent with a reliance on breach than on repudiation. On the other hand, if it was the pleader's intention to found the claim in prayers 4 and 5 on a cancellation of the contract pursuant to the first

1 'From the time of the delay'. 'Mora' is the Latin word for 'delay'.

plaintiff's failure to perform (ie 'breach') after having been placed in mora, the necessary allegations to support that are also lacking.

Accordingly, whether predicated on a breach or a repudiation of the agreement, the pleaded facts do not make out a cause of action in respect of the defendant's counterclaim for damages in the sum of US$ 17,749,454.60.2 The first plaintiff's first ground of exception will therefore be upheld to that extent.

The second exception

The second exception concerns the defendant's claim, in terms of prayer 3 of the claim in reconvention, for an order that 'clause 20 of the Agency Agreement is contrary to public policy and/or is (sic) unenforceable against the defendant'. Clause 20 of the Agency Agreement provides, s.v.

'NO CONSEQUENTIAL LOSSES' –

> 'Under no circumstances whatsoever shall any Party be liable for any indirect, extrinsic, special, penal, punitive, exemplary or consequential loss or damage of any kind whatsoever or howsoever caused (whether arising under contract, delict or otherwise and whether the loss or damage was actually foreseen or reasonably foreseeable), including but not limited to any loss of commercial opportunities or loss of profits, and whether as a result of negligent (including grossly negligent) acts or omissions of such Party or its servants, agents or contractors or other persons for whose actions such Party may otherwise be liable in law.'

The allegations pleaded in support of the claim are contained in paragraph 10 of the claim in reconvention, which reads as follows:

'10. The enforcement of clause 20 of the Agency Agreement would be unfair, unreasonable and unjust to the extent that it would be contrary to public policy by reason of the following:

10.1. no equality in contract existed when the Agency Agreement was concluded;

10.2. when the Agency Agreement was concluded between the first plaintiff and the defendant, it was not contemplated by those parties that the first plaintiff's business would be transferred to another entity in the StatPro Group of companies;

10.3. the plaintiffs, in collaboration with other entities in the StatPro Group of companies, transferred the first plaintiff's business to other

2 The arithmetical calculation in para 91.3 of the claim in reconvention appears in any event to be incorrect, but nothing turns on that for current purposes.

entities after the defendant had indicated that it intended enforcing its rights in terms of the Agency Agreement; and

10.4. the directors of the plaintiffs acted in a mala fides manner in dealing with the first plaintiff's business, the aim of which actions was to render the defendant unable to enforce its rights in terms of the contract and/or unable to claim damages.'

The first plaintiff stated in paragraph 11 of the notice of exception that 'the Defendant is precluded by clause 20 of the Agency Agreement from recovering the amounts claimed in claims 4 and 5'. ('Claims 4 and 5' is a reference to the equivalently numbered prayers in the claim in reconvention, in terms of which the defendant seeks orders against the plaintiffs for contractual damages in the sum of US$ 17,749,454.60 and interest thereon a tempore morae.) The defendant, however, makes no such allegation in its pleading. Indeed, it is not apparent on the pleading why the defendant is seeking a declaratory order.

It is by no means clear to me that the first plaintiff's statement is well-founded – certainly to the extent that it implies a construction of the clause that would exclude a contractual claim for what is variously labelled as 'direct' (as distinct from 'indirect'), 'intrinsic' (as distinct from 'extrinsic') or 'general' (as distinct from 'special') contractual damages – but the point, in any event, is one that might appositely be taken in a plea rather than an exception. Clause 19 of the Agency Agreement appears to be directed at excluding claims by either party for special contractual damages, whereas clause 20 is directed at the waiver by the parties of any claims against each other for 'consequential loss'. What the distinction is between the potential claims covered by clause 19 and those at which clause 20 appears to be directed might be the subject of some debate. It is evident, however, that both clauses manifest what might be labelled as pacta de non petendo (agreements not to sue). The question raised by the exception is whether the pleading makes out a cause of action for an order declaring the pactum de non petendo in clause 20 to be contrary to public policy.

The meat of the second exception is contained in paragraphs 13 and 14.1 of the notice of exception, which go as follows:

'13 The allegations in paragraphs 10.1 to 10.4 [of the claim in reconvention] do not, individually or cumulatively, sustain the allegation that enforcement of clause 20 of the Agency Agreement

would be unfair, unreasonable and unjust to the extent that it would be contrary to public policy, in that:

13.1 The allegation in paragraph 10.1 ("no equality in contract") does not constitute a basis not to enforce clause 20; and, in any event, ex facie the terms of the Agency Agreement, the allegation is manifestly false and divorced from reality.

13.2 The allegation in paragraph 10.2 ("transfer of the First Plaintiff's business to another entity") is irrelevant and furnishes no basis for the non-enforcement of clause 20 on the grounds of public policy.

13.3 The allegation in paragraph 10.3 ("transfer of the First Plaintiff's business after the Defendant had indicated that it intended enforcing its rights") is irrelevant and furnishes no basis for the non-enforcement of clause 20 on the grounds of public policy.

13.4 The allegation in paragraph 10.4 ("the directors of the Plaintiffs acted in a mala fide manner for the purpose alleged") is irrelevant and furnishes no basis for the non-enforcement of clause 20 on the grounds of public policy.

14 Accordingly:

14.1 the allegations in paragraph 10 of the amended counterclaim are insufficient to sustain claim 3; ...'

The principles that the courts will apply in determining whether a contract or contractual provision should not be enforceable for being contrary to public policy have quite recently been reviewed by the Constitutional Court in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 (17 June 2020); 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC). The Court there affirmed its earlier judgment in *Barkhuizen v Napier* [2007] ZACC 5 (4 April 2007); 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

In *Beadica*, the Constitutional Court accepted the summary of 'the relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution' given in the appeal court's judgment in *A B and Another v Pridwin Preparatory School and Others* [2018] ZASCA 150 (1 November 2018); [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA); 2019 (8) BCLR 1006 (SCA), at para 27,3 viz –

3 Drawing on the authorities cited in footnotes 7 – 12, Barkhuizen supra, Bredenkamp & others v Standard Bank of South Africa Ltd 2010 (4) SA 468 (SCA),

(i) Public policy demands that contracts freely and consciously entered into must be honoured ['pacta sunt servanda'];

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

In para 83-90 of *Beadica*, the Constitutional Court 'further elucidated' two of the points listed in *Pridwin*.

In para 87, the majority judgment explained, with reference to the first point on the list in *Pridwin*, that: '... pacta sunt servanda is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging pacta sunt servanda over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances'. The explanation was supplemented with a footnote comment (in fn. 200) that 'This is not to say that a constitutional right must be implicated for a contractual term to be contrary to public policy.'

With reference to the fifth point listed in *Pridwin*, the majority judgment in *Beadica* cautioned that the principle should not serve as a means for courts to shirk their constitutional duty. At para 90, the majority held '... courts should not rely upon this principle of restraint

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Sasfin (Pty) Ltd v Beukes 1989 (1) SA (A) and Potgieter & another v Potgieter NO & others 2012 (1) SA 637 (SCA).

to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. Accordingly, the "perceptive restraint" principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable "harm to the public" before a court may decline to enforce a contract on public policy grounds is alien to our law of contract'. (The import of the last sentence was illustrated with reference to para 158 of the minority judgment of Froneman J where reference was made to the Appellate Division jurisprudence regarding public policy in restraint of trade matters,4 as well as to *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A), which, it will be recalled, involved findings that the unduly oppressive effect of a contract on an individual's private rights rendered its enforcement contrary to public policy.)

A two-stage enquiry was described in *Barkhuizen*. Its character was described in *Beadica* at para 37 in the following way: 'The first stage involves a consideration of the clause itself. The question is whether the clause is so unreasonable, on its face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the enquiry will be embarked upon. The second stage involves an inquiry whether, in all the circumstances of the particular case, it would be contrary to public policy to enforce the clause. The onus is on the party seeking to avoid the enforcement of the clause to "demonstrate why its enforcement would be unfair and unreasonable in the given circumstances." The majority emphasised that particular regard must be had to the reason for non-compliance with the clause'. (Footnotes omitted.)

It has not been pleaded, nor in my view could it have plausibly been argued, that the clause is so unreasonable, on its face, as to be contrary to public policy. That moves the focus onto whether the pleading sets

4 Magna Alloys & Research (SA) (Pty) Ltd. v Ellis [1984] ZASCA 116; 1984 (4) SA 874 (A).

out circumstances which, if established, could impel the conclusion that it would be contrary to public policy to enforce the clause. The only circumstances pleaded in the claim in reconvention are those set out in paragraph 10.1 to 10.4 thereof, quoted above.[5]

The first plaintiff's counsel submitted that 'there is no general principle to the effect that the contract or, as in this particular case, a particular clause in the contract, will not be enforced because "no equality in contract existed" when the contract was concluded'. That must be right, for otherwise it would not be open to anyone to make an agreement with another party with greater or lesser bargaining power. What about employment contracts or mortgage loan agreements with banks, for example? Could it be said that they should be unenforceable merely because of the inequality of the contracting parties? Obviously not. Demonstrating in a given case that such contracts should not be enforced as being contrary to public policy would require something more. It would require proof that the operation of the given contract according to its tenor would be legally or societally unacceptable for some objectively identifiable reason; for example, that it would unjustifiably impinge on an inalienable constitutional right, be inconsistent with the rule of law (the old case of Nino Bonino v De Lange 1906 TS 120 affords an example) or bear unacceptably onerously on a party (as illustrated, for example, in Sasfin supra, where the features of a cession in securitatem debiti executed in favour of Sasfin by its debtor (Beukes) that impelled the conclusion that the agreement offended against public policy were described by the court as follows: 'This follows from the provisions in clause 3.4 that Sasfin would be "entitled but not obliged" to refund any amount to Beukes in excess of Beukes' actual indebtedness to Sasfin. As a result Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to an end, as clause 3.14 specifically provides that "this cession shall be and continue to be of full force and effect until terminated by all the creditors". Neither an absence of

[5] In paragraph 0.

indebtedness, nor reasonable notice to terminate by Beukes in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end.').

The defendant sought to supply that 'something more' in subparagraphs 10.2 to 10.4 of its claim in reconvention. The allegations pleaded there imply conduct by the first plaintiff directed at thwarting the enforcement of the Agency Agreement by the defendant. They have no recognisable relationship with or connection with clause 20, which, as mentioned, contains a mutual waiver by the parties of any right to claim for 'consequential loss' from each other. It has not been suggested that clause 20 excludes the defendant's right to sue to enforce the agreement. (And, although it is not a question for decision at this stage, as indicated above it in any event seems to me that the clause does not exclude the right of an innocent party to the contract to claim general, direct or intrinsic contractual damages from a defaulting party.)

In his written submissions, counsel for the defendant stressed that it was incumbent on a court seized of determining whether a contract was contrary to public policy to have regard to 'all the particular facts and circumstances of [the] case' and proceeded –

'The particular facts and circumstances relevant to clause 20 of the written agency agreement should be considered by the trial court when deciding whether the clause should be enforced.

A decision by a court deciding an exception whether it would or would not be contrary to public policy to enforce clause 20, without hearing the evidence, would be premature. It should be borne in mind that the pleading only contains the facta probanda while the trial court will have the benefit of the facta probantia.'

The argument misses the point. In the context of the absence of a contention that the clause is contrary to public policy on its face, this court is not seized of the task of deciding whether it is. The question before this court is whether the pleaded facts make out a triable case in support a claim for a declaration that it is.

For the reasons stated in paragraphs 0 and 0 above, and accepting that the facts pleaded in paragraph 10 of the claim in reconvention are what the defendant asserts to be the facta probanda, the pleading does not make out a cognisable case for the relief claimed in prayer 3 thereof. The argument that some or other, as yet unidentified, evidence might come out in the wash at the trial to support the claim cannot

prevail.[6] The pleadings are required to define the parameters of the case being sent to trial. They are as much for the court as the litigants. If the parameters of the case are not sufficiently apparent on the pleadings, how is the trial judge to manage the proceedings effectively, and how are the opposing parties to know the case they must come to trial ready to meet?

The second exception will therefore be upheld.

It is strictly unnecessary, in view of the conclusions reached on the first and second exceptions, to deal with the other grounds of exception (the third and fourth exceptions, respectively) raised by the plaintiffs on the basis that certain allegations in the claim in reconvention are vague and embarrassing. I shall do so, however, so that the court's findings in that regard might assist if the defendant avails of the opportunity that will be afforded to it, pursuant to the conclusions already reached, to amend the pleading.

The third exception

In paragraph 7 of its claim in reconvention, the defendant pleaded –

'The defendant performed its obligations in terms of the Agency Agreement and the verbal/tacit agreement insofar as performance on its part was not made impossible by the first plaintiff.'

The first plaintiff contends in its notice of exception that the allegation in paragraph 7 of the claim in reconvention is vague and that it is embarrassed in pleading thereto because the defendant had not pleaded –

> '1. What is meant by the allegation that the Defendant performed its obligations "insofar as performance on its part was not made impossible by the First Plaintiff"; and/or
>
> 2. When, where and in what manner performance on its part was made impossible by the First Plaintiff.'

In my judgment, it is evident, when the pleading is read as a whole, that the purpose of paragraph 7 of the claim in reconvention was merely to plead that the defendant had complied with its obligations under the contract(s). It was necessary for it to do that to be able enforce its alleged rights under the contract. It was not necessary for

[6] Cf. *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73 (9 September 2005); [2006] 1 All SA 6 (SCA); 2006 (1) SA 461 (SCA), at para 3.

the defendant to plead that it had not performed what was impossible for it to have performed under the contract, for obviously it could have been under no obligation to have done so. There is nothing in the pleaded case that would confuse or embarrass the plaintiffs from denying, if that is what they contend to be the position, that the defendant had performed its obligations under the contract(s).

I have not been persuaded that the pleading of paragraph 7 leaves the plaintiffs uncertain of the case they are called upon to meet or in material uncertainty as to how to plead to it.

The third exception will therefore be dismissed.

The fourth exception

The fourth exception is about the impenetrable reference, in parentheses, in paragraph 9.1 of the claim in reconvention (quoted in paragraph 0 above) to the date 25 October 2018. There is no doubting that the significance of the date is not apparent on the pleading. In my judgment, the plaintiffs cannot reasonably be expected to plead to paragraph 9.1 without clarification of the import of the reference to the date mentioned there. The first plaintiff's contention that the pleading is vague and embarrassing in the respect is well-founded. The fourth exception will be upheld, accordingly.

The remaining exceptions, also on the grounds of vagueness and embarrassment, concern the defendant's plea to the claim in convention.

The fifth exception

In paragraphs 5 – 7 of their declaration, the plaintiffs alleged the 'purported' conclusion of the Agency Agreement on the first plaintiff's behalf by one Kemper. Further on in the pleading it is alleged that Kemper acted fraudulently and without authority.

In subparagraphs 2.4 and 2.5 of its plea, under the subheadings 'Ostensible Authority' and 'Estoppel', respectively, the defendant responded as follows to the plaintiffs' allegation that Kemper had not been authorised to act on the first plaintiff's behalf in concluding the agreement:

'OSTENSIBLE AUTHORITY:

2.4. In the alternative to sub-paragraphs 2.2 and 2.3 above, and should it be found that Kemper did not have actual authority to conclude binding agreements, including the Agency Agreement, on the first plaintiff's behalf (which is denied), the defendant pleads as follows:

2.4.1. at all relevant times hereto and in particular on 9 November 2015, 9 May 2016 and 15 September 2016, the first plaintiff, duly represented by Kemper and one or more of the other directors of the first plaintiff, conducted itself in a manner that misled the defendant's representatives into reasonably believing that Kemper had actual authority to conclude binding agreements, including the Agency Agreement, on the first plaintiff's behalf with the defendant (hereinafter 'the misrepresentation');

2.4.2. the misrepresentation led to an appearance that Kemper had the necessary actual authority to conclude binding agreements, including the Agency Agreement, on behalf of the first plaintiff with the defendant;

2.4.3. the defendant reasonably acted upon the ostensible or apparent authority of Kemper and, on that basis, concluded the Agency Agreement with the first plaintiff; and

2.4.4. in the premises, the first plaintiff is bound by the conduct of Kemper and its other directors referred to in paragraph 2.4.1 above and by the terms of the Agency Agreement concluded between the first plaintiff and the defendant.

ESTOPPEL:

2.5. As an alternative to sub-paragraphs 2.2 to 2.4 above, and should it be found that Kemper did not have actual or ostensible authority to bind the first plaintiff and to conclude the Agency Agreement on its behalf (which is denied), the defendant pleads as follows:

2.5.1. at all relevant times hereto but in particular from 9 November 2015 to 15 September 2016, the first plaintiff, duly represented by Kemper and other directors of the first plaintiff, by way of their conduct, both express and by way of silence or inaction, represented to the defendant's representatives that Kemper had the necessary authority to conclude binding agreements on the first plaintiff's behalf, including the Agency Agreement forming the subject matter of this case;

2.5.2. the representations were made by the first plaintiff, represented as pleaded in paragraph 2.5.1 above, to the defendant's duly authorised representatives and directors;

2.5.3. the first plaintiff, duly represented as pleaded in paragraph 2.5.1 above, did expect, alternatively must reasonably have expected, that its conduct may mislead the defendant to reasonably believe that

Kemper had the necessary authority to conclude binding agreements on the first plaintiff's behalf, including the Agency Agreement;

2.5.4. the defendant reasonably acted upon the truth of the representation;

2.5.5. the defendant acted to its prejudice by concluding the Agency Agreement, by performing its obligations in terms thereof and by being the effective cause of agreements concluded by and/or for the benefit of the first plaintiff with third parties on the basis of which agreements the defendant earned and would have continued to earn fees; and

2.5.6. in the premises, the first plaintiff is estopped from relying on a lack of authority on the part of Kemper to conclude the Agency Agreement and bind the first plaintiff thereto.'

The fifth ground of exception raised by the plaintiffs is that the plea is vague and embarrassing because it 'does not identify the "other directors of the First Plaintiff" to which reference is made in subparagraphs 2.4.1, 2.5.1 and 2.5.2.

In my judgment, the omission is not one that prejudices the plaintiffs' ability, if so advised, to replicate to the plea, nor does it leave the plaintiffs in any doubt about the issues for trial. The plaintiffs will be able to obtain the missing particularity in due course through a request for trial particulars.

In the result, the fifth exception will be dismissed.

The sixth exception

The first plaintiff's sixth exception was stated in the following terms in paragraphs 25 – 30 of their notice of exception:

'25 In response to the Plaintiffs' allegation in paragraph 9.1 of the particulars of claim (to the effect that Stillwell, Kemper and Burke fraudulently backdated the signature date of the agreement to reflect a signature date of 9 May 2016, when in fact it was signed on or about 14 and 16 September 2016), in paragraph 5.1 of the amended plea the Defendant admits that the agreement was back-dated to reflect 9 May 2016 as the signature date.

26In paragraph 7 of the amended plea the Defendant pleads that the backdating of the agreement to 9 May 2016 occurred "pursuant to and against the backdrop of the following facts:", being the allegations contained in paragraphs 7.1 to 7.10.

27In paragraph 7.3 of the amended plea the Defendant pleads reference to a period up to and including October 2018.

28In paragraph 7.10 the Defendant pleads reference to an event which allegedly occurred in November 2016.

29On the face of it, events which post-date September 2016 do not and cannot have any relevance to the backdating of an agreement to 9 May 2016 of an agreement concluded in September 2016.

30Accordingly, these allegations are vague and the Plaintiffs are embarrassed in pleading thereto.'

Paragraph 7 of the defendant's plea reads as follows:

'7. The conclusion of the Agency Agreement and the insertion at the instance of the first plaintiff's duly authorised representative, Mr Kemper, of the date of 9 May 2016 as the signature date occurred pursuant to and against the backdrop of the following facts:

7.1. the first plaintiff and its products were not known in the United States of America or Canada prior to October 2015;

7.2. the first applicant had no agent or representative in the USA or Canada prior to October 2015;

7.3. during the period October 2015 to October 2018 the first plaintiff allowed the defendant to represent itself as 'Infovest USA', to sell the first plaintiff's products in the USA and Canada and approved such representation and sales by the defendant;

7.4. after discussions beginning in October 2015, during November 2015 the commercial collaboration between the first plaintiff and the defendant and the defendant acting as the first plaintiff's agent in the USA and Canada, had developed and solidified sufficiently for the terms of such collaboration and agency to be included in a document drawn up by the first plaintiff's representatives and termed 'Heads of Agreement', a copy of which is attached hereto and marked "A". The Heads of Agreement will be referred to hereinafter as 'the HOA';

7.5. during the period 1 March 2016 to 7 March 2016 the plaintiffs' duly authorised representatives, Messrs Wheatley, Peddar and Kemper in particular, together with the defendant's Mr Stillwell, developed certain rules (hereinafter the "Rules of Engagement') to regulate the commercial collaboration between the first plaintiff and the defendant and to regulate the sale of the first plaintiff's products in the USA and Canada by the defendant, acting as agent of the first plaintiff. This included the understanding that any opportunities uncovered by sales people of the second plaintiff and related companies (e.g. StatPro Inc. and Statpro Canada Inc) for the first

plaintiff's products in USA and Canada would be passed exclusively to the defendant. A copy of the Rules of Engagement, accepted and approved by the first and second plaintiffs and the defendant, is attached hereto and marked "B";

7.6. the first and second plaintiffs and the defendant all considered themselves bound by the HOA (from November 2015 to 15 September 2016) and the Rules of Engagement (from March 2016 to 15 September 2016) and acted in a manner consistent with them being bound by the terms thereof;

7.7. the first and second plaintiffs and the defendant all gave effect to the HOA (from November 2015 to 15 September 2016) and the Rules of Engagement (from March 2016 to 15 September 2016);

7.8. from November 2015 to 15 September 2016 the defendant acted as the first plaintiff's sole agent in the USA and Canada;

7.9. from November 2015 to 15 September 2016 the defendant promoted, marketed and sold the first plaintiff's products in the USA and Canada and rendered services to the purchasers of the first plaintiff's products on behalf of the first plaintiff; and

7.10. in November 2016 the first plaintiff paid fees to the defendant in accordance with the HOA and the Rules of Engagement, fees arising from the sale of the first plaintiff's products to Triasima Portfolio Management Inc (hereinafter 'Triasima'), this being the defendant's first client that they signed on.'

There is no merit in the first plaintiff's complaint. The course of conduct pleaded in subparagraph 7.3 of the plea was a continuing course of conduct that commenced before the execution of the Agency Agreement and continued after it. There is nothing vague or embarrassing about the allegation. It is the continuing course of conduct that formed part of the alleged 'backdrop' to the execution of the agreement. That it continued for a period after the execution of the agreement is neither here nor there. Similarly, the payment of fees in November 2016 alleged in subparagraph 7.10 is conduct by the first plaintiff related to the HOA alleged concluded in November 2015, well before the execution of the Agency Agreement in September 2016. The relevant 'backdrop' is not only the conclusion of the HOA but also the parties' performance in terms of the HOA. It is immaterial in the context of the pleaded facts that the alleged performance post-dated the execution of the Agency Agreement.

The sixth exception will therefore be dismissed.

Costs

The overall result of the exception proceedings is a mixed bag. The first plaintiff has been substantially successful with regard to its exceptions to the defendant's claim in reconvention, but unsuccessful in respect of its exceptions to the defendant's plea. The focus of argument at the hearing and in the heads of argument was, understandably, on the questions whether the defendant had made out causes of action in respect of the relief claimed in prayers 3, 4 and 5 of the claim in reconvention, matters in respect of which the plaintiffs have proven to be successful. In all the circumstances I consider that it would be just to order that the defendant pay 75 percent of the first plaintiff's costs of suit in the exception proceedings.

An order will issue in the following terms:

The first plaintiff's exceptions (ie the abovementioned first and second exceptions) to the claims in prayers 3, 4 and 5 of the defendant's amended claim in reconvention, dated 25 May 2022, on the grounds that no causes of action are made out, are upheld.

Insofar as remains necessary, the abovementioned fourth exception to the defendant's amended claim in reconvention on the ground of vagueness and embarrassment is also upheld.

Insofar as remains necessary, the abovementioned third exception to the defendant's amended claim in reconvention on the ground of vagueness and embarrassment is dismissed.

The abovementioned fifth and sixth exceptions to the defendant's amended plea dated 25 May 2022 are dismissed.

The defendant is afforded 20 days from the date of this order to further amend its claim in reconvention.

The defendant shall be liable to pay 75 percent of the first plaintiff's costs of suit in the exception proceedings.

BUTCHER SHOP AND GRILL CC v TRUSTEES OF THE BYMYAM TRUST

Circumstances for piercing the corporate veil

Judgment given in the Supreme Court of Appeal on 2 March 2023 by Goosen JA (Van der Merwe, Mbatha, Carelse and Weiner JJA concurring):

The trustees of the Bymyam Trust owned property which it leased to Butcher Shop & Grill CC. As envisaged by the lease, the leased premises were used as a restaurant, butchery, deli and wine shop, with the largest part of the leased area being used as a steakhouse restaurant. This business was conducted by Apoldo Trading (Pty) Ltd, a sub-tenant. Both it and the Butcher Shop had a sole shareholder, a Mr Pick.

With the imposition of regulations for the control of the coronavirus, known as 'the lockdown', restaurants were required to close. This meant that the Butcher Shop ceased operation of the restaurant on 23 March 2020. As alert levels changed in 2020, the restaurant was allowed a seating capacity of 50%. The regulations imposed affected the Butcher Shop's business negatively, with a substantial loss of turnover. It did not fulfil its obligations fully in terms of the lease.

The Butcher Shop did not occupy the leased premises during the lockdown and extended lockdown periods, and at the time that the various regulations were passed, as from March 2020, although an associated company occupied and traded from the premises and utilised the entire leased area.

In August 2020 Bymyam brought an application for an order compelling Butcher Shop to pay R1 576 919,20 representing all amounts due to Bymyam, as at 1 August 2020, in terms of the lease agreement between the parties.

The Butcher Shop was of the view that during the lockdown it was exempt from paying the full rental in terms of the lease agreement because the legislative regulations constituted a vis maior or casus fortuitus.

Held—

A lessee is entitled to claim rental remission where there is a deprivation of or lack of beneficial use or occupation of the leased premises, and where the interference is caused by vis maior or casus fortuitus, neither of which eventuality is the fault or cause of either the lessor or lessee. This right was not excluded by the terms of the lease.

The question was whether the Butcher Shop had a claim, in law, for the loss of use and enjoyment of the premises suffered by Apoldo.

Actual loss must be established by the party seeking remission of rental. This accords with general principle. Remission of rent is available to a lessee or tenant who suffers loss consequent upon the interference with its use and enjoyment of the leased property. It is an equitable remedy which seeks to ameliorate the prejudice caused by circumstances beyond the control of the parties to the lease. It may only be claimed by the party who suffers the loss. Such loss must be directly attributable to the vis major event and must be substantial.

In the present case, Apoldo, a separate legal entity, occupied the premises and had use and enjoyment thereof and conducted the business of the restaurant. In terms of the sub-letting arrangement between the Butcher Shop and Apoldo, it stood in the position of tenant vis-à-vis the Butcher Shop as landlord. As a matter of fact, the loss of beneficial use and enjoyment of the sub-leased premises was suffered by Apoldo, not the Butcher Shop. The existence of the sub-tenancy in law precluded a claim for remission based on loss suffered by the sub-tenant.

There were no grounds, either statutory or in common law, which would form a basis for piercing the corporate veil, thereby allowing Apolodo to be seen as the actual tenant with which the Trust had concluded the lease.

Advocate J Muller SC and Advocate L Kelly instructed by Werksmans Attorney, Cape Town, appeared for the appellant
Advocate P A Corbett SC instructed by Van Rensburg & Co, Cape Town, appeared for the respondent

Goosen JA:

[1] This appeal raises the question of a lessee's entitlement to claim remission of rent payable to a lessor in circumstances where *vis major* has interfered with the beneficial use and enjoyment of leased property by a sub-lessee. The question arises in the context of the economic disruptions caused by the Covid-19 pandemic and the consequent declaration of a national state of disaster.

[2] The respondent, the trustees for the time being of the Bymyam Trust (the Trust), owns sections in a sectional title scheme that applies to a building (Amalfi) situated in Mouille Point, Cape Town. In 2014 it concluded a lease agreement in respect of a section of the scheme (the premises) with the appellant, the Butcher Shop & Grill (Pty) Ltd

(the Butcher Shop).[1] The premises were occupied in February 2014 for the purpose of conducting business as the Butcher Shop and Grill (the restaurant).

[3] During 2019 the Trust became aware that the premises were occupied by Apoldo Trading (Pty) Ltd (Apoldo), which was conducting the business of the restaurant. Apoldo is related to the Butcher Shop inasmuch as its sole shareholder is the same as the sole shareholder of the Butcher Shop, a Mr Pick. The Trust and the Butcher Shop then entered into an Addendum Agreement (the addendum) to the lease agreement. Its primary effect was to grant consent to the subletting arrangement between the Butcher Shop and Apoldo.

[4] The advent of the Covid-19 pandemic and the promulgation of a National State of Disaster in March 2020 gave rise to the present dispute. It is common cause that the imposition of trading restrictions on restaurants and on the sale of liquor initially precluded and subsequently limited the operation of the restaurant during certain stages of the national 'lockdown'. The Butcher Shop withheld payment of rent due to the Trust. It contended for a remission of rent on the basis that it had suffered a significant loss of turnover. It claimed that since it was denied beneficial use of the premises because of the lockdown restrictions, it was not obliged to make payment of the full amount of rent due in terms of the lease.

[5] On 13 October 2020, the Trust launched an application in the Western Cape Division of the High Court, Cape Town (the high court) in which it claimed payment of an amount of R1 576 919.20 for amounts due (the main application). The Butcher Shop opposed the application and filed a counter application (the counter application) in which it sought: (a) that the main application be stayed; (b) a declaration that it is entitled to remission of the base rental payable in a specified amount; and (c) that the main application be dismissed.

[6] The Butcher Shop's case was that its loss of the use and enjoyment of the premises caused it a significant loss of turnover in its business, which entitled it to remission or abatement of rent. Insofar

[1] The lease agreement was concluded with the Butcher Shop & Grill CC, which subsequently changed its corporate structure to that of a limited company. The lease was concluded on 20 February 2014.

as the sub-tenancy of Apoldo was concerned, it based its case upon the following contentions:

(a) A lessee is entitled to claim remission of rental arising from the loss of a sub-lessee's beneficial occupation on account of *vis major* or *casus fortuitus*.

(b) In the alternative, that the Butcher Shop and Apoldo are in effect, Mr Pick, their sole shareholder, in corporate guise and therefore one business entity. The common law either recognises or ought to recognise as a remedy in equity, the entitlement of the Butcher Shop to claim remission of rent because of the loss of beneficial occupation suffered by Apoldo.

[7] On 19 November 2021, the high court dismissed the counter application and granted an order in the main application, requiring the Butcher Shop to pay an amount of R2 703 191,17[2] together with interest and costs on an attorney and client scale. Leave to appeal to this Court was granted on 22 December 2021.

[8] It is common cause that from the commencement of the lease, the Butcher Shop, as tenant, sublet the whole of the premises to Apoldo. Apoldo conducted the business of the restaurant. The Addendum was concluded on 14 August 2019. It was signed by Mr Shapiro on behalf of the Trust and by Mr Pick on behalf of both the Butcher Shop and Apoldo. It *inter alia* recorded that

'(a) The Tenant hereby agrees to remain [responsible] for all the terms and conditions of the Lease.

(b) APOLDO TRADE (PROPRIETARY) LIMITED hereby agrees to be jointly and severally equally responsible for the term of the Lease.'

The issues

[9] The appeal raises four issues. The first is whether the lease agreement excludes the claim for remission of rent raised by the Butcher Shop. If the answer to this question is positive, it would dispose of the appeal. If not, the further issues require consideration.

[10] The second question is whether the Butcher Shop, a tenant, may claim remission of rental in circumstances where the loss of use and enjoyment of the property is suffered by its sub-tenant, Apoldo.

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[2] The Trust had supplemented its papers in the high court to claim further amounts. which became due after the launch of the main application.

[11] The third issue concerns a so-called reverse piercing of the corporate veil. Essentially, the question is whether, on the facts of this case, this Court should disregard the separate legal personality of Apoldo, to allow the Butcher Shop to raise as a defence to the Trust's claim for payment of rent, a defence that Apoldo would be entitled to raise against it.

[12] The fourth issue arises if the answer to the third is negative. In that event, the Butcher Shop contends that the common law ought to be developed to permit this Court to disregard the corporate personality of Apoldo in the present circumstances.

The lease agreement and remission

[13] The circumstances in which a tenant is entitled to claim remission of rent, at common law, are not controversial. A lessee is obliged to fulfil all obligations which were expressly or impliedly undertaken by agreement with the lessor. It is obliged to pay the rent; to care for the property let; not to use it for a purpose other than for which it was let; and to restore it in the same good order upon termination of the lease. The lessee must pay the full amount of rent due less that which is remitted by law.[3] For the present we need only deal with entitlement to remission when the property is not placed at the disposal of the lessee, either by the lessor or because of an intervening circumstance. The principle was set out in *Hansen, Schrader & Co v Kopelowitz*:

> '. . . [A] lessee is entitled to remission of rent either wholly or in part where he has been prevented either entirely or to a considerable extent in making use of the property for the purposes for which it was let, by some *vis major* or *casus fortuitus,* provided always that the loss of enjoyment of the property is the direct and immediate result of the *vis major* or *casus fortuitus*, and is not merely indirectly or remotely connected therewith.'[4]

[14] Parties may limit or exclude the right to claim remission of rent in circumstances of *vis major.* When construing a lease agreement, it is assumed that they intend the operation of principles of

[3] A J Kerr, *The Law of Sale and Lease* 3rd ed at 350.

[4] *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707 at 718-719; see also *Thompson v Scholtz* [1998] 4 All SA 526 (A); 1999 (1) SA 232 (SCA) at 237H-238C.

the common law. As stated in *First National Bank of SA Ltd v Rosenblum & Another*,

> 'In matters of contract the parties are taken to have intended their legal rights and obligations to be *governed by the common law unless they plainly and unambiguously indicated the contrary*. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness of approach is exemplified by the cases in which liability for negligence is under consideration. Thus, *even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability* for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, *it will not be regarded as doing so if there is another realistic and not fanciful basis* of potential liability to which the clause could apply *and so have a field of meaningful application*. (See [*South African Railways and Harbours] v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419D-E).'[5]

(My emphasis.)

[15] The Trust contended that the lease agreement did not envisage a claim for remission of rental. It based its argument on the premise that,

> (a) the lease restricted beneficial occupation to physical occupation and control.
>
> (b) the obligation to pay the base rent was not reciprocal, as the base rental was payable in advance; and
>
> (c) the Butcher Shop had assumed the risk of a *vis major* event such as had occurred.

[16] Clause 1 of the lease defines 'beneficial occupation' to mean the physical possession and control of the leased premises. It was submitted that the restrictive definition reflected an intention to place the lessee in physical possession of the premises in exchange for the payment of a base rental. Since the payment of turnover rent related to the conduct of the restaurant business as a separate charge, the

[5] *First National Bank of SA Ltd v Rosenblum & Another* [2001] 4 All SA 355 (SCA); 2001 (4) SA 189 (SCA) para 6.

conduct of the business from the premises did not form part of the *commodus usus* conferred by the lease. The lease did not contemplate a common law-based claim for remission of base rental other than provided by clause 34, which deals with the physical destruction of the premises.

[17] The argument loses sight of the context of the lease agreement construed as a whole. The term 'beneficial occupation' does not define the use and enjoyment that is conferred by the lease agreement. Clause 3 records that the premises are leased '. . .on the terms and conditions set out in the Agreement and Schedules 1 and 2 attached . . . ' to the agreement. Schedule 1 deals with the period of the lease and the rates applicable to the calculation of the base and turnover rental. Paragraph 16, under the heading 'right of use' states that:

'The Tenant will open an upmarket steakhouse, butchery, wine shop in section 1 and will be responsible for all licences and planning submissions required by local or national authorities.'

[18] Clause 9.1 states that the tenant shall not use the leased premises for any purpose other than that set out in paragraph 16 of Schedule 1. Although clause 9.2 expressly excludes a warranty that the leased premises 'has been configured for the purposes' of the business, other clauses serve to ensure that the premises may be put to the use contemplated by the lease agreement. Thus, in clause 9.15 the Trust warranted that the property had been zoned for the contemplated use. Clause 10.1 contains a similar warranty in relation to the body corporate rules of the sectional title scheme.

[19] These provisions plainly and unambiguously indicate that the property was let for the purpose of conducting a restaurant business from the premises. The term 'beneficial occupation' therefore did not restrict the use and enjoyment of the property to mere physical occupation and possession. The context, furthermore, indicates that beneficial occupation was given in order to allow the fitting-out of the premises as a restaurant, prior to the commencement of trading. The responsibility for the fitting out of the premises, the installation of electrical, gas and other services was that of the Butcher Shop. It was obliged to submit building plans to the local authority for approval. To this end provision was made for a power of attorney given to the Butcher Shop to authorise submission of the plans. Common sense

dictates that physical occupation and control of the leased premises would necessarily be required in order to enable the Butcher Shop to carry out its obligations in the development of the premises.

[20] The beneficial occupation date was set as the first business day after the last of three identified documents were delivered. These were the power of attorney referred to above; a practical completion certificate issued by an architect; and a partial occupation certificate. This latter certificate was defined to mean:

> 'a letter of consent issued by the Landlord … or a certificate/approval/consent issued . . . as may be required which allows the Tenant to commence its fit out of the Leased Premises by allowing the Tenant's contractors and other professionals access to the Building, Property and Leased Premises….'

[21] These provisions, considered in their proper context, point to the conclusion that the restrictive definition of 'beneficial occupation' does not define the use and enjoyment of the premises. Since the lease in fact conferred use and enjoyment beyond mere physical possession and control, a *vis major* event, which did not interfere with physical possession and control, could give rise to a claim for remission.

[22] Clause 34 also does not assist the Butcher Shop. It contemplates two scenarios. The first is where the leased premises is destroyed or damaged 'to an extent which prevents the Tenant from being able to conduct its business'. In that event, if the premises cannot be restored to its condition within a period of nine months, the landlord has an election to cancel the lease. If the landlord does not notify the tenant of its election, the lease is deemed to have been cancelled. It is then provided that the tenant shall have no claim against the landlord and that the tenant is not liable for the payment of rent and operating costs 'from the date of destruction'. If the landlord elects not to cancel, it is obliged to reinstate the premises and the tenant is excused from the payment of rent and operating costs for as long as it is unable to conduct its business. The total physical destruction is not confined to circumstances arising from a *vis major* event.

[23] The second scenario involves partial destruction or damage by whatever cause, provided that the damage was not caused by a *vis major* event or by the tenant. In such event the agreement shall not be cancelled. It is provided that the rent and operating costs payable by the tenant shall be reduced *pro rata* and to the extent to which the

tenant's turnover is reduced. Apart from this, the tenant shall have no claim whatsoever against the landlord as a result of the damage, no matter how caused. Clause 34 therefore does not purport to limit or restrict the appellant's right to rely upon common law principles, which regulate the consequences of a *vis major* event.

[24] The further argument based on the absence of reciprocity was, correctly, not pressed with enthusiasm. The requirement that the rent be paid monthly in advance has the effect that the payment of the rent is not reciprocal to the delivery of the use and enjoyment of the leased property. Such clause does not, however, preclude the right to claim a remission or abatement of rent which arises by operation of law.[6] Nor does a clause which requires that payment be made without deduction or set-off.[7]

[25] The Trust's contention that the Butcher Shop had voluntarily assumed the risk of a *vis major* event such as that upon which it relied, was based on clause 15.1 of the agreement. It stated that,

'The Tenant shall not contravene or permit the contravention of any law, by-law, ordinances, proclamation or statutory regulation or the conditions of any licence relating to or affecting the carrying on of any business in the Building.'

[26] This clause, so the argument went, is sufficiently broad to cover the imposition of general trading restrictions as were imposed pursuant to the declaration of the National State of Disaster. It should therefore be accepted that the Butcher Shop had assumed the risk that its business operations may be precluded by law or regulation.

[27] The language employed in the clause is directed to compliance with laws and regulations which affect the business of the tenant. It says nothing of the consequences which flow from the curtailment of business activities. It prohibits contravention of laws. The clause must be read in context. I have already pointed to several provisions of the lease agreement which placed upon the Butcher Shop the obligation to obtain the required licences and local authority approval for the conduct of its business. In addition, the lease indemnified the Trust

[6] Kerr fn 3 above at 353.
[7] Ibid at 357.

from liability arising from the Butcher Shop's failure to comply with licencing or local authority requirements.

[28] It follows that the first question must be answered in the negative. The lease agreement did not preclude a claim for remission of rent arising from a *vis major* event such as that relied upon in this case.

The effect of the Apoldo sub-tenancy

[29] The next question which arises is whether the Butcher Shop has a claim, in law, for the loss of use and enjoyment of the premises suffered by Apoldo. Counsel for the Butcher Shop placed heavy reliance upon the judgment in *North Western Hotel Ltd v Rolfes, Nebel & Co*[8] to support the proposition that a tenant may seek remission of rent in circumstances where a sub-tenant has suffered the loss of use and enjoyment of the leased property as a result of *vis major*.

[30] The facts of that matter were as follows. The plaintiff, North Western, owned a property on which was constructed an hotel. It let the property to the defendant, Rolfes, Nebel & Co (Rolfes), who in turn sub-let the property to two sub-tenants who conducted the business of an hotel on the property. The lease conferred on the tenant the right to cancel the lease if its liquor licence was revoked. At the outbreak of the South African War, the Government of the Zuid Afrikaanse Republiek prohibited the sale of liquor at hotels and bars. When the sub-tenants wanted to cease operating the hotel, they were compelled to continue its operation under threat that the Government would take over the operation. At some point thereafter the liquor licence was restored, and they were able to operate the hotel along normal lines. Still later, the British military authorities took occupation of the hotel. It was then used to accommodate a military unit and as a site for accommodating refugees. During this latter period considerable damage was done to the property and the furniture of the hotel.

[31] North Western brought an action to recover rent due to it; for compensation for the damage to the furniture; and that Rolfes deliver the property in proper repair or pay an amount sufficient to undertake such repairs. Rolfes resisted the claim on the basis that the sub-tenant had been deprived of its use and enjoyment of the property and that the damage caused to the furniture and the property occurred *casus*

[8] *North Western Hotel Ltd v Rolfes, Nebel & Co* 1902 TS 324 (*North Western Hotel)*.

fortuitus. It sought determination of the remission by way of a claim in reconvention. The court granted judgment in favour of North Western for rent which was payable during the period from the outbreak of war until 5 August 1900 when the British forces commandeered the hotel. It allowed Rolfes full remission of rent for the period 5 August 1900 until 15 July 1901on the basis that the British occupation of the hotel deprived the sub-tenants of the beneficial use of the property. It also granted full remission of rent for the period from July 1901 until the tenants quit the hotel in September 1902. The court did so on the basis that the damage to the furniture rendered the property unfit for the purpose for which it was let. It found that the circumstances in which the property came to be damaged, was not within the contemplation of the parties; that Rolfes had not assumed such risk and had not assumed the landlord's obligations to keep the property in proper repair. The court therefore dismissed the claim for payment of the damage caused to the furniture and the buildings.

[32] While these facts suggest, at face value, that the court in *North Western Hotel* found that a lessee may rely upon the loss suffered by a sub-lessee, it did not. The court was not called upon to decide that question. That issue, although raised on the pleadings, was disposed by the acceptance, at trial, that the lessee and sub-lessee could be regarded as one party. The judgment states:

> 'The contention of the defendants that they are in the same favourable position as the sub-lessees is practically admitted by the plaintiff company; for though the company denies generally the amended plea of the defendants, their counsel, Mr *Leonard*, boldly accepted this position and argued his whole case from the standpoint that the lessees and sub-lessees were one.'[9]

[33] What the court was required to decide in relation to the remission of rent, was whether the election not to cancel the lease in the face of the imposed restrictions, and the fact that compensation for losses was claimed from a third party, constituted a waiver of the right to assert non-beneficial occupation by reason of *vis major*. The court held that it did not constitute a waiver. A claim lodged against the party that caused the loss of beneficial occupation did not preclude a claim for

[9] Fn 8 above at 329.

remission as against the landlord. No compensation had been paid. Importantly, the court held that different considerations would apply if compensation had been received. It held:

'If the lessees had been paid the full rent and damage suffered by the forcible ejectment either by the military power that ejected them or by someone else, and they then claimed a remission of rent from the lessors, they would have been met by the *exceptio doli mali*, and if hereafter they are paid compensation the lessors can for similar reasons claim any money so paid to them.'[10]

[34] *North Western Hotel* is therefore not authority for the proposition advanced by counsel for the Butcher Shop. It is, if anything, against the proposition, since it holds that actual loss must be established by the party seeking remission of rental. This accords with general principle. Remission of rent is available to a lessee or tenant who suffers loss consequent upon the interference with its use and enjoyment of the leased property. It is an equitable remedy which seeks to ameliorate the prejudice caused by circumstances beyond the control of the parties to the lease. It may only be claimed by the party who suffers the loss. Such loss must be directly attributable to the *vis major* event and must be substantial.[11]

[35] In this instance, Apoldo, a separate legal entity, occupied the premises; had use and enjoyment thereof and conducted the business of the restaurant. In terms of the sub-letting arrangement between the Butcher Shop and Apoldo, it stood in the position of tenant vis-à-vis the Butcher Shop as landlord. As a matter of fact, the loss of beneficial use and enjoyment of the sub-leased premises was suffered by Apoldo, not the Butcher Shop. The existence of the sub-tenancy in law precludes a claim for remission based on loss suffered by the sub-tenant.

The piercing of the corporate veil

[36] This brings me to the nub of the case for the Butcher Shop. It was this: the Butcher Shop and Apoldo are no more than their sole shareholder and controlling mind, Mr Pick, in corporate guise. Apoldo has traded the restaurant since the start of the lease agreement. It has

[10] Ibid at 332.

[11] Kerr fn 3 above at 353 – 356; , Du Bois et al *Wille's Principles of South African Law* (2007) 9 ed at 916.

paid the rental due to the Trust. Apoldo and the Butcher Shop are, vis-à-vis the Trust essentially a single entity and the Trust drew no distinction between them, save by formal consent to the sub-lease in 2019. On this basis, it was submitted, the common law principles which allow a separate legal personality to be disregarded, ought to apply. These principles, it was argued, are sufficiently flexible to allow the Butcher Shop to put up the loss suffered by Apoldo as a defence to the Trust's claim for rent payable by the Butcher Shop.

[37] The argument, in the main, was that the existing principles of the common law support the outcome. The alternative argument was that, if it is found that the common law does not permit the 'piercing of the veil', then it should be developed to allow the remission claim in this case.[12]

[38] It is necessary, given the arguments advanced, to begin by considering whether s 20(9) of the Companies Act 71 of 2008 (the Companies Act) has codified, in the sense of having replaced, the common law in relation to when corporate personality may be disregarded. Section 20 deals with the validity of company actions. It contains several provisions which relate to actions taken by a company contrary to any limitation or restriction imposed by its memorandum of incorporation and with instances of conduct which is *ultra vires* the authority of the directors or officers of the company. Many of these provisions implicate principles which find expression in the common law.[13]

[39] Subsection (9) provides that:

'If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or, of a

[12] I deal with the 'development of the common law' argument later in this judgment. See para 55 below.

[13] For example, matters which arise in relation to the *Turquand* rule and the protection of persons who, bona fide, rely upon the conduct of directors and officers of a company purportedly carried out with authority to bind the company.

shareholder of the company or, in the case of a non-profit company, a member the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph *(a)*.'

[40] The question is one of interpretation. As noted in *Ex Parte Gore and Others N N O (Gore),*[14] there is no language which expresses an intention either way. In *Gore*, Binns-Ward J, concluded that there was no discord between the section and the approach to piercing the veil set out in the cases decided before the section was enacted.[15] The learned judge held that the provision 'broadens the bases upon which the courts in this country…have hitherto been prepared to grant relief that entails disregarding corporate personality'.[16] Section 20(9), therefore does not replace the common law, it supplements the common law. This Court, in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others*,[17] expressed the view that the section supplements the common law.

[41] The section does not contain language which evidences an intention to abolish or replace the common law, such as that contained in s 165(1) of the Act.[18] This, for me, is the decisive consideration. It must therefore be accepted that s 20(9) does not replace the common law nor establish a defined set of circumstances in which a court may disregard the separate legal personality of a company.

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[14] *Ex Parte Gore and Others* 2013 (3) SA 382 (WC); [2013] 2 All SA 437 (WCC) (*Gore*) para 31.

[15] Ibid para 32.

[16] Ibid para 33.

[17] *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* [2017] ZASCA 177; 2018 (4) SA 71 (SCA).

[18] Section 165 deals with derivative actions. Subsection (1) states that:

'Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.'

Section 161 deals with the protection of the rights of holders of securities. It provides in subsection (2) that the right to approach a court conferred by the section is in addition to the rights conferred at common law. It is not without significance that subsection (2) was amended by the Companies Amendment Act 3 of 2011, which is the same amending legislation which introduced s 20(9) to the Act.

[42] The next enquiry is what general common law principles apply when the question of piercing the corporate veil arises. Smalberger JA, in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others,*[19] observed that a company might be used as a façade even though it was not originally incorporated with any deceptive intention. He observed that the law is far from settled regarding such circumstances and that each instance involves an enquiry into the facts, which may be decisive.[20]

[43] However, having made this observation, Smalberger JA proceeded to assert several principles which were sufficiently clear to apply to the facts of the case. The first is that a court has no general discretion to simply disregard a company's separate legal personality whenever it considers it just to do so.[21] The second, drawing upon the judgment of Corbet CJ in *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*,[22] is that, as a matter of policy, the separate corporate personality ought to be upheld. 'Piercing' or 'lifting' of the corporate veil will not lightly occur, and then only when considerations of policy favour it. The learned judge held:

'It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate legal personality but should strive to uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct … are found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil…'[23]

[44] The third principle, encapsulated in the quoted passage, is that the balancing of policy considerations will only arise where there is

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[19] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* [1995] 2 All SA 543 (A); 1995 (4) SA 790 (A) at 804C-D (*Cape Pacific*).

[20] Ibid at 802H-I.

[21] Ibid at 803A.

[22] *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*1994 (1) SA 550 (A) at 566C-F.

[23] *Cape Pacific* fn 19 above at 803H-I.

some element of fraud, abuse or dishonesty in respect of the corporate personality. The fourth, is that the purpose of piercing the corporate veil is to fix the person or persons responsible for abuse with liability.[24]

[45] These principles were affirmed in *Hülse-Reuter and Others v Gödde*,[25] where the court emphasised that the misuse or abuse of the distinction between the corporate entity and those who control it should result in some unfair advantage to them. In the context of that case, the availability of an alternative remedy to the party seeking to have the corporate identity disregarded, was decisive.[26] It was held that the dictum in *Cape Pacific* to the effect that piercing of the veil is not necessarily precluded if another remedy exists,[27] means no more than that the existence of such remedy is a relevant factor to be weighed in the policy judgment applied when disregarding the separate corporate personality.[28]

[46] These are clear guiding principles which have consistently been applied in matters where the separate legal personality of a company is sought to be disregarded. The argument by counsel for the Butcher Shop was that these principles, applied with the required flexibility to the facts of this case, entitle the Butcher Shop to the relief it sought in its counter application for remission of rent.

[47] It was submitted that several factors rendered the matter exceptional. The two corporate entities, the Butcher Shop and Apoldo, were in essence Mr Pick in corporate guise. Mr Pick, as sole shareholder, conducted a family business, in which his son was also involved, and he did so via the two corporate entities. The business was that of Mr Pick. Seen from this perspective, it was suggested that there was no *de facto* distinction between the Butcher Shop and Apoldo. Furthermore, the addendum to the lease agreement was a tripartite agreement. The involvement of Apoldo in the conduct of the

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[24] Ibid at 804D.

[25] *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA); [2002] 2 All SA 211 (A) para 20.

[26] Ibid para 23..

[27] *Cape Pacific* fn 19 above at 805G-I. The court held that '[t]he existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy considerations come into play, but it cannot be of overriding importance'.

[28] *Hülse-Reutter* fn 25 above para 23.

business was known, and accepted, by the Trust. Invoices for the monthly rental were submitted to Apoldo, and the base rent was paid by Apoldo. These facts indicated that the Trust treated the Butcher Shop and Apoldo as a single trading entity.

[48] It was argued that these facts call for an equitable treatment of the two corporate entities. If the court did not treat the two entities as one for the purpose of the rent remission claim, it would give rise to an anomaly in relation to the Butcher Shop's liability to the Trust for turnover rental, inasmuch as the turnover from the business was that of Apoldo rather than the Butcher Shop. The Trust would therefore not be entitled to turnover rental based on Apoldo's turnover.

[49] Flexibility, as enjoined by the judgment in *Cape Pacific*,[29] does not imply that the guiding principles are jettisoned. It means no more than that careful consideration be given to the facts of the case and that the matter is not approached on the basis that the principles apply only in a set category of cases. Counsel's argument proceeded from the acceptance that this is not the usual case in which a piercing of the veil is sought. This, it was submitted, was akin to 'reverse piercing', where the members or shareholders of a company seek to have the corporate identity of the company disregarded to advance rights which would otherwise accrue to the company, as their rights.[30] It was argued that the remedy is not only available to an outside party or creditor who seeks to ignore the consequences of the separate legal personality of a company in order to fix liability upon the shareholders of the company.

[50] This submission is, so far as it goes, accurate. It is true that none of the reported cases specify it as a requirement that the remedy is only

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[29] *Cape Pacific* fn 19 above at 805F.

[30] *The Law of South Africa (LAWSA)* 3rd ed, Vol 6, Part 1, para 64, where it is described as:

'Veil piercing is referred to as "reverse veil piercing" when the persons who sought to have the veil set aside were the shareholders themselves. Thus, while the more usual situation is for a creditor to attempt to pierce the corporate veil in order to impose personal liability on the corporate members, in the case of a reverse piercing the members of the company attempt to pierce the corporate veil from within, usually by claiming that the court ought to treat them as the true owners of the business or assets of the company.'

available at the instance of a creditor. The question, however, is this: is the Butcher Shop entitled to ignore the corporate personality of Apoldo so that it may assert rights which accrue to Apoldo? Counsel submitted that fraud or dishonesty, or unconscionable conduct is not a pre-requisite for the remedy. The submission is, however, in conflict with established authority of this Court. There is no authority for the proposition that the ordinary employment and use of a corporate form, involving no abuse, misuse or unconscionable conduct would entitle a court to ignore the separate legal personality of a company.

[51] The lease agreement between the Butcher Shop and the Trust was premised on the fact that the Butcher Shop would occupy and use the leased premises for the purpose of running the restaurant. Yet, the premises were sub-let to Apoldo, and it conducted the business. This choice of business arrangement was not explained. The rationale is not strictly relevant. What is relevant is that Mr Pick, who on the submission of counsel is to be regarded as the person conducting the business, chose to do so in the form of a corporate entity.

[52] In *Ochberg v Commissioner for Inland Revenue* De Villiers CJ said, in relation to the distinction between a company and its shareholder,

'The wisdom of allowing a person to escape the natural consequences of his commercial sins under the ordinary law, and for his own private purposes virtually to turn himself into a corporation with limited liability may well be open to doubt. But as long as the law allows it the Court has to recognise the position. But then too the person himself must abide by that. A company, being a juristic person, remains a juristic person separate and distinct from the person who may own all the shares, and must not be confused with the latter. To say that a company sustains a separate *persona* and yet in the same breath to argue that in substance the person holding all the shares is the company is an attempt to have it both ways, which cannot be allowed.[31]

[53] A similar view was expressed in *Tunstall v Steigmann.*[32] In that case it was contended that a sole shareholder of a company should be

[31] *Ochberg v Commissioner for Inland Revenue* 1931 AD 215 at 232.
[32] *Tunstall v Steigmann* 1962 (2) Q.B. 593; [1962] 2 All ER 417 (CA).

held to occupy premises for the purpose of a business conducted by the company. The Court of Appeal rejected the notion. It said:
'But the fact remains that she has disposed of her business to a limited company…It is to be assumed that the landlord in this case assigned her business to the limited company for some good reason which she considered to be of an advantage to her. She cannot say that in a case of this kind she is entitled to take the benefit of any advantages that the formation of the company gave her, without at the same time accepting the liabilities arising therefrom. She cannot say that she is carrying on the business or intends to carry on the business … and at the same time say that her liability is limited as provided in the Companies Act.'[33]
[54] As I have demonstrated, there is no scope for the application of the remedy of disregarding the corporate identity, upon the existing principles of the common law, on the facts of this case. What the Butcher Shop seeks is to disregard, for its own benefit, the separate corporate personality of Apoldo, in circumstances where their joint shareholder has deliberately arranged that Apoldo operates the restaurant even though the Butcher Shop is the Trust's tenant. The common law does not countenance disregarding corporate identities to allow this to be done.

The development of the common law

[55] This brings me to the alternative argument advanced by counsel for the Butcher Shop. It was that, in the light of the circumstances of the case, the existing principles of the common law ought to be developed in order to make available the remedy of piercing the veil in circumstances such as the present.
[56] The Butcher Shop's case for the development of the common law was not based upon a claim that an existing common law rule conflicts with a provision of the Constitution. The injunction to develop the common law arises, instead, in the context of the court's inherent jurisdiction to do so, in the interests of justice.[34] Once the court is engaged in developing the common law, it is enjoined to do so in

[33] Ibid at 420I-421A.
[34] Constitution s 173.

conformity with the Constitution and in a manner that promotes the spirit, purport and objects of the Bill of Rights.[35]

[57] The first difficulty which confronts the Butcher Shop is that, apart from contentions in argument, no proper case has been made out upon which the Court can engage in the development of the common law in a constitutional context. In *MEC for Health and Social Development, Gauteng v D Z obo WZ*, the approach to the development of the common law in the context of s 39(2) of the Constitution was held to require that:

'… [a] court must: (1) determine what the existing common-law position is; (2) consider its underlying rationale; (3) enquire whether the rule offends s 39(2) of the Constitution; (4) if it does so offend, consider how development in accordance with s 39(2) ought to take place; and (5) consider the wider consequences of the proposed change on the relevant area of the law.'[36]

[58] The argument for the development of the common law was premised upon the particular facts of the case. No general policy considerations were raised as being a conceivable basis for such development. The proposition was that the common law ought to recognise the availability of the remedy of disregarding corporate identity as a generally available equitable remedy to meet the exigencies of this case. The proposition would require this Court to hold:

(a) that our law accepts that the courts will pierce the corporate veil in the interests of justice.

(b) that the remedy is available even in circumstances where the use of a corporate personality involved no misuse, abuse, or other form of unconscionable conduct.

(c) that a court may disregard the existence of a separate legal personality in order to confer upon a third party, who is not a shareholder of the corporate entity, rights which vest in the corporate entity so disregarded.

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[35] Constitution s 39(2).

[36] *MEC for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC) para 31; see also *Thebus and Another v S* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 28.

(d) that it may do so even if the corporate entity whose personality is to be disregarded and its shareholder are not before the court.

[59] Such development is, in truth, not a development of the common law so much as an abrogation of the principles of the common law, long accepted by the courts of this country; duly recognised in statutory form by s 20(9) of the Companies Act; and consonant with legal principles applied in international jurisdictions.

[60] The existence and effect of s 20(9) of the Companies Act cannot be overemphasised. It was introduced to the Companies Act by an amendment effected in 2011. As explained earlier in this judgment, the section does not abrogate or replace the common law. It supplements the common law. The judgment in *Gore* explains, correctly, that use of the term 'unconscionable conduct' broadens the reach of the doctrine. The section, however, clearly contemplates some form of misuse or abuse of a separate corporate identity as a necessary condition for the application of the remedy.

[61] A court will exercise its inherent discretion to develop the common law sparingly.[37] It will approach the task, as indicated in *Carmichele v Minister of Safety and Security and Another:*

'… [M]indful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it is worth repeating the dictum of Iacobucci J in *R v Salituro*, which was cited by Kentridge AJ in *Du Plessis v De Klerk*:

"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. … In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. … The Judiciary should confine itself to those incremental changes which are necessary to

[37] *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) paras 51 & 52.

keep the common law in step with the dynamic and evolving fabric of our society.'" [38]

[62] In this instance the legislature has recently considered the questions that arise in this case. It enacted s 20(9) of the Companies Act in the form that it did. It did not introduce a general discretion to disregard the separate corporate personality of a company and it chose to confirm, even if in broader formulation, an essential requirement for the granting of the remedy, namely some form of unconscionable conduct. It was not suggested that s 20(9) offends a provision of the Constitution.

[63] This is not a case where there is any warrant for the sort of development of the law sought by the Butcher Shop. All that might notionally be available to it is some 'incremental change which keeps the common law in step with the dynamic and evolving fabric of our society'. In the preceding section dealing with the application of the common law principles to the facts of this case, I indicated that they do not countenance the relief sought by the Butcher Shop. Two further considerations militate against any form of 'incremental' fact-based development to accommodate the position of the Butcher Shop.

[64] Firstly, the existence of separate corporate identities and the consequences which attach thereto are by no means inherently unfair or unjust. Nor is there anything to suggest that the enforcement of the obligations undertaken by the Butcher Shop will bring about an injustice. Secondly, our law does not countenance a casuistic resort to equity and fairness to circumvent statutory provisions or the rules of the common law.[39]

Conclusion

[65] The appeal was argued primarily on the issues raised in the counter application brought by the Butcher Shop. There was, in effect, no contest in relation to the relief which was sought in the main application brought by the Trust. Counsel accepted that the lease agreement precluded the withholding of payment of the base rental. It

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[38] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 36.

[39] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 52; *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) para 18.

was accepted that the Butcher Shop had withheld payments and, in the absence of success in the counter application, the relief was properly granted in the main application. The conclusions reached on the four issues which were debated before this Court mean that the high court's orders must stand.

[66] In the result, the appeal is dismissed with costs.

BCB CABLE JOINTING CC v AMPCOR KHANYISA (PTY) LTD

Grounds for setting aside the award of a tender

Judgment given in the Western Cape Division, Cape Town, on 3 May 2023 by Cloete J

During 2019 the City of Cape Town advertised a tender relating to the provision of emergency cable jointing and terminating services with a closing date of 3 December 2019 for a period not exceeding 36 months from date of commencement of contract. Bids would be assessed in accordance with a so-called "80/20" calculation, applying to tenders with a value less than R50m. This meant that bidders would be scored based on a competitive assessment of their quoted prices with a maximum score of 80 points; and up to 20 "preference points" based on their "contribution level" in terms of the Broad-Based Black Economic Empowerment Act (no 53 of 2003) (BBEE). The bidder with the best overall score would be successful, save in exceptional circumstances

The City's Bid Evaluation Committee (BEC) found that both BCB Cable Jointing CC and Ampcor Khanyisa (Pty) Ltd submitted bids which met the mandatory requirements of the tender, offered reasonable and acceptable rates, had sufficient experience and offered adequate resources and staff to complete the work.

However, when the bids were scored, Ampcor achieved better than BCB. The latter offered the best prices, thus entitling it to 80/80 points for this item. However BCB acknowledged in its bid that it was a "non-compliant contributor" in terms of BBEE. In terms of the tender documents, this meant that BCB had to be scored with 0/20 possible preference points. Ampcor offered competitive prices, which entitled it to 75.07/80 points for price, and was a "level 1" B-BBEE contributor, which entitled it to 20/20 preference points.

The BEC thus recommended that Ampcor be appointed as the main contractor, and BCB as the alternative contractor. This recommendation was accepted by the City's Bid Adjudication Committee (BAC) and the tender award decision was conveyed to BCB and Ampcor on 11 June 2020.

BCB submitted an internal appeal to the City Manager. The appeal was determined on 13 July 2020. On 8 October 2020, BCB enquired from the relevant City official 'if there has been a commencement date set for the tender…'. On 16 October 2020 the official confirmed BCB's appointment as alternative contractor and requested certain documents and information, including 'the staff that will be used in the contract'. On 19 October 2020, BCB responded, pointing out that most of the documentation had already been supplied

On 20 October 2020 the Head: Maintenance and Service Standards for electricity generation and distribution, the City's Mr Gqwede, responded. On 18 November 2020, BCB's attorney wrote to the City making further representations. On the same date another City official replied that he 'Will respond!'. No response was forthcoming.

On 1 April 2021, BCB was advised that the contract had been concluded with the City on 3 August 2020. The City's formal acceptance of the same date was annexed to the letter, for a contract period commencing on 1 July 2020 and terminating on 30 June 2023.

BCB applied for an order that the City be compelled to conclude a contract, and allocate work to it, as alternative contractor pursuant to the tender award.

BCB relied on the Promotion of Administrative Justice Act (no 3 of 2000) (PAJA)and accordingly it was obliged to launch the review "without unreasonable delay and not later than 180 days" from having exhausted its internal remedy, ie its appeal, in terms of s 7(1)(a) of PAJA.

As the appeal was determined on 13 July 2020, the review should have been instituted, at the latest, by 9 January 2021.

Section 9 of PAJA provides that a court may "on application" extend the 180 day period "where the interests of justice so require".

BCB applied for condonation of the delay.

Held—

The most prominent factor militating against condonation was the combination of the unexplained delay of four months and the wholly inadequate explanation for delay during the balance of the eoght month period. However there was another significant factor militating against BCB.

The contract period for the tender expired on 30 June 2023, a mere three and a half months after the matter was argued. However, this was no excuse for BCB's earlier eight month delay. After delivery of the replying affidavit on 15 February 2022 it was in fact only on 19 September 2022 that the registrar was approached for a date to be allocated for the hearing. Even then Ampcor, the City and its Manager had to file heads of argument. BCB should have filed theirs by latest 22 February 2023 but they were only filed on about 9 March 2023. The further unexplained delays did not portray the picture of an anxious litigant wishing to bring finality to its dispute in a reasonably expeditious manner. The factual consequence was that, even were this court to come to BCB's assistance on the merits, the relief it sought would be rendered moot.

To the extent BCB had made out a case for condonation, it had to fail.

As far as the merits of the matter were concerned, the crux of BCB's attack was that, since the regulations promulgated on 20 January 2017 by the Minister of Finance while purporting to act in terms of s 5 of the Preferential Procurement Policy Framework Act (no 5 of 2000) were declared unlawful by the Supreme Court of Appeal in *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) on 2 November 2020, so too was the City's supply chain management policy ('SCMP') and given that the award of the tender to Ampcor occurred in terms of the regulations and SCMP, this was a self-standing ground for the setting aside of that award.

The fundamental flaw in BCB's argument was its contention that the invalidity of the regulations resulted in the SCMP being invalid on the basis that it was unconstitutional. The courts found the Minister to have acted ultra vires his powers in promulgating those regulations because they were unnecessary to make, since each organ of state is empowered to determine its own preferential procurement policy. There was no direct challenge by BCB to the constitutionality of the SCMP itself.

BCB advanced various grounds for why it believed the tender award to Ampcor should be set aside. The only objective evidence relied upon by BCB was a list which came into its possession from an undisclosed source on an undisclosed date of certain cable jointers in Cape Town on 3 December 2019, and who allegedly held the required

qualifications for the tender. BCB maintained that none of them was employed by Ampcor on that date.

BCB's complaint was that the manner in which points were allocated for pricing of the tender was irrational since the formula contained in the tender documents made no mathematical sense when applied to the tender awarded to Ampcor. BCB assumed that the City added all the items on the pricing lists of the tenderers together, to determine individual totals per tenderer. These totals were then compared for the awarding of points. According to BCB this was irrational.

However the City provided a complete answer. It explained that it used a basket to evaluate rates. It advises tenderers that a basket will be used but the City cannot make these values known as this would defeat the competitiveness criteria in the tender process.

The application failed.

Mr L Van Rensburg for Van Rensburg & Co, Cape Town, appeared for the applicant
Advocate D Borgstrom SC instructed by: Dirk Kotze Attorneys, Cape Town, appeared for the first respondent
Advocate M Adhikari instructed by Riley Inc, Cape Town, appeared for the second and third respondents

Cloete J:

Introduction

[1] This is an opposed review in which the applicant ("BCB") seeks, *inter alia*, the setting aside of a tender awarded by the second respondent (the "City") to the first respondent ("Ampcor") relating to the provision of "emergency cable jointing and terminating services for up to 11 KV cables" (the "tender").

[2] BCB launched this application on 16 March 2021 in two parts. In Part A it sought an order that pending determination of the relief in Part B the City be compelled to conclude a contract, and allocate work to it, as alternative contractor pursuant to the tender award.

[3] On 19 April 2021, Part A was settled in terms of an agreed order which reads in relevant part as follows:

'2. It is recorded that:

2.1 a contract was concluded on or about 3 August 2020 between the second respondent and the applicant, as alternative contractor ("the Contract") pursuant to the award of tender number…

2.2 the applicant and second respondent will adhere to the terms of the Contract referred to in paragraph 2.1 above, while the Contract remains in effect;

2.3 the applicant's entitlement to be allocated work, as alternative contractor, in terms of the Contract is dependent on the first respondent as main contractor defaulting in terms of the relevant provisions of the contract concluded between the first respondent and the second respondent pursuant to the award of the Tender…

3. The aforementioned recordals do not constitute an admission on the part of the second and/or third respondents that the applicant is entitled to any of the relief sought in Part A of the notice of motion.

4. The second and third respondents expressly reserve the right to dispute the applicant's entitlement to any of the orders sought in Part A of the notice of motion; and to dispute the allegations in the founding affidavit pertaining to the relief sought in Part A of the notice of motion.

5. The costs pertaining to the relief sought in Part A of the notice of motion, will stand over for determination at the hearing of the relief sought in Part B of the notice of motion.'

[4] In the amended Part B the following relief is sought:

4.1 Condonation for any delay in launching the application;

4.2 Setting aside the City's supply chain management policy ("SCMP") to the extent that it seeks to comply with the Preferential Procurement Regulations, 2017;

4.3 Setting aside the tender award together with the decision of the third respondent ("City Manager") to dismiss BCB's appeal against that award;

4.4 Substituting the award of the tender by awarding it to BCB as principal contractor;

4.5 Directing that compensation be paid to BCB, jointly and severally by the respondents, in the amount of R958 820.86; and

4.6 Costs on the scale as between attorney and client.

Relevant factual background

[5] BCB had previously been the contractor and service provider to the City for the electrical work underpinning the tender for 12 years. During 2019 the City advertised the tender with a closing date of 3 December 2019 for a period not exceeding 36 months *'from date of commencement of contract'*.

[6] From the tender documents it is clear that the tender did not relate to any specific project(s). It instead envisaged a "framework agreement" in which a successful bidder would perform *ad hoc* services for the City as and when the need arose, at agreed rates.

[7] Bids would be assessed in accordance with a so-called "80/20" calculation, which applies to tenders with a value less than R50 million. This meant that bidders would be scored based on a competitive assessment of their quoted prices with a maximum score of 80 points; and up to 20 "preference points" based on their "contribution level" in terms of the B-BBEE Act.[1] The bidder with the best overall score would be successful, save in exceptional circumstances (as far as can be gleaned from the papers, BCB does not rely on any such circumstances).

[8] As also evidenced by the tender documents, the City envisaged appointing one successful bidder for all of the tendered work in all of its electrical distribution areas. However, it reserved the right to break up the tendered work, and to appoint both a "main" and "alternative" contractor. The alternative contractor would only be awarded work projects if the main contractor defaulted, and failed to meet its commitment to be on site within 4 hours of notification that work was required.

[9] The City's Bid Evaluation Committee ("BEC") found that both BCB and Ampcor submitted "responsive" bids (i.e. those which met the mandatory requirements of the tender); offered reasonable and acceptable rates; had sufficient experience; and offered adequate resources and staff to complete the work.

[10] However, when the bids were scored, Ampcor achieved better than BCB. The latter offered the best prices, thus entitling it to 80/80 points for this item. However BCB acknowledged in its bid that it was a "non-compliant contributor" in terms of B-BBEE. In terms of the

1 Broad-Based Black Economic Empowerment Act 53 of 2003.

tender documents, this meant that BCB had to be scored with 0/20 possible preference points. Ampcor offered competitive prices, which entitled it to 75.07/80 points for price; and was a "level 1" B-BBEE contributor, which entitled it to 20/20 preference points.

[11] The BEC thus recommended that Ampcor be appointed as the main contractor, and BCB as the alternative contractor. This recommendation was accepted by the City's Bid Adjudication Committee ("BAC") and the tender award decision was conveyed to BCB and Ampcor on 11 June 2020.

[12] Aggrieved by the outcome, BCB submitted an internal appeal to the City Manager. In summary its grounds of appeal were: (a) superior work experience and functionality in comparison to Ampcor; and (b) better pricing than Ampcor. On 13 July 2020 the City Manager advised BCB that its appeal had been unsuccessful. In his accompanying reasons the City Manager confirmed that BCB offered marginally better prices, but this had been eclipsed by the fact that it scored no preference points. Ampcor thus achieved the highest score, and there was no reason that BCB's claimed superiority should place it above Ampcor. In particular, the City Manager stated that:

> 'What the Appellant raises as its upper hand when compared to Ampcor was responsiveness criteria which both tenderers satisfied. Accordingly, based on regulation 5(7) of the PPPFA Regulations, the tenderers had to be evaluated further based on their price and preference points…
>
> Clause 6.3.10.3 of the tender conditions provides that scoring of tenderers would be done in terms of points for price and preference. The Appellant is correct in asserting that its price was lower than that of Ampcor. However, as alluded to earlier, price is not the only factor to consider when determining the highest ranked tenderer; a tenderer's preference points must additionally be considered.
>
> The Appellant, as a non-contributor[2] in terms of Broad-Based Black Economic Empowerment, did not score any preference points.
>
> For further clarity on why Ampcor was successful as Main Contractor, the total scores on price and preference were as follows:-

[2] A non-compliant contributor is one who does not meet the minimum score for a level 8 contributor in terms of clause 6.3.10.3 4 of the tender conditions.

Tenderer	Price points	Preference points	Total
1. Ampcor	75.07	20	95.07
2. The Appellant	80	0	80

[13] Almost three months later, on 8 October 2020, BCB enquired from the relevant City official *'if there has been a commencement date set for the tender…'*. On 16 October 2020 the official confirmed BCB's appointment as alternative contractor and requested certain documents and information, including *'the staff that will be used in the contract'*. On 19 October 2020, BCB responded, pointing out that most of the documentation had already been supplied. It also complained about Ampcor's competence and then went on to state:

> 'As per a previous email received from the CoCT regarding our appeal, we were informed that we could seek further legal action within 180 days should we feel that we are not receiving the necessary feedback we require. To date, we do feel that this matter is not being dealt with and hope that this is not the course of action which we may need to follow.'

[14] On 20 October 2020 the Head: Maintenance and Service Standards for electricity generation and distribution, the City's Mr Gqwede, responded. In essence, he pointed out that it had taken time to have Ampcor's cable jointers declared competent by the City's training centre (due to Covid-19 related restrictions) and stated that:

> 'As mentioned above we aim to finalise the administrative process this week and issue communication to our users to start placing orders to Ampcor in the coming week. In essence we have not officially commenced with this contract, we have not officially monitored the contractor's performance and therefore cannot agree with [BCB's] comments. The contract allows us to utilise the alternative contractor where necessary, at the moment it is not necessary and we will not invoke this provision yet. As per the norm we will monitor the performance of this contractor and enforce contract conditions as is required from us.'

[15] Almost another month went by until on 18 November 2020, BCB's erstwhile attorney wrote to the City. The relevant portion of that letter reads as follows:

> '3. Our client's further instructions are that no further feedback or correspondence has been received whatsoever in relation to the prospective signature of a contract confirming their appointment as Alternative Contractor. Not only is this situation untenable, but it also runs contrary to our client's experience of the CoCT in such matters…
>
> 4. Accordingly, our client is at a loss to understand… why the CoCT has so far failed to attend to the contract compliance matter…
>
> 5. With due regard to the aforesaid, we are instructed to call upon you to provide our client with confirmed arrangements for signature of a suitable contract to govern their position as Alternative Contractor… Considering that so much time has passed since the tender was awarded, you are requested to now respond with appropriate urgency and in writing by close of business on Friday 20 November 2020.
>
> 6. In conclusion, we are instructed to place on record that our client intends to conclude such a contract with the CoCT to regularise any work that it is required to do as Alternative Contractor, but without prejudice to its contention that the tender was irregularly composed, considered and/or awarded and stands to be set aside. In this latter respect our client is mindful of the 180-day period within which it is expected to launch a legal challenge if necessary. That said, our client persists in its hope that the CoCT will confront the incontrovertible difficulties that it has created for itself in the award of this tender (some of which it has, itself, placed on record), and that a Court challenge will not be required to deal with same…'

[16] On the same date another City official replied that he *'Will respond!'*. According to the applicant no response was forthcoming at the time of deposing to the founding affidavit on 15 March 2021 (a further 4 months later). After this application was launched (with Part A enrolled for hearing on 19 April 2021) the attorney for the City and its Manager wrote to BCB's current attorney (on 1 April 2021). BCB was advised that the contract had been concluded with it on 3 August 2020. The City's formal acceptance of the same date was annexed to the letter, for a contract period commencing on 1 July 2020 and

terminating on 30 June 2023. As I understand it, this resulted in the agreed order in respect of Part A.

[17] There is no assertion in the answering affidavit of the City and its Manager that this formal acceptance was ever sent to BCB prior to 1 April 2021, and in this respect BCB's version falls to be accepted. However in its supplementary founding affidavit deposed to later on 26 July 2021, BCB nonetheless elected to devote 34 out of 85 paragraphs (or 17 pages of its 40 page affidavit) to the events leading up to settlement of the Part A relief, which was entirely unnecessary and caused the City (and its Manager) to incur costs to deal with this.

Delay

[18] In its founding affidavit BCB relied squarely on PAJA[3] and accordingly – as BCB itself acknowledged in earlier communications with the City – it was obliged to launch the review "without unreasonable delay and not later than 180 days" from having exhausted its internal remedy, i.e. its appeal, in terms of s 7(1)(a) of PAJA.[4] The appeal was determined on 13 July 2020 and the review should thus have been instituted, at the latest, by 9 January 2021.

[19] Section 9 of PAJA provides that a court may "on application" extend the 180 day period "where the interests of justice so require". What was stated in the founding affidavit on this score is set out hereunder:

> '18. In Part B of the notice of motion, the applicant seeks the following orders:
>
> 18.1 An order condoning:…
>
> 18.1.2 Any delay in the institution of this application…
>
> 86. In light of what is recorded above, it should be clear that the tender could not have been lawfully awarded to the first respondent. The first respondent either made misrepresentations to the second respondent (the applicant alleged that the misrepresentations were fraudulent), leading to the award of the tender, alternatively, the representations of the first respondent were not properly considered before the tender was awarded...

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3 Promotion of Administrative Justice Act 3 of 2000.

4 Section 7(2)(c) of PAJA does not apply since no relief was sought in terms thereof.

121. Given the applicant's limited access to the tender documents of the first respondent, and the documents which show what the second respondent did to award the tender to the first respondent, I am not in a position to say precisely what the first respondent put forward to the second respondent, or where exactly the second respondent went wrong in the award of the tender to the first respondent, as principal contractor, in addition to what is recorded above. The same goes for the actions of the third respondent. What is recorded above, is based on the limited information which the applicant was able to source from various sources and with great effort, before this application was launched. Accordingly, the applicant's legal advisers will only be able to finalise the precise wording of the review relief sought in respect thereof, once this information becomes available through the provision of the rule 53 record of decisions.

122. The applicant wanted to avoid litigation, but this amounted to a waste of time. The officials of the second respondent are not interested in correcting the unlawfulness which resulted from their unlawful decisions, or even ameliorating the effects thereof. Their refusal to conclude any contract with the applicant is proof thereof.

123. It in fact took only a couple of months for the first applicant [sic] to resolve to pursue this weighty matter, to consult with relevant persons who have some knowledge of the facts underlying this matter, to work through what is a set of complicated facts and legal issues, to instruct legal representatives and decide upon the course of action to be adopted. Thereafter the founding papers had to be drafted and settled which, as is apparent from the complexity of the issues and the history of the matter, has in itself been a lengthy task. I respectfully submit that the applicant cannot be accused of having been dilatory in launching this application, more particularly in circumstances in which the second respondent has kept the applicant on a proverbial string, for a long time…

124. I respectfully submit that the applicant has acted with all reasonable expedition in investigating, obtaining advice concerning and now asserting its rights.

125. In any event, I am advised that as a result of the fraudulent/false (mis)representations of which the first respondent made itself guilty, in the submission of its tender to the second respondent (as

explained above), the decisions in favour of the first respondent, specifically the award of the tender to it as principal contractor [under] any subsequently concluded contract, were void ab initio. The result of such voidness obviates any need for condonation.'

[20] Nothing more was said about the delay in BCB's supplementary founding affidavit (delivered after receipt of the rule 53 record). In its answering affidavit Ampcor pertinently raised the issue of delay. It submitted that there was no proper application for an extension; BCB (which bears the onus) failed to provide any compelling allegations to sustain an extension; and that in any event it was not in the interests of justice for an extension to be granted. Ampcor stated that it has been performing the tendered work, and employed people on the basis that it was properly awarded the tender. Should the tender now be undone, these employees would suffer most and the impact on Ampcor itself would be devastating.

[21] The City and its Manager made similar submissions in their answering affidavit. They pointed out that BCB delayed for eight months (246 days to be exact) after its appeal was dismissed before bringing this application. It now not only seeks to review and set aside the award to Ampcor, but also to substitute that decision with an award to it. They submitted that in the circumstances of this case, not least the significant and far-reaching consequences insofar as Ampcor is concerned, a delay of eight months from when BCB became aware of the decision is unreasonable. They made common cause with Ampcor that BCB provided no reasonable justification for the delay in instituting the review relief and took issue with BCB's attitude that there is no need to seek condonation for the delay.

[22] In its replying affidavit BCB submitted the following:

'46. …[PAJA] allows for condonation, should an application of this nature be launched outside of the period of 180…days. The overall question to be determined in this regard, is where the interests of justice lie.

47. There can be little doubt that the interests of justice demand that the application succeed. First respondent cannot be allowed to get away with its actions, on the basis of delay…

59. …The first respondent cannot be allowed to benefit from its own wrongdoing, simply because of the lapse of time…

212. The applicant admits that the 180… day period… expired on 9 January 2021. To the extent that condonation is required, the applicant has applied for condonation.

213 It is respectfully submitted that as a result of the conduct which led to the award of the tender to the first respondent, condonation is not required. The applicant applied for condonation ex abundanti cautela…'

[23] In *Van Wyk v Unitas Hospital*[5] the Constitutional Court set out the manner in which condonation is to be approached:

'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised… and the prospects of success…

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable…'

In *OUTA*[6] it was held that:

'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 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

5 2008 (2) SA 472 (CC).

6 *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others* [2013] 4 All SA 639 (SCA) at para [26].

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.'

[24] Having regard to the facts and those averments in BCB's affidavits in relation to delay there is an entirely unexplained period preceding the launching of this application of almost 4 months out of the total 8 month period, i.e. between dismissal of the appeal on 13 July 2020 and BCB's first communication to the City on 8 October 2020; and between the response of Mr Gqwede on 20 October 2020 and the letter to the City from BCB's erstwhile attorney on 18 November 2020. In addition, the reasons advanced by BCB in respect of the balance of the period are extremely broad, vague, bereft of detail, and are not even elaborated on in the confirmatory affidavit filed by its attorney.

[25] In *Gijima Holdings*[7] the Constitutional Court stated that the discretion to overlook an undue delay in instituting review proceedings cannot be exercised in the abstract. There must be a basis upon which to do so, arising from facts placed before the court by the parties, or objectively available factors. In *Khumalo*[8] the same court said:

'[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'

[26] Further, in *Tasima*[9] that court also explained that this discretion should not be exercised lightly:

'While a court "should be slow to allow procedural obstacles to prevent it from looking into the challenge to the lawfulness of an exercise of public power", it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a

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7 *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para [49].

8 *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para [45].

9 *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para [142].

review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.'

[27] It is so that BCB failed to bring a substantive application for extension of the 180 day period. But even if this court is generous to it, and accepts that BCB considered the averments made, coupled with a prayer in the notice of motion, to be such an application, I am nonetheless in no position to determine whether or not the delay was reasonable *in the circumstances*. I agree with Ampcor, the City and its Manager that a delay of some eight months from when the decision to award the tender was finalised is most certainly not negligible. BCB seemingly fails to appreciate that, even if the review proceedings had been instituted within the 180 day period (i.e. by 9 January 2021), this court would still be required to engage in an enquiry to ascertain whether the delay was unreasonable or not.

[28] In my view BCB's true attitude to the issue of delay is displayed by its stance that, given fraud "unravels everything", it was not necessary for it to seek condonation at all but that it did so out of caution. However at the time the application was launched, on BCB's own version, it had no "proof" of fraud. The best it could contend was that either Ampcor made misrepresentations to the City (which BCB "believed" to be fraudulent) or Ampcor's representations were not properly considered by the City prior to award of the tender.

[29] In other words, BCB itself was not even sure of the true nature of its complaint more than eight months after dismissal of its appeal. The assertion of possible fraud at the time when the review application was instituted does not, in my view, assist BCB even if there was merit in its submission that in the case of fraud condonation is not required. In any event BCB has misconceived the legal position. The authority upon which BCB itself relies indicates quite the opposite in challenges to administrative decisions:

'Furthermore, decisions induced by fraud have sometimes been regarded as revocable on the basis that "fraud unravels everything". This common-law jurisprudence is, however, in considerable tension with a principle established in Oudekraal and since developed by the Constitutional Court in a series of cases. In one of

these [i.e. Tasima]… a majority of the court expressed the principle as follows:

Our Constitution confers on the courts the role of the arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.

In a later case, Magnificent Mile Trading,[10] the majority described this principle even more broadly. In the words of Madlanga J, it applies "to any situation where – for whatever reason – an extant administrative act is being disregarded without first being set aside.'[11]

[30] To my mind the most prominent factor militating against condonation is the combination of the unexplained delay of 4 months and the wholly inadequate explanation for delay during the balance of the 8 month period. However there is another significant factor which stacks the cards against BCB.

[31] The contract period for the tender expires on 30 June 2023, a mere 3 ½ months after the matter was argued. Ampcor accepts that it was late in delivering its answering affidavit and has given a satisfactory explanation why this occurred. That affidavit was deposed to on 19 November 2021. However the affidavits of the City and its Manager were delivered around 11 October 2021, and this puts Ampcor's delay of just over five weeks thereafter in proper perspective.

[32] It is also no excuse for BCB's earlier 8 month delay, since by the time Part A was set down to be heard the parties were already almost a year into the three year contract period. Moreover after delivery of the replying affidavit on 15 February 2022 (I accept BCB's explanation that this further delay was due to ill-health of one of its members as well as its attorney) it was in fact only on 19 September 2022 (another 7 months later) that the registrar was approached for a date to be allocated for the hearing.

[33] Even then Ampcor, the City and its Manager had to file heads of argument before BCB in order to comply with the relevant Practice Directive. BCB should have filed theirs by latest 22 February 2023 but

10 2020 (4) SA 375 (CC).

11 Hoexter: Administrative Law in South Africa (3ed) at 386-387.

they were only filed on about 9 March 2023, unaccompanied by any explanation, let alone a condonation application.

[34] The further unexplained delays outlined above do not portray the picture of an anxious litigant wishing to bring finality to its dispute in a reasonably expeditious manner. The factual consequence is that, even were this court to come to BCB's assistance on the merits, the relief it seeks will be all but rendered moot.

[35] I thus conclude that to the extent BCB has made out a case for condonation, it must fail, and the application falls to be dismissed on this ground alone. However I nonetheless deal with the merits, for two reasons. The first is that the Supreme Court of Appeal has held that it is not desirable, where possible, for a lower court to determine a matter purely on a point *in limine*.[12] The second is what was stated by that court in *Sasol Chevron*:[13]

> '[17] In Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited[14], this court said that in applications for condonation (extension of time in the context of s 9(2) of PAJA), the substantive merits of the principal case may be relevant. The court proceeded to say that in circumstances where the merits are considered to be relevant, they are not necessarily decisive. In Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others[15] this court stated that absent an extension, "the court has no authority to entertain the review application". However, this statement was qualified in South African National Roads Agency Limited v City of Cape Town[16], in which Navsa JA said that this dictum "cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all

12 *Spilhaus Property v MTN* 2019 (4) SA 406 (CC) at para [44].

13 *Commissioner for the South African Revenue Service v Sasol Chevron Holdings Limited* (1044/2020) [2022] ZASCA 56 (22 April 2022).

14 *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* 2017 (6) SA 90 (SCA) at para [34].

15 fn 6 above.

16 2017 (1) SA 468 (SCA) at para [81].

the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned.'[17]

The City's supply chain management policy

[36] The crux of BCB's attack is that, since the regulations promulgated on 20 January 2017 by the Minister of Finance while purporting to act in terms of s 5 of the PPPF Act[18] were declared unlawful by the Supreme Court of Appeal in *Afribusiness NPC*[19] on 2 November 2020, so too is the City's supply chain management policy ("SCMP") – the so-called domino effect – and given that the award of the tender to Ampcor occurred in terms of the "regulations and" SCMP, this is a self-standing ground for the setting aside of that award.

[37] However the following passages from the *Afribusiness* judgment are instructive:

'It follows therefore that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful. He acted outside his powers under s 5 of the Framework Act [i.e. the PPPF Act]. In exercising the powers to make the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act, which is the national legislation that was enacted to give effect to s 217 of the Constitution. The framework providing for the evaluation of tenders provides firstly for the determination of the highest points scorer and thereafter for consideration of objective criteria which may justify the award of a tender to a lower scorer. The framework does not allow for the preliminary disqualification of tenderers, without any consideration of a tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated framework of the Framework Act.

The Minister's decision is ultra vires the powers conferred upon him in terms of s 5…'

[38] On appeal the majority of the Constitutional Court[20] stated that:

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17 See also *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality and Another* 2017 (6) SA 360 at para [12].

18 Preferential Procurement Policy Framework Act 5 of 2000.

19 *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA).

20 *Minister of Finance v Sakeliga NPC (previously Afribusiness NPC) and Others* 2022 (4) SA 362 (CC).

> 'In my view, the impugned regulations are not necessary. The impugned regulations are meant to serve as a preferential procurement policy… Section 2(1) of the Procurement Act [i.e. PPPF Act] provides that an organ of state must "determine its preferential procurement policy" and implement it within the framework laid down in the section… If each organ of state is empowered to determine its own preferential procurement policy, how can it still lie with the Minister also to make regulations that cover that same field?'

[39] Accordingly, as I see it, the fundamental flaw in BCB's argument is its contention that the invalidity of the regulations results in the SCMP being invalid on the basis that it is unconstitutional. The courts found the Minister to have acted *ultra vires* his powers in promulgating those regulations because they were unnecessary to make, since each organ of state is empowered to determine its own preferential procurement policy. There is no direct challenge by BCB to the constitutionality of the SCMP itself. In any event BCB failed to follow the procedure prescribed in rule 16A of the uniform rules of court (for constitutional challenges) and, even if it could be said that some sort of challenge is advanced on BCB's papers, that challenge is thus not properly before the court.

[40] Moreover the Supreme Court of Appeal suspended its declaration of invalidity for 12 months to enable corrective action. Once the Constitutional Court dismissed the Minister's appeal on 16 February 2022 that 12 month period resumed. Neither court granted retrospective relief. This accords with the general principle that such a declaration should have no retrospective effect.[21] In the circumstances the SCMP was valid at the time of the tender award.

[41] It also dispenses with BCB's argument that had it not been for the "unconstitutional" 2017 regulations, the 80/20-point system would not have been applied to the tender. As was submitted on its behalf:

> 'This means that:
>
> Either a 90/10-point system would have been applied, in terms of the 2011 regulations, as the 2011 regulations would not have been repealed but for the unconstitutional 2017 regulations. The results of this conclusion would mean that the applicant would have scored

[21] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 at para [32].

90/90 for price and 0/10 for its previously disadvantages status. The scoring of the first respondent on this interpretation is unknown; or
No point system should have been applied to this tender in terms of the 2017 regulations, because of the unconstitutionality thereof. The result of this latter conclusion would mean that the tender should have been awarded to the applicant, based on price only.'

Setting aside of tender award and substitution

[42] BCB advanced 9 grounds for why it believed the tender award to Ampcor should be set aside. Of these only 5 were persisted with in argument, namely: (a) fraud by Ampcor; (b) pricing; (c) the report to the BAC; (d) point scoring; and (e) absence of a quorum for the Bid Specification Committee ("BSC").

Alleged fraud

[43] This relates to the cable jointers put forward by Ampcor for purposes of its tender. It is BCB's case that the successful tenderer had to have at least three qualified cable jointers in its employment at close of the tender on 3 December 2019, failing which it could not have met the requirement for its "capacity to proceed with the contract".[22] BCB maintained that none of the three cable jointers put forward by Ampcor met this threshold (including a Mr Vicars), but in argument BCB only persisted in relation to two of them, namely a Mr Jones and a Mr Van Staden.

[44] BCB claimed that Jones lacked the relevant qualifications and had no knowledge of his name being put forward. He also did not reside in Cape Town and had no intention of relocating here. Although Van Staden was resident in Cape Town on date of closure of the tender, he too lacked the necessary qualifications and was dismissed from Ampcor's employ shortly after 3 December 2019.

[45] These were not complaints raised in BCB's internal appeal to the City Manager, but appeared for the first time in BCB's founding affidavit. The information was apparently obtained by BCB's attorney from Jones and Van Staden. Neither Jones nor Van Staden deposed to a confirmatory affidavit and these allegations thus constitute inadmissible hearsay.

[46] The only objective "evidence" relied upon by BCB is a list which came into its possession from an undisclosed source on an undisclosed

22 Clause 6.1.1.3 of the tender conditions.

date of certain cable jointers in Cape Town on 3 December 2019, and who allegedly held the required qualifications for the tender. BCB maintained that none of them were employed by Ampcor on that date.

[47] In its answering affidavit Ampcor pointed out that the same list included Mr Vicars (who was in its permanent employ and was presented in its tender). This is presumably the reason why BCB dropped that complaint. After setting out in detail why both Jones and Van Staden were eminently qualified for purposes of the tender, and stating that it was the intention that Jones would relocate if successful, Ampcor explained that soon after the award (i.e. on 11 June 2020) Van Staden resigned and was replaced by a Mr Samuels. Jones was replaced by a Mr Hackley. Both met the qualification requirements. These replacements occurred with the City's approval in accordance with clause 6.1.5 of the tender documents.

[48] In reply BCB appeared to abandon its "qualification" attack, persisting however with a claim that Ampcor should have disclosed that Van Staden was not employed by it before the award of the tender. This was alleged to constitute fraud on Ampcor's part. In addition much was made by BCB of Jones not being in Cape Town "at the time the tender was awarded" to Ampcor. But nothing turns on this since that was not the relevant date; and to the extent that it might have some significance this was a new case made out in reply which Ampcor was thus precluded from dealing with.

[49] BCB also alleged in its founding papers that in an email dated 20 October 2020, the City's officials admitted that Ampcor's responsiveness was never checked before the tender award was made. But this is a misleading gloss on that email. It actually states that after the tender award the City assessed Ampcor's designated cable jointers at the City's training centre – as expressly permitted in clause 8 of the tender specifications. Ampcor's cable jointers were again found to be competent. This is over and above the minimum requirements in the tender.

Pricing

[50] BCB's complaint is that the manner in which points were allocated for pricing of the tender was irrational since the formula contained in clause 6.3.10.2.4 of the tender documents "made no mathematical sense" when applied to the tender awarded to Ampcor. BCB "assumes" that the City added all the items on the pricing lists of

the tenderers together, to determine individual totals per tenderer. These totals were then compared for the awarding of points. According to BCB this was irrational.

[51] However the City provided a complete answer. It explained that it uses a "basket" to evaluate rates. It advises tenderers that a basket will be used but the City cannot make these values known as this would defeat the competitiveness criteria in the tender process. The salient information is made known in clause 6.3.10.3.1 of the tender documents:

> '6.3.10.3.1 Points for price will be allocated in accordance with the formula set out in this clause based on the price per item/rates as set out in the Price Schedule (Part 3):
>
> Based on the sum of the prices/rates in relation to a typical project/job.'

[52] The City also stated that the evaluation of adjudication points was made available to the BAC for consideration. It also pointed out that of the two responsive tenderers, being BCB and Ampcor, BCB scored highest on points but because it scored no points for B-BBEE criteria, on the 80/20 points system utilised for the tender, BCB scored fewer points overall and was thus appointed as alternative contractor.

[53] BCB seems to suggest that if it could show Ampcor should have scored lower than 75.07/80 points for pricing, this would have tipped the overall scale in BCB's favour, since it scored 80/80 points, and the only differential was the scoring of preference points.

[54] However cut to its bare bones BCB's irrationality complaint is really nothing more than an assumption. Apart from its (failed) attack on the constitutionality of the SCMP, it has not been able to demonstrate how being provided with chapter and verse of the City's internal scoring process would place it in a better overall position than Ampcor. Although it alleges that the manner in which points were allocated for pricing of the tender was irrational, BCB can go no further than "assuming" that the City approached pricing in a particular way. To my mind more is required of BCB to persuade this court in its favour.

The report to the BAC

[55] BCB complained that when the BEC report was submitted to the BAC, pricing and B-BBEE status were not allocated in points, and accordingly those points were not considered when the tender was

adjudicated. Reliance was placed on an extract of the BEC report which was annexed to the founding affidavit.

[56] However the very extract upon which BCB relied clearly reflects that the tender sums were "rates based"; Ampcor was found to be a level 1 valid, verified B-BBEE contributor whereas BCB was found non-responsive; and the 80/20 price preference points system was prescribed in the tender documents as advertised.

[57] In addition, after the award of the tender BCB requested the City to provide it with the final scoring, to which the responsible City official replied that there was no such scoring for the tender. Although BCB latched onto this to draw a conclusion that therefore no scoring took place, as the City's deponent pointed out, no final scoring was required since the tender did not have a functionality requirement.

[58] Again BCB changed tack in reply:

> '318 I deny that the second and the third respondents were entitled to award the tender without final scoring, simply because of the absence of the requirement of functionality. This concession alone, should cause this application to succeed…'

[59] BCB has not explained why it holds this view and the court is left to consider whether this has any merit in the abstract, which it cannot do. But in any event the argument is self-defeating because BCB cannot rely on a process which it contends is fatally flawed for substitution relief (the same applies to most of the other grounds as well).

[60] For sake of completeness and as pointed out by the City, the lack of a functionality assessment does not render the tender irrational, as responsiveness was evaluated based on the documents and information submitted by the tenderers. The responsive tenders (i.e. those that met the tender criteria) were evaluated on price and B-BBEE points on an 80/20 basis. The City has a discretion whether a bid demands the burden of a functionality assessment, and it was well within its powers to determine that in respect of this tender it was not required.

Point scoring

[61] The complaint is the same as that pertaining to the "challenge" to the SCMP although it was advanced under the guise of a separate ground. I accordingly do not repeat what is already contained in this judgment.

Absence of a quorum for the BSC

[62] This complaint was raised in BCB's supplementary founding affidavit and formulated as follows:

> '78. The first meeting of the bid specifications committee took place on 13 September 2019. The above five (5) persons attended the meeting, but there were three (3) apologies… Only two (2) of the persons appointed to the BEC on 3 May 2018, attended this meeting. The applicant challenges the lawfulness of that meeting on the basis that it did not have a quorum…'

[63] Clause 116 of the SCMP provides that:

> 'The Bid Specification Committee shall be comprised of at least two city officials as members, consisting of an appointed Chairperson and a responsible technical official. The Supply Chain Management Practitioner serves in an advisory capacity. No bid committee meeting shall proceed without an SCM practitioner.'

[64] The City states that the BSC meeting of 13 September 2019 was attended by two SCM representatives, the chairperson and two other officials from the Line Department. Regulation 27(3) of the SCM regulations provides that:

> 'A bid specification committee must be composed of one or more officials of the municipality or municipal entity, preferably the manager responsible for the function involved and may, when appropriate, include external specialist advisors.'

[65] As pointed out by the City the constitution of the BSC for the meeting of 13 September 2019 was thus consistent with the abovementioned prescripts. However BCB maintains that the minimum number of persons by which the BSC committee must be composed does not equate to a quorum. It submits that in the absence of a quorum prescribed by law: (a) there is authority that it is two-thirds of members of the meeting; and (b) if functions are entrusted to a statutory body, it can only act if all of its members are present and unanimous.

[66] The common law authority upon which BCB relies for the "two-thirds" requirement[23] does not assist it since on the City's version (which must be accepted on the basis of the Plascon-Evans rule) only three individuals (two City officials and a SCM practitioner) are required to attend BSC meetings and this occurred on 13 September 2019. There is also nothing on the papers that I can find (and BCB itself

[23] Voet *Commentarius 3.4.7.*

did not suggest this in argument) that those who attended that meeting were not unanimous in their decision(s).

[67] Those common law authorities upon which BCB relies for functions entrusted to a statutory body also do not support its argument. The starting point of *Schierhout*[24] is that: 'when several persons are appointed to exercise… powers, then in the absence of provision to the contrary, they must all act together…'. *Price*[25] dealt with the composition of a court in a criminal trial in similar context. *Schoultz*[26] and *De Vries*[27] applied *Schierhout* and *Price*. On the City's version the procedure followed accords with the principle.

[68] In any event BCB also relied on various dictionary definitions for the meaning of a "quorum". The Collins Dictionary describes it as 'the minimum number of people that a committee needs in order to carry out its business efficiently'; the Cambridge Dictionary as 'the smallest number of people needed to be present at a meeting before it can officially begin and before official decisions can be taken'; and the Merriam Webster Dictionary as 'the number (such as a majority) of officers or members of a body that when duly assembled is legally competent to transact business'. BCB's reliance on these definitions puts paid to its own argument.

Substitution

[69] Given my conclusions BCB's substitution relief must fail, and as earlier stated, even if it had succeeded on one or other ground, BCB cannot have it both ways. Apart from the ground of fraud, all the others were directed at a fatally flawed process. A finding to that effect would have had the consequence that the tender process was void *ab initio* and would have to commence afresh.

Payment of compensation

[70] Although this claim was introduced in the amended notice of motion, the accompanying supplementary founding affidavit made no mention of it at all and accordingly no case was advanced for any of the

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24 *Schierhout v Union Government* 1919 AD 30 at 44.

25 *R v Price* 1955 (1) SA 219 (A) at 223E-G and 224C-E.

26 *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander* 1983 (4) SA 689 (C) at 707F-711B.

27 *De Vries and Others v Eden District Municipality and Others* (9164/09) [2009] ZAWCHC 94 (17 June 2009 at para [26].

respondents to meet. It was also not even alluded to in BCB's replying affidavit (although this would have been impermissible in the absence of the court sanctioning it on application with an appropriate order as to costs and time for the respondents to deal with it).

[71] Moreover, not a murmur was made of any "exceptional circumstances" to justify compensation in terms of s 8(1)(c)(ii)(bb) of PAJA. The "claim" is thus stillborn and no more need be said about it.

Costs

[72] BCB on the one hand, and Ampcor, the City and its Manager on the other, claim punitive costs against each other. The manner in which BCB approached and conducted its case is concerning. It also made certain scurrilous attacks on Ampcor and the City. I quote a few examples from its replying affidavit:

> '131. The fact that the first respondent continues to put forward incorrect facts, in order to justify its own unlawful position, and which facts cannot be sustained, justifies a punitive costs order against it. It also justifies the disqualification of the first respondent from all future tenders. Tenderers who win tenders in unscrupulous and/or unlawful ways can be disqualified… thereby preventing future situations such as the present situation, from arising…
>
> 137.The conduct of the first respondent is reprehensible and it should be disqualified from future tenders…
>
> 157.It appears that the first respondent either did not bother to read the awarded tender properly, or it is intentionally attempting to mislead this honourable court. In light of the fraud it committed in having the tender awarded to it, together with the false allegations the first respondent puts forward in its answering affidavit, the applicant puts nothing past the first respondent…
>
> 220.The second and third respondents are being intentionally slow-witted in this paragraph…
>
> 274.The interpretation which the deponent to the [City's] answering affidavit gives to the tender document is irrational and with respect, ridiculous. No reasonable person will interpret the terms and conditions of the tender in that manner. As the City's Director: Supply Chain Management, the deponent knows better than to make allegations of this nature on oath.
>
> 275.In short, it is shameful that a director of the City, which professes to be the best run city in the country, would depose to

allegations such as those contained in these paragraphs. If the second and third respondents persist with the line of argument contained in these paragraphs, then oral evidence in this application cannot be excluded. The deponent to the answering affidavit may soon have to explain himself before a High Court judge, for making wholly unsustainable allegations, on oath. He will also have to explain how what he is doing is in the best interests of the second and the third respondents, as well as the ratepayers and residents of this city…'

[73] In respect of the Part A relief, it is appropriate that each party should pay their own costs for the reasons contained in paragraph [17] of this judgment. As far as the Part B relief goes, I am persuaded that a punitive costs award against BCB is warranted. Ampcor has been put to considerable expense to fend off this scatter-shot attack peppered with serious allegations against it. It is deserving of as full an indemnity for its costs as is reasonably possible. The same applies to the City and its Manager, but with the additional factor that they will otherwise have to fund their shortfall out of public funds which could have been utilised for other purposes.

[74] The following order is made:

1. The application is dismissed;
2. In respect of the Part A relief, no order is made as to costs; and
3. In respect of the Part B relief, the applicant shall pay the costs of the first, second and third respondents on the scale as between attorney and client, including any reserved costs orders pertaining to such relief as well as the costs of counsel.