THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 20580/2014

In the matter between:

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **First Appellant**

THE CITY MANAGER OF THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Second Appellant**

DUMISANE J OTUMILE NO **Third Appellant**

THE EXECUTIVE DIRECTOR SUPPLY CHAIN MANAGEMENT OF THE CITY OF TSHWANE **Fourth Appellant**

THE CHAIRPERSON OF THE BID EVALUATION COMMITTEE OF THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Fifth Appellant**

THE CHAIRPERSON OF THE BID ADJUDICATION COMMITTEE OF THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Sixth Appellant**

and

NAMBITI TECHNOLOGIES (PTY) LTD **Respondent**

Neutral citation: *City of Tshwane v Nambiti Technologies (Pty) Ltd* (20580/2014) 2015 ZASCA 167 (26 November 2015)

Coram: MAYA DP, BOSIELO, WALLIS, PETSE and DAMBUZA JJA

Heard: 17 November 2015

Delivered: 26 November 2015

Summary: Tender – cancellation thereof – terms of tender authorising its withdrawal – cancellation not administrative action – cancellation set aside by High Court as unfair and municipality ordered to adjudicate tender – no grounds for holding cancellation unfair – relief granted by High Court impinging on municipality's powers and obligations in regard to procurement – such impermissible as infringing the doctrine of the separation of powers.

.

ORDER

On appeal from: Gauteng Division, Pretoria (Kganyago AJ, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the High Court is set aside and the following substituted therefor:

'The application is dismissed with costs.'

JUDGMENT

Wallis JA (Maya DP, Bosielo, Petse and Dambuza JJA)

Introduction

[1] From 1 August 2009 until 31 December 2012, the respondent, Nambiti Technologies (Pty) Ltd (Nambiti) was contracted to the first appellant, the City of Tshwane Metropolitan Municipality (the City), to provide it with SAP support services. On 12 October 2012 the City published an invitation to submit tender CB204/2012, for:

'The provisioning of on-site and off-site SAP support services for the City of Tshwane.'

Nambiti, along with a number of other parties, submitted a tender to supply these services. On 11 December 2012 it was informed that the tender would be cancelled and a new tender issued. In the meantime on 20 December 2012 its services were effectively terminated and a new contractor EOH Mthombo Limited (EOH), which was the fifth

respondent in the high court but has played no role in the litigation, was employed to provide those services. It is accepted in these proceedings that EOH lawfully provided SAP support services to the City until 31 December 2013. The papers do not reveal what occurred after that date.

[2] Nambiti was dissatisfied with this course of events. After an exchange of correspondence it launched proceedings on 1 March 2013 in which it claimed the following relief:

'2. The decision of the First alternatively Second alternatively Third alternatively Fourth respondent to appoint the Fifth Respondent as service provider to the First Respondent in respect of on- and off-site SAP support services for the period 1 January to 30 June 2013 is reviewed and set aside.

3. The decision of the First alternatively Second alternatively Third alternatively Fourth Respondent to cancel tender CB204/2012 for the provision of on- and off-site SAP support services to the First Respondent for a three year period with effect 1 January 2013 is reviewed and set aside.

4. The First Respondent is ordered without delay to invite new tenders in respect of the provision of on- and off-site SAP support services to the First Respondent.'

[3] Subsequently there was an amendment to the notice of motion and the relief sought was varied. After the application was argued, the high court held that, while the award of the contract to EOH was deficient, it should not be set aside. There is no challenge to that decision. But the high court granted relief in relation to the cancellation of tender CB204/2012.

[4] The net effect of the high court's order was to resuscitate the cancelled tender and compel the City to adjudicate and award the tender within two months of this order. Tenderers were permitted to adjust their

tariffs upwards or to withdraw their tenders, but otherwise the process was to continue as if the tender had never been cancelled. Leave to appeal against the order was refused but granted by this Court.

Mootness

[5] The immediate question is whether the appeal still raises a live dispute. Counsel were at one that the order granted by the high court could not be implemented at this stage. The contract period of the tender the City was ordered to adjudicate will expire at the end of next month. The original contract with EOH has also expired. Presumably the City has made fresh arrangements in respect of SAP support services. When asked about this counsel for Nambiti said that they were not here to defend the order, but to defend the judgment. But that is a classic indication that the outcome of this appeal will have no practical effect or result and the appeal has become moot. Why then should it not be dismissed in terms of s 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013?

[6] There is no need to rehearse the jurisprudence that developed around section 21A(1) of the Supreme Court Act 59 of 1959, which jurisprudence is equally applicable under section 16(2)(*a*)(i) of the Superior Courts Act. The court has a discretion notwithstanding that an appeal has become moot, to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters.[1]

---

[1] *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* 2013 (3) SA 315 (SCA) para 5.

[7] In my view there is such an issue in this case. This is the first occasion in the reported cases where a decision by a public authority to cancel a tender has been challenged by way of judicial review. Not only is this the first such case, but the review succeeded and the court ordered the City to adjudicate and award the cancelled tender. That was a far-reaching order impinging as it did on the power of a municipal council to determine for itself what goods and services it needed and would procure by a process complying with s 217 of the Constitution. Whether such a decision is administrative action bringing the case within the purview of PAJA[2] is central to the case. Furthermore the terms of the order granted by the high court had the potential to infringe upon the constitutional powers and obligations of a municipal council. Accordingly the mootness of the appeal should not bar the court from addressing the merits.

The facts

[8] A brief exposition of the facts surrounding the disputed tender and its cancellation is called for. The call for tenders was issued in the ordinary course and Nambiti and various other parties submitted tenders. These were opened on 13 November 2012.

[9] On 5 November 2012, the City appointed the third appellant, Mr Dumisane Otumile, as its Group Chief Information Officer. Mr Otumile's responsibilities extended to oversight of all matters relating to information systems used by the City. As such he had a material interest in the basis upon which SAP support services were provided to the City. His first intervention in relation to this tender came on 23 November 2012, when he, on behalf of his department, placed a

---

[2] The Promotion of Administrative Justice Act 3 of 2000.

motivation before the Executive Acquisition Committee, a Supply Chain Committee chaired by the Municipal Manager, asking that it approve an effective extension of the existing contracts of Nambiti and Baraka, another contractor providing similar services, until September 2013.

[10] This proposal did not find favour with the committee. Instead it resolved to refer the matter back to Mr Otumile's department on one of two bases. The first was that it should consider the use of other SAP entities used by different organs of state for support and maintenance and appoint them in line with regulation 32 of the regulations published in terms of the Local Government: Municipal Finance Management Act 56 of 2003.[3] The second option was to fast-track and finalise tender CB204/2012. The municipal manager signed a resolution to this effect on 30 November 2012. Fast-tracking the tender was the option that Mr Otumile and his department decided to explore, but first they reviewed the terms of the tender in the light of the needs of the City as determined by Mr Otumile.

[11] The results of that review were unfavourable. It concluded that the tender as published was seeking services inconsistent with the City's needs and for a longer period than the policy of the City permitted. In part, at least, these conclusions flowed from Mr Otumile's re-evaluation of the City's technological needs since his appointment. He identified three issues. They were that:

- The City had outsourced its requirements in respect of SAP support services without building its own internal capacity.

---

[3] The resolution referred to regulation 36, but Mr Otumile said, without dispute, that this was an error and should refer to regulation 32.

- The arrangements in place for the provision of SAP support services provided that such support be given both on-site and off-site, and in the case of the latter it was not possible to monitor the work and assess whether it was being done and the value of the services being rendered.
- The City had decided that it was undesirable to have contracts of this type extend over a period of three years in the light of the rapidity with which technological change can occur. It had accordingly taken a decision that it would no longer contract on that basis.

[12] These conclusions appear to have been reported to the Bid Adjudication Committee of the City (BAC), because on 7 December 2012 it took a decision to cancel tender CB204/2012. The resolution recorded that the tender would be re-advertised, with a changed specification addressing the current needs of the City.

[13] There was some debate on the papers whether the decision to cancel the tender was in fact taken on 7 December 2012. However, the debate appears to be academic as it is plain that the City proceeded on the basis that a firm decision had been taken on that date. On 11 December 2012 Mr Otumile met with Mr Paul and Ms Easton, representing Nambiti. The minute of the meeting prepared by Nambiti reflected in its conclusion that tender CB204/2012 would be cancelled and a new tender released. So by that date a decision had been taken and appropriate steps were being pursued in consequence of that decision. Principal among these was the appointment of a new service provider to provide SAP support services.

[14] In view of the imminent expiry of Nambiti's contract Mr Otumile was to advise it by no later than 21 December whether their contract would be further extended. On 18 December 2012 a letter was addressed to Nambiti informing it formally of the cancellation of the tender. On the following day Mr Otumile sent an email to Mr Paul advising him that Nambiti's contract would be expiring at the end of the month and that it was unnecessary, with effect from 20 December 2012, for it to continue rendering services to the City. It is common cause on the affidavits that from 20 December 2012 Nambiti's representatives were excluded from the municipal offices. At the same time employees of EOH started to render SAP support services to the City.

[15] In the light of these events there was an exchange of letters on 18 and 19 December 2012, and on 27 December 2012 attorneys representing Nambiti wrote to the City Manager requesting written reasons in terms of s 5(1) of PAJA[4]. The 'decisions'[5] in respect of which reasons were sought were the appointment of a new service provider, in the form of EOH, and the cancellation of the tender CB204/2012. The City responded to this request on 18 January 2013. It took the attitude that these were contractual matters and that they did not fall within the category of decisions subject to PAJA, but nonetheless certain reasons were proffered, presumably in the interests of open and transparent government.

[16] In regard to the termination of Nambiti's contract it was pointed out that this terminated by effluxion of time on 31 December 2012. As to

---

[4] The Promotion of Administrative Justice Act 3 of 2000.
[5] The definition of administrative action in PAJA relates to decisions as defined in s 1 of that Act.

its complaint that insufficient was done to provide for an orderly handover, the City's approach was that it did not require Nambiti's assistance in that regard. Finally in regard to the cancellation of the tender and the appointment of a new contractor the letter said:

'Please note that a number of factors arose that have made the COT [City of Tshwane] reconsider the way it would procure its IT services going forward, not the least of which was the recent appointment of a Chief Information Officer (CIO) within the COT. Unfortunately, the CIO was not appointed at the time the renewal of IT services tender was dispatched. Since his appointment, the CIO was authorised to review the specifications of any tender that would serve his portfolio. It is for this reason that the tender that was in progress was abandoned, with certain provisional ensure continued business operation.

We advise that the new service provider has been appointed in terms of Regulation 32 to Municipal Supply Chain Management Regulations. The regulations are in terms of the Municipal Finance Management Act 56 of 2003. The service provider was the IT service provider at the City of Johannesburg.

You will appreciate that in order to procure prudently within the present circumstances, a sensitive balance of the rights and obligations, as well as procurement procedures had to be weighed by the COT. We assure your client that legal advice has been taken every step of the way and the COT is committed to good governance and legal compliance in its operations. The COT therefore denies that any laws have been side-stepped in the present circumstances.'

[17] Nambiti did not accept this response and on 1 March 2013 it launched review proceedings directed at challenging both EOH's appointment and the cancellation of tender CB204/2012. After the delivery of further affidavits and the production, in a somewhat sporadic fashion, of the record, Nambiti delivered a supplementary founding affidavit and an amended notice of motion. It continued to challenge the appointment of EOH, but added a challenge to any extension of the latter's contract on a month to month basis after the expiry of the initial

period. It also sought an order preventing the City from continuing with a fresh tender CB107/2013 for SAP services issued on 10 May 2013.

The Review

[18] The review was eventually heard by Kganyago AJ. On 1 November 2013 judgment was handed down with the following order:

'1. The decision of the respondent to cancel tender CB204/2012 for the provision of on- and off-[site SAP] support services to first respondent of a three year period with effect from 1st January 2013 is hereby reviewed and set aside.

2. The City of Tshwane must give written notice within ten days of this order to all the short-listed tenderers in respect of CB204/2012. The said notice must inform the tenderers that they are only allowed to adjust their tariffs upwards (to make provision for inflation) or withdraw their tenders should they wish to do so and to give notice to the City of Tshwane of their decision within ten days of receiving such notice.

3. The City of Tshwane must proceed to adjudicate tender CB204/2012 within two months after the expiry of the ten days period.

4. The fifth respondent to be allowed to honour the contract until the 31/12/13 when it expires.'

[19] Some explanation of the basis for this order is necessary. The judge held that the award of the contract to EOH was flawed, rendering it liable to be set aside, but decided that, as it only had two more months to run, it should not be set aside. That explains para 4 of the order. That order was unnecessary and it has in any event long since expired. In the heads of argument of Nambiti's counsel it was accepted that during the year from 1 January to 31 December 2012, SAP services were lawfully rendered to the City by EOH. We do not know what happened thereafter, but that is not a concern in these proceedings.

[20] The remaining portions of the order relate to the cancelled tender CB204/2012. They required the City to proceed to adjudicate that tender after allowing tenderers to withdraw or to adjust their prices upwards to make provision for inflation. The order was silent about the fresh tender CB107/2013. Presumably that was because there was an interim order in place prohibiting the City from proceeding with that tender pending the outcome of the review.

[21] The high court concluded that there were no justifiable reasons for the cancellation of tender CB204/2012 and that it was unfairly cancelled. The judge appears to have been greatly influenced by the resolution taken on 30 November 2012 referred to in para 10 above. He said that it provided for the fast tracking of the tender process in respect of CB204/2012. He described the reasons given for the cancellation of the tender as flimsy. In his view the revised tender CB107/2013 was only marginally different from that under CB204/2012. Accordingly he said that the earlier tender could have been proceeded with and minimal changes negotiated with the successful tenderer after the award of the contract.

Was this administrative action?

[22] PAJA gives effect to the right to just administrative action in section 33 of the Constitution. It provides for judicial review of administrative action. What constitutes administrative action is the subject of a lengthy and somewhat convoluted definition, which was

consolidated and abbreviated by Nugent JA in *Grey's Marine*,[6] in the following terms:

'Administrative action means any decision of an administrative nature made … under an empowering provision [and] taken … by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect …'

[23] The Constitutional Court,[7] citing *Grey's Marine* with approval, has broken the definition into seven components, namely that 'there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.'

[24] Whether the cancellation of a tender before adjudication is administrative action in terms of these requirements depends on whether it involves a decision of an administrative nature and whether it has direct, external legal effect. I do not think that the decision in this case satisfied either of these criteria.

[25] To determine if action by an organ of State is administrative action requires an analysis of the nature of the action in question and a positive

---

[6] *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21.
[7] *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) (*Motau*) para 33.

decision that it is of an administrative character.[8] Here the decision related to a matter of procurement. The issue of a tender indicated that the City wished to procure certain services. But its desire to procure them was always provisional. That follows from the terms of the advertisement of the tenders, which contained the caveat that 'the lowest or any tender will not necessarily be accepted'. In the standard conditions of tender, which counsel agreed applied to both tenders, clause F.1.5.1 provided even more explicitly that the City 'may cancel the tender process and reject all tender offers at any time before the formation of a contract'. In cancelling tender CB204/2012 the City was doing no more than exercising a right it reserved to itself not to proceed to procure those particular services on the footing set out in that tender.

[26] It is possible that these express reservations merely made explicit what would in any event have been the position, namely, that it is always open to a public authority, as it would be to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender. (I stress that there is no allegation in this case that the decision was tainted by impropriety such as improper political influence, fraud, bribery or corruption, where different considerations may apply.)

[27] In saying this I am aware that regulation 10(4) of the Procurement Framework Regulations 2011[9] provides that prior to awarding a tender an organ of state may cancel a tender in three circumstances, namely if:

---

[8] *Sokhela & others v MEC for Agricultural and Environmental Affairs (KwaZulu-Natal) & others* [2009] ZAKZPHC 30; 2010 (5) SA 574 (KZP) para 60 quoted with approval in *Motau* para 34 and *Minister of Home Affairs & others v Scalabrini Centre & others* 2013 (6) SA 421 (SCA) para 52.

[9] Published in *Government Gazette* 34350 of 8 June 2011 in terms of s 5 of the Preferential Procurement Policy Framework Act 5 of 2000.

- Due to changed circumstances there is no longer a need for the services, works or goods requested;
- Funds are no longer available to cover the total envisaged expenditure;
- No acceptable tenders are received.

[28] In *Trencon*[10] it was said that this regulation constrained the discretion afforded an organ of state by the terms of the tender and that a tender could only be cancelled if one of the grounds set out in the regulations existed. It is unclear what is meant by 'changed circumstances' in this regard. Would it be a changed circumstance if the organ of state concluded that the terms of the tender were detrimental to its interests? What if the goods or services were still required, but the terms of the tender were no longer thought to be favourable? Why should an organ of state be constrained by the necessity to demonstrate a change of circumstances, in order to cancel a tender for goods or services that it had decided it no longer needed? A change in control of a municipality could easily lead to a change in priorities. Is it suggested that the incoming council would be forced to go ahead with procurement decisions with which it did not agree? Take the simple example of a tender to purchase a new mayoral car. That the mayor needed a car might not be in dispute. But the outgoing council might have issued a tender for the acquisition of a luxury vehicle, while the incoming council might believe that something more modest would be appropriate. Would that be a sufficient change of circumstances?

---

[10] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22 para 68.

[29] These are difficult questions. *Trencon* was not concerned with the cancellation of a tender. It was concerned with whether the court should have made a substitution order that a tender awarded to one company unlawfully be awarded to the tenderer whose bid had been unlawfully excluded. It is not clear in what context the argument was advanced that the public body concerned was not obliged to award any contract at all. That was not the factual situation with which the court was confronted. Assuming that to have been correct, the reality was that a contract had been awarded and it was the intention to proceed with the work. So cancellation was not an issue. Furthermore the statement in question was based on a concession by counsel that was accepted as correct without explanation.

[30] The regulation is couched in permissive, not mandatory, terms. There is nothing to show that it is intended to be restrictive in regard to an organ of state's powers to cancel a tender. In addition the organ of state is equally obliged to conduct the tender process strictly in accordance with the tender conditions, which also have a statutory provenance. But there is no need to resolve these questions because in this case there was a change in circumstances. The needs of the City had been reviewed and it no longer required that SAP support services be provided to it for the period stipulated in CB 204/2012 or on the same terms as those in that tender. Its requirements changed and that is why it cancelled the tender. In terms of the regulation it was entitled to do so. No contrary argument was advanced in Nambiti's heads of argument.

[31] Until the tender was issued the City was entirely free to determine for itself what it required by way of SAP support services. The evidence showed that it had decided that it did not want those services on the

conditions set out in CB204/2012. In other words it decided to deal with its requirements for SAP support services on a different basis. That was a decision it could have reached at the very outset and Nambiti would have had no grounds for complaint. I cannot think that because it thought initially that a fresh contract on the basis of CB204/2012 was desirable and then, on reconsideration changed that view, the decision to cancel CB204/2012 constituted administrative action. While there are instances where a decision not to do something may constitute administrative action, as in the case of a failure to issue a passport or an identity document, inaction is not ordinarily to be equated with action. Even less so is it administrative in nature. Administration is concerned with the implementation of the policies and functions of government after those policies and functions have been determined, usually through the political process or as a result of actions by the executive. A decision not to procure certain services does not fit easily into that framework.

[32] But the second aspect seems to me, if anything, clearer. A decision not to procure services does not have any direct, external legal effect. No rights are infringed thereby. Disappointment may be the sentiment of a tenderer, optimistic that their bid would be the successful one, but their rights are not affected. There can be no legal right to a contract and counsel did not suggest that there was. When asked to identify the direct, external, legal effect of cancelling tender CB204/2012 his sole submission was that his client had a reasonable expectation that its tender would be considered by the Bid Evaluation Committee (BEC) and thereafter by the BAC. But that expectation was dependent on there being an ongoing tender process, where principles of just administrative action are of full application. Once the entire tender was cancelled any

expectation that the tenders submitted by tenderers would be adjudicated by the BEC and the BAC fell away.

[33] No other direct external legal effect was suggested to us and I can think of none. Nambiti's legal entitlement to provide SAP support services to the City would expire at the end of December 2012. Thereafter it had no right to provide those services. It had a right to a fair adjudication of tender CB204/2012, but only so long as that tender remained extant. Once it was cancelled none of the tenderers had any rights in relation to, or arising from, it. In the words of King Lear 'Nothing will come of nothing.'[11] There is no scope in that situation for the King's injunction to think again.

[34] It follows that the decision by the City to cancel the tender was not administrative action and was not susceptible of review in terms of PAJA. As that was the sole basis upon which the review was brought it should have failed on this ground. But even if the decision had been susceptible to judicial review on the grounds of unfairness advanced by Nambiti it should not I think have succeeded. It is appropriate briefly to state my reasons for saying that.

The fairness of the cancellation

[35] The judge's reasoning that led him to the conclusion that the decision to cancel the tender was unfair has been summarised in para 21 above. Three factors were identified as leading to that conclusion. They were the resolution to fast-track tender CB204/2012; that the reasons given for cancelling the tender were 'flimsy'; and that CB204/2012 and

---

[11] William Shakespeare *King Lear* Act 1, scene I, line 92.

CB107/2013 were so similar that the City could easily have proceeded with the earlier tender and, after awarding it, negotiated with the successful bidder to adjust the terms of the contract to fit its concerns.

[36] There are a number of difficulties with these reasons. In regard to the resolution they overlooked the fact that the resolution included an alternative of appointing a fresh service provider under regulation 32(1). No preference was expressed between these two options. What Mr Otumile did was, in the first instance, to review CB204/2012 with a view to fast-tracking it. Once he had done so and concluded that it was not suitable the BAC agreed that it should be withdrawn and steps were taken to appoint EOH in terms of regulation 32(1). So the resolution had been followed and no significance could be attached to the fact that the cancellation occurred only a week after the resolution was taken. There was in fact no obligation at all on Mr Otumile to consider fast-tracking CB204/2012.

[37] Turning to the reasons for cancelling the tender advanced by Mr Otumile in his affidavit, the judge did not analyse those reasons. He simply said that they were flimsy. Why he did so is unclear, because he did not explain his conclusion. It is not suggested that Mr Otumile did not genuinely entertain the views expressed by him in advancing those reasons. Nor was it suggested that those were not the reasons that motivated the decision by the BAC not to proceed with the tender, but to appoint EOH on a short term contract, while preparing and then issuing a revised tender. Furthermore, Mr Otumile's reasons related to the technical requirements of the City in regard to information technology and support for its existing systems. Judges do not ordinarily have the qualifications, in the absence of expert testimony to assist them, to make

judgments on the weight to be attached to reasons for taking technical and strategic decisions in the field of technology.

[38] The first reason was that it was necessary to develop the City's own capacity to deal with issues around SAP and the support that the SAP system required. On the face of it this was a reasonable desire on the part of the City and it was something provided for in Nambiti's original contract. The minutes prepared by Nambiti of the meeting on 11 December, when it was told that the tender was to be withdrawn, reflected that there had been a problem in this regard. Nambiti's representative attributed this to the City's failure to 'up skill' and retain staff rather than to any deficiency in the training they had received. Right or wrong this was an issue and it was legitimate for Mr Otumile to form his own view on how it could be addressed and whether simply proceeding with CB204/2012 would resolve the problem. We were referred to a passage from a recording of that meeting in support of the submission that Mr Otumile always intended to continue outsourcing SAP support services, but this was beside the point. The concerns related to oversight functions and the ability to account internally for the performance of these services, as well as dealing with changing circumstances.

[39] Mr Otumile's second reason relating to the fact that the support services were furnished both on-site and off-site was not addressed in the judgment. The affidavits did not suggest that it was not a real concern. Finally there was the point that the tender was for three years and the City had decided that contracts involving technology should not be for longer than two years in view of the rate at which technology was changing. As I understand the judgment, the judge's approach was that this was a minor

matter that could be adjusted after the tender had been awarded by way of negotiations with the successful bidder. I am unable to agree. First, there would be no reason why a contractor appointed for three years would be willing to reduce the contractual period to two years. Second, this would be a material, not an insignificant, alteration to the contract. And it is, at its lowest, doubtful whether it is open to an organ of State to make such a substantial change to a contract secured by way of public tender after letting the contract. That would possibly expose it to legal challenges on the grounds that it thereby subverted the procurement process and rendered it unfair.

[40] The judge's conclusion that the reasons given by the City for cancelling the tender were flimsy was not therefore justified. His last ground related to the differences between CB204/2012 and CB107/2013. He regarded these as inconsequential. But he did not have the two tenders before him, as CB204/2012 was not included in the application papers. On what basis he compared the two is therefore unclear. In any event these were tenders dealing with a technical subject and the affidavits did not contain a detailed analysis of the similarities and differences between the two. In those circumstances this was not a conclusion that could be reached on these papers.

[41] It follows that there were no grounds upon which the judge was entitled to come to the conclusion that the decision to cancel the tender CB204/2012 was unfair, even if one assumes that this was a ground on which the court was entitled to intervene. On that ground as well the appeal must succeed. But before concluding it is desirable that I say something about the relief granted by the high court.

The relief

[42] I have already set out the terms of the order granted by the high court. It effectively compelled the City to consider and award a tender that it had decided should not be proceeded with. The fact that the tender, on its own terms, reserved the City's right not to accept any of the tenders was ignored. Instead the court took it upon itself to order the City to procure SAP support services in terms of a contract concluded after a tender process on the terms stipulated by the high court.

[43] That this was the effect of the order should have given pause for thought. A decision as to the procurement of goods and services by an organ of State is one that lies within the heartland of the exercise of executive authority by that organ of State. We live in a country of finite resources at every level of government. Decisions by organs of State on how their limited resources will be spent inevitably involve painful compromises.[12] A decision to spend money on support systems for computer technology will divert those resources from other projects such as the construction of roads or the provision of rubbish collection in residential areas. The Constitution entrusts these decisions to elected bodies at all three tiers of government. In turn the elected representatives at every tier select the executive that is required to carry out the chosen programme of government. It is an extremely serious matter for a court to intervene in such decisions. But for it to do so by compelling the organ of State to enter into contracts and acquire goods and services that it has determined not to acquire, or at least not to acquire on the terms of a specific tender, is something that, if open to a court to do at all, should

---

[12] None more so than that in *Soobramoney v Minister of Health. KwaZulu-Natal* [1997] ZACC 17; 1998 (1) A 765 (CC).

only be done in extreme circumstances. These issues are among those comprehended by the broad doctrine of the separation of powers. But the court here does not appear to have been alive to them or to the impact of its orders. That should not have been the case.

Result

[44] In the result the appeal must succeed. The following order is granted:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the High Court is set aside and the following substituted therefor:

'The application is dismissed with costs.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	Vuyani Ngalwana SC (with him Khaya Mnyandu) Instructed by: Dlamini Attorneys, Sandton Honey Attorneys, Bloemfontein
For respondent:	Q Pelser SC (with him C J Welegemoed) Instructed by: Thapelo Kharametsane Attorneys, Pretoria Symington & De Kok, Bloemfontein.