



**CONSTITUTIONAL COURT OF SOUTH AFRICA
City of Cape Town v Aurecon South Africa (Pty) Ltd**

CCT 21/16

Date of judgment: 28 February 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 28 February 2017, the Constitutional Court handed down a judgment in an application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA). The matter started as a review application in the High Court of South Africa, Western Cape Division, Cape Town (High Court). The applicant, the City of Cape Town (City), seeks to review its own decision in terms of which the respondent, Aurecon South Africa (Pty) Ltd (Aurecon), was awarded a tender for the decommissioning of the Athlone power station. Relying on the provisions of the Promotion of Administrative Justice Act (PAJA), the City contends that its decision ought to be set aside on the basis of procedural irregularities in its award of the tender to Aurecon.

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

In 2008, the City of Cape Town appointed a joint venture which comprised of a wholly-owned subsidiary of Aurecon and ODA Consulting Pty Ltd to conduct a high level pre-feasibility study into the decommissioning of the Athlone power station. The brief to the joint venture involved, amongst other things, the compilation of a scope of work. A draft scope of work was submitted by the joint venture. Thereafter, the City issued a tender for the decommissioning of the Athlone power station. The joint venture did not assist in the compilation of the tender documents. Aurecon and five others submitted tenders to the City, but only Aurecon's tender was considered as responsive. The City's Bid Adjudication Committee (BAC) resolved to accept Aurecon's tender, subject to the conclusion of the process contemplated in the Municipal Finance Management Act and

Aurecon was duly notified of the BAC's decision. When the approval of the award served before the City's council, concerns were raised that the tender process was tainted by corruption and irregularities, particularly due to Aurecon's involvement in the prefeasibility study. Accordingly, Ernst & Young (EY) was commissioned to investigate the process followed in Aurecon's appointment. The forensic report produced by EY recorded a number of alleged irregularities.

The High Court found that review proceedings were launched within the required period and the City, accordingly, did not require condonation for the late institution of the application. This was because the statutorily prescribed 180-day time period within which judicial review proceedings ought to be launched only began to run once the City had become aware that the process was tainted by corruption and irregularities as exposed in the EY forensic report. Furthermore, the High Court held that Aurecon should have been precluded from tendering for the contract due to its involvement in the preparation of the draft scope of work, amongst other procedural irregularities.

On appeal, the SCA found that the High Court's interpretation of the statutorily prescribed 180-day period was incorrect, observing that the plain meaning of the provision did not support the meaning ascribed to it by the High Court. In its view, the time period began to run at the moment the administrative action in issue took place. The SCA held that since the City had not made a proper case for condonation, the delay was inexcusable and for this reason alone the High Court should have dismissed the review application. Nonetheless, the SCA proceeded to assess the alleged irregularities, finding that the allegations were technical and did not affect the substantive fairness of the process.

In the Constitutional Court, Mbha AJ (Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring), held that it is not necessary to definitively decide whether PAJA is the appropriate framework for decision-makers to rely on for review of their own decisions. On the assumption that PAJA is available to the City, he found that the City cannot suggest that it "was not aware of the reasons for the decision prior to receipt of the [Ernst & Young] report". The decision was taken by the BAC which approved the BEC's report without qualification. The resolution of the BAC records that it awarded the tender to Aurecon "for the reasons set out in the [BEC's] report". Since the BEC's report served before the BAC, the BAC must have been aware of those reasons when it made its decision. The City clearly brought its application outside the 180-day period prescribed by section 7(1) of PAJA. Section 9 of PAJA allows the Court to shorten or extend the periods relating to non-compliance with the stipulated time periods "where the interests of justice so require", but Mbha AJ held that the City's condonation argument lacked merit and failed to root its discretionary challenge properly.

Given that this matter is disposed of on the basis that the City was out of time and failed to make out a proper case for condonation in terms of section 9 of PAJA, it is not necessary to venture into the arguable point of law raised, namely the prior involvement of a prospective tenderer.