THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1030/2017

In the matter between:

SWIFAMBO RAIL LEASING (PTY) LIMITED
APPELLANT

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA
RESPONDENT

Neutral citation: *Swifambo Rail Leasing v PRASA* (1030/2017) [2018] ZASCA 167 (30 November 2018)

Coram: Lewis, Ponnan, Zondi, Makgoka and Schippers JJA

Heard: 1 November 2018

Delivered: 30 November 2018

Summary: An award of a tender vitiated by irregularities, corruption and 'fronting' within the meaning of the Broad-Based Black Economic Empowerment Act 53 of 2003 set aside: delay in instituting review proceedings reasonable in the circumstances, and condonation would be granted if it was unreasonable.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Francis J sitting as court of first instance):

The appeal is dismissed with the costs of two counsel.

JUDGMENT

Lewis JA (Ponnan, Zondi, Magkoka and Schippers concurring)

[1] The Passenger Rail Agency of South Africa (PRASA), the respondent, until 2014, was effectively controlled by Mr Lucky Montana, the Group Chief Executive Officer of PRASA. He and some of his officials approved the award of a tender for the supply of various train locomotives to a recently incorporated company, Swifambo Rail Leasing (Pty) Ltd (Swifambo), the appellant. The award was vitiated by a number of material irregularities, primarily the dishonest and corrupt conduct of officials of PRASA in advertising the Request for Proposals in respect of the supply of locomotives and in awarding the contract. Swifambo has neither challenged nor contradicted PRASA's evidence that the tender was procured through corruption. But it insisted that it was an innocent tenderer, and that the contract between it and PRASA ought nonetheless to remain in existence and that the parties should be permitted to continue performing their respective obligations.

[2] On discovering the fraudulent conduct of Mr Montana and others, a newly reconstituted board of control of PRASA applied to the Gauteng Local Division of the High Court to have the contract declared invalid and for an order setting it aside. I shall refer to that court as the high court for the sake of convenience. Francis J granted the orders sought. The appeal before us is with his leave. The chief

defences raised by Swifambo in the high court were that PRASA brought the application some three years after the contract was concluded and was thus precluded from seeking relief because of its unreasonable delay; that Swifambo was an innocent tenderer, which had no knowledge of PRASA's dishonesty; and that it was not equitable to set aside the contract in the circumstances. Francis J rejected all these defences. On appeal, Swifambo persists in them. In the high court, PRASA also sought an order setting aside an arbitration agreement in the contract. That order was not contested in the high court and it is not an issue in this appeal.

Background

[3] PRASA is an organ of state, funded by National Treasury. It is mandated to provide rail services throughout South Africa. On 25 March 2013, and pursuant to a tender process, PRASA decided to conclude a contract with Swifambo for the purchase of locomotives. Prior to that, in July 2009, PRASA had published a request for expressions of interest in the supply of locomotives for the haulage of passenger trains on various national routes as it had a shortfall of some 85 locomotives needed for various purposes. Following that, in May 2011, a Spanish company, Vossloh España S A U (Vossloh), inspected PRASA's fleet, and made recommendations as to what PRASA needed in the short, medium and long terms.

[4] In July 2011, the then Executive Manager: Engineering Services of PRASA, Mr D Mtimkulu, sent a memorandum to Montana about PRASA's needs. He recorded that PRASA's fleet was outdated and that this impacted on the reliability of the services PRASA was supposed to provide. He estimated that it would cost R5 billion over a period of six years, and recommended that Montana and the Board of PRASA, approve the sourcing of 100 locomotives.

[5] PRASA published a request for proposals late in November 2011, having decided to purchase some 88 locomotives. The number actually needed was not clear at the time when the application to the high court was made, nor was it clear whether diesel, electric or hybrid locomotives were needed. Accordingly, no proper assessment of actual needs was in fact made by PRASA. And the normal financial procedures required by PRASA's procurement policy were not followed. It appeared

that PRASA had not obtained the approval of National Treasury, required in terms of s 54(2) of the Public Finance Management Act 1 of 1999.

[6] Nonetheless, on 9 December 2011, PRASA held a compulsory briefing session for potential bidders. Swifambo was not listed as one of the companies in attendance, but its holding company, Swifambo Rail Holdings (Pty) Ltd, was present. Swifambo sought to adduce evidence that at the briefing, the presentation made by PRASA indicated that it was willing to consider the purchase of locomotives as well as their hiring. I shall return to this issue.

[7] The specifications for the locomotives to be supplied were drawn by Mtimkulu. He had no expertise in the subject, but had been appointed to a position at PRASA by Montana in 2010, and had a meteoric rise through the ranks, with a meteoric salary hike to match it. Mtimkulu claimed to have diplomas in engineering and later a doctorate. In fact he had no qualification at all. The specifications contravened various requirements of the procurement policy. But they matched those of Vossloh locomotives manufactured in Spain. Francis J in the high court found that the specifications had been tailored by Mtimkulu to ensure that the entity importing the locomotives from Vossloh would be awarded the bid.

[8] Swifambo does not deny that Mtimkulu behaved dishonestly but maintains that Swifambo was not aware of this, an issue to which I shall return. When the board of PRASA was reconstituted in 2014, Mtimkulu's fraud came to light. Disciplinary proceedings against him were initiated in 2015 but he resigned before any hearing could be held and he seemed to have disappeared. Montana, who had been party to Mtimkulu's conduct, also resigned in March 2015. When the application was instituted by the new board, investigations into Mtimkulu's and Montana's fraud were ongoing.

[9] After the briefing session in December 2011, Swifambo Holdings (Pty) Ltd, on 7 February 2012, acquired a company known as Mafori Finance Vrydheid (Pty) Ltd (Mafori Finance), the name of which was later changed (on 5 May 2012) to Swifambo Rail Leasing (Pty) Ltd, the appellant. Mafori Finance submitted a bid for the award of the tender under the name 'Swifambo Rail Leasing' on 27 February

2012, some 20 days after that company had been acquired for the purpose. There were five other bidders.

[10] Swifambo's bid did not comply with the requirements of the request for proposals in a number of material respects. First, bidders had to supply tax clearance certificates. The certificate submitted by Swifambo did not have a VAT number. And although Swifambo indicated that the locomotives would all be manufactured and supplied by Vossloh, it did not submit any tax clearance certificate for Vossloh, which was required as Vossloh was regarded, according to the bid, as a subcontractor. Although it operated outside South Africa, and was not registered as a taxpayer, Vossloh had to supply a certificate of good standing regarding tax from the authority where it was liable for tax.

[11] Second, no broad based black employment equity (BBBEE) plan for procurement of goods and services for the duration of the contract was submitted, as was required by the request for proposals. Third, the bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain. Fourth, there was no evidence in the bid itself that supported Swifambo's assertion that it and its shareholders had previous experience in the rail industry: the request for proposals required that the bidder had to be technically and financially qualified to provide the locomotives that PRASA needed.

[12] In the fifth place, Swifambo did not demonstrate in the bid that it had previous experience in the supply of locomotives (it could hardly have done so since it came into existence only a few days before the bid was submitted) nor did it show the capacity to manage a project of the size put out to tender. The five reference letters supplied, in accordance with the request for proposals, all related to Vossloh's operations in Europe. Moreover, Swifambo indicated in the bid that it would rely entirely on Vossloh to fulfill its obligations, but Vossloh was not a co-bidder, and at the time of the bid, had no contractual relationship with Swifambo.

[13] Despite material non-compliance with the request for proposals (which was not disputed by Swifambo) the Bid Evaluation Committee of PRASA, which first met on 27 March 2012, recommended to the Bid Adjudication Committee that the bid be

awarded to Swifambo. And at a meeting held on 24 July 2012, the Board of PRASA approved Swifambo as the preferred bidder for the procurement of dual electric diesel locomotives. The contract between PRASA and Swifambo was concluded on 25 March 2013. Only after that, on 4 July 2013, was a contract for the supply of locomotives concluded between Swifambo and Vossloh.

[14] As I have said, Swifambo does not deny the irregularities in the bidding process. It takes issue, however, with the allegation of 'fronting' made by PRASA; with the nearly three year period between the decision to award the bid by PRASA and the bringing of the application; and with the order of the high court setting aside the contract. It complains also that PRASA has relied on hearsay evidence in its founding and replying affidavits; that much of PRASA's evidence as to fraud and fronting is to be found only in its reply to Swifambo's answering affidavit (despite the fact that Swifambo was afforded the opportunity to respond to that); and it denies that it was the only bidder to offer to sell locomotives to PRASA, alleging that at least two of the bidders also included a purchase option in their bids.

[15] In the founding affidavit of PRASA, deposed to by Mr Popo Molefe, the new chairman of the reconstituted board, in addition to raising the irregularities in Swifambo's bid, said that PRASA considered the award to have been vitiated not only by the irregularities to which I have already alluded, and which are not disputed, but by other factors. These included a change in the procurement strategy for a lease to an outright purchase; the 'appearance' of a fronting relationship between Swifambo and Vossloh which, as a Spanish entity, did not have BBBEE credentials; the apparent preference afforded to Swifambo throughout the tender process, in particular in that the specifications were 'tailored to suit the products supplied by Swifambo'; and that the diesel-electric locomotives were not evaluated by a technical committee, as a result of which those that were acquired from Vossloh exceeded the maximum height suitable for South African railway lines.

[16] Francis J in the high court found for PRASA on all these issues and concluded that he should entertain the application to have the contract set aside despite the unreasonable delay in the institution of proceedings. He also found that

the hearsay evidence was admissible under s 3(1) of the Law of Evidence Amendment Act 45 of 1988.

[17] Swifambo on appeal contends that the findings were incorrectly made for a number of reasons. It complains that they are based on hearsay evidence and on inferences from facts that have not been proved. It denies that it was guilty of the practice of fronting, and asserts that PRASA had not made out a case for fronting in the founding affidavit. It complains that the entire judgment of the high court was informed by the finding that Swifambo was not an innocent tenderer. Swifambo also argues that Francis J had made findings of fact that were misdirected. And it contends that the delay in bringing the application was unreasonable and should not be condoned. I shall deal with these arguments in turn. Since the finding on fronting colours the issues of delay and the remedy granted, I shall deal with the issues of fronting and delay last.

Hearsay evidence

[18] The founding affidavit deposed to by Molefe started thus:

'I commenced my involvement with the applicant [PRASA] as part of an entirely reconstituted board of control on 1 August 2014 and accordingly many of the facts set out herein are not within my personal knowledge. I am nevertheless aware of the facts . . . from an investigation the board has caused to be conducted into the conduct of the applicant's business prior to my involvement. The applicant's business is both substantial and technically complex, and it took significant effort and a considerable amount of time for the reconstituted board to familiarize itself with the intricacies of PRASA's business. The task was exacerbated by resignations, dismissals and a generally un-cooperative attitude from certain employees within the organisation. In some instances PRASA's records were concealed, spirited away or destroyed and it was only through the interaction and assistance of the investigators that the facts set out in the affidavit were discovered. The facts specific to this case were discovered and only revealed through the broader investigation into a number of relationships and activities the board suspected were generally corrupt. Having regard to all the steps that were reasonably required prior to and in order to initiate these review proceedings, I respectfully submit that this application has been brought within a reasonable time.

The facts have been presented to me by the investigators and are mainly derived from documents attached as annexures. The attached documents are contemporaneous

documents and form part of the applicant's records under my control. I cannot think of any reason to doubt the reliability of the documents.

. . .

I have obtained confirmatory affidavits [from employees of PRASA] only where I am confident that the employees concerned will not be intimidated and the integrity of the investigation will be maintained.'

[19] Swifambo's chief complaint appears to be that allegations of fraud and corruption should not be made lightly, and should be based on hard facts, or amount to the 'clearest evidence' or 'clear and satisfactory evidence'. It argues that no such evidence was tendered by PRASA. Molefe's conclusion, in the replying affidavit, that there were 'irregular and corrupt practices at PRASA', is criticized on the basis that there is no direct evidence supporting it. However, Swifambo in its heads of argument on appeal gives no detail as to what evidence it objected to. Moreover, it did not take issue with the conclusion itself, professing ignorance as to the practices within PRASA. Swifambo did not contest the merits of the application, and did not generally dispute the factual allegations made by Molefe. Nor did Swifambo dispute the contents, or the reliability, of the documents attached to the affidavits deposed to by Molefe. And as Francis J held, confirmatory affidavits were provided in respect of the replying affidavit. Thus while hearsay evidence is generally not permitted in affidavits, where there is no reason to doubt the reliability of the allegations made, they are uncontested, and the deponent says he believes them to be true, they will be admissible.

[20] Section 3(1) of the Law of Evidence Amendment Act provides that hearsay evidence is inadmissible unless the court, having regard to the nature of the proceedings; the nature of the evidence tendered; its probative value; the reason why the evidence is not given by the person upon whose credibility it depends; any prejudice to the party who objects to its admissibility; and any other factor which, in the opinion of the court, should be taken into account, is of the view that the evidence should be admitted in the interests of justice. As Francis J held, the evidence in the documents supporting both the founding and replying affidavits was not alleged to be unreliable and the facts and documents were discovered by independent investigators in the course of their broader investigation into corruption within PRASA. The reasons why direct evidence could not be given were explained

by Molefe in the passages quoted above: some employees of PRASA had resigned, others were uncooperative, records were concealed, and in so far as possible documentary evidence was adduced. Swifambo had the opportunity to examine all the evidence and to respond to it. But since it did not dispute that there was corruption, claiming ignorance, it was not in any way prejudiced by the admission of the evidence. The application was manifestly in the public interest. And it was in the interests of justice to admit the evidence adduced by PRASA. Swifambo did not take issue with any of the allegations of PRASA's corruption. Francis J thus correctly admitted the evidence.

The purchase option

[21] Francis J found that Swifambo was the only bidder to offer the sale of locomotives to PRASA, rather than leases for which the other bidders tendered. Swifambo argues that the finding was incorrect. The request for proposals anticipated that the successful bidder would let locomotives to PRASA. The high court regarded this as an indication of corruption. However, Swifambo argues on appeal that the finding was due to the failure of the court to have regard to an affidavit, which it applied to admit, by an attorney who alleged that at the compulsory bidder briefing, potential bidders had been advised that a sale of locomotives would be considered.

[22] As PRASA points out, however, Swifambo amended its application so as to ask only for a document that was attached to the affidavit to be admitted. That document does not indicate that the request for proposals was amended in any way. The fact that one other bidder also tendered a sale option does not change the fact that the request for proposals does not expressly refer to the purchase of locomotives and was not amended. In the circumstances, Francis J correctly concluded that Swifambo was at an advantage in the tender process since other bidders were not given an opportunity to bid to sell locomotives to PRASA. There was no misdirection of fact in this regard.

The tailoring of the specification

[23] I have already referred to the fact that the specifications for the locomotives to be acquired were drawn by Mtimkulu who was not qualified to do so. The

procurement policy of PRASA required that specifications be drawn by a cross-functional sourcing committee. The specifications would, in the ordinary course, take into account exactly what would function on South African railway lines. Instead, Mtimkulu made provision for the Vossloh locomotives, tailoring the requirements to what Vossloh was manufacturing in Europe. This process ensured that Swifambo would score the highest points in the technical evaluation.

[24] The high court set out in detail the specifications that matched the Vossloh locomotives. Swifambo does not, on appeal, dispute any of the facts. It argues merely that the high court drew the 'most adverse inference' from the undisputed facts. There is, however, no other inference to be drawn. Many of the features of the Vossloh locomotives were of no relevance to the needs of PRASA, yet they were required in the specifications. Swifambo argues, however, that these features were public and disclosed by PRASA in its request for expressions of interest. Moreover, other bidders could match some of the specifications. That is beside the point. Swifambo argues that a more benign explanation of the uncanny resemblance between the specifications and the Vossloh locomotives can be given. But it does not suggest what that might be. The high court correctly concluded that the specifications had been tailor-made for the benefit of Vossloh, and thus Swifambo. It correctly held that this was a factor that leads to the conclusion that the tender process was corrupt.

Fronting

[25] PRASA alleged that Swifambo was a 'front' for Vossloh, who would not have been able to bid itself because it was not based in South Africa and did not meet the requirements of the procurement policy nor the request for proposals that necessitated that it be Broad-Based Black Employment Equity (BBBEE) compliant. Swifambo, on the other hand, had a level 4 BBBEE rating.

[26] Swifambo argues that it was not knowingly a party to 'fronting'. A fronting practice is defined in the Broad-Based Black Economic Empowerment Act 53 of 2003 as a transaction, arrangement or other act or conduct that undermines the achievement of the objectives of the Act. Section 1(c) refers to the 'conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a

certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person'. Any person who knowingly engages in a transaction that undermines the BBBEE Act would be guilty of an offence under s 13O of the Act.

[27] Swifambo attacks the finding of the high court that it was guilty of fronting on various bases. It argues that, since fronting is a criminal offence, PRASA should have shown beyond reasonable doubt that Swifambo was knowingly a party to a fronting transaction. This argument loses sight of the nature of the proceedings: it is not a criminal prosecution, but an application to set aside a transaction vitiated by serious irregularities. It also argues that the allegation of fronting is made only obliquely in the founding affidavit, where Molefe stated that there was an 'appearance of fronting', since Vossloh was the real bidder hiding behind a company controlled by black persons. However, the allegation is borne out by the chronology of events leading to the making of the bid, and of the events after the tender was awarded. I have already alluded to these events.

[28] I emphasize that a shelf company, Mafori Finance, was acquired by Swifambo Holdings (Pty) Ltd 20 days before the bid was made. Its name was changed to Swifambo after the bid was submitted. Before then, in May 2011, Vossloh had done a needs assessment in respect of PRASA locomotives, and made recommendations as to its short, medium and long term requirements. Vossloh was not eligible to bid. It did not have any BBBEE rating. If it were to supply locomotives to PRASA it had to become part of a BBBEE compliant enterprise. Vossloh's status was far from clear: in the bid it was described as a subcontractor, but it was supplying all the locomotives via Swifambo – the main obligation of Swifambo under the contract with PRASA. The contract between Swifambo and Vossloh was concluded only on 4 July 2013, more than a year after the bid was submitted. In terms of that contract, Swifambo's only obligation was to accept delivery of locomotives, and to procure their handing over to PRASA. It played no other role.

[29] Counsel for Swifambo submitted that that is the essence of any BBBEE transaction. The entity with the skills and assets contracts with a black owned entity which is BBBEE compliant. The argument ignores the purpose of the BBBEE Act,

which is to transfer capital and skills to black people. Swifambo personnel played no real role in so far as PRASA was concerned, and so there was no skills transfer and no change of asset holding. Vossloh had complete control over every aspect of the contract between Swifambo and PRASA, including the appointment of members of the steering committee overseeing the acquisition and commissioning of locomotives. Swifambo's real role was undoubtedly to enable Vossloh to become the real bidder for the tender. In *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) (para 26) this court described fronting as a 'fraud on those who are meant to be the beneficiaries of legislative measures put in place to enhance the objective of economic empowerment'.

[30] Accordingly, the high court did not err in finding that Swifambo was a party to a fronting practice, and was not an innocent tenderer. This, apart from other factors that I will discuss, clearly colours the nature of the remedy to which PRASA is entitled.

Delay

[31] Francis J in the high court found that the nearly three year delay in bringing the application was unreasonable, but that given the public interest in state owned entities not being corrupt, and the enormous cost to the country incurred through the tender process, the period for bringing the application should be extended and the delay condoned. The parties had assumed, as had the high court, that the application was brought by PRASA under the Promotion of Access to Administrative Justice Act 2 of 2000 (PAJA). That Act provides that applications must be brought within 180 days of the decision under review (s 7(1)), but that an applicant may apply for an extension of that period and condonation under s 9 if the interests of justice require it.

[32] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2018] ZACC 40; 2018 (2) SA 23 (CC) the Constitutional Court held that where the State or an organ of state seeks to review its own decision, the PAJA is not applicable. Instead, any application for review that it may bring would have to be based on the principle of legality, and at common law such an application must be

brought within a reasonable period – without unreasonable delay. Swifambo argues that the period between the making of the decision to award the bid to it and the date when the application was brought, more than two years, was unreasonable. Moreover, complains Swifambo, PRASA did not apply for an extension of time in the application initially, and Molefe did not explain the reasons for the delay in the founding affidavit. PRASA did, however, apply to amend its notice of motion before the hearing was held in the high court, and Swifambo did not object to the amendment. It did take issue with the assertion that the delay was not unreasonable in the circumstances.

[33] In particular, Swifambo argues that three periods are not accounted for in PRASA's explanation set out in the replying affidavit. Francis J accepted that the three periods were not explained but found that in all the circumstances the apparent delay was to be condoned.

[34] I have already set out Molefe's explanation for bringing the application only in November 2015. He pointed out that the entire board of PRASA was reconstituted in August 2014, more than two years after the tender was awarded. It had taken time for the new board to familiarize itself with the complexity of the PRASA business operation. And about 40 complaints of maladministration at PRASA had been made to the then Public Protector. She had spent some two years in attempting to investigate the complaints. The Auditor General had also been tasked with investigating illegal expenditure by PRASA, and PRASA needed to examine his report. Montana, who had controlled PRASA and its staff, was obstructive, and attempted to cover up his role in various corrupt transactions, including the award of the tender to Swifambo. He resigned only in March 2015, and left before providing any response to the Public Protector's report entitled 'Derailed'. The Public Protector had experienced similar obstruction in her investigation, and so had released her report only in August 2015. In it she said:

'I must record that the investigation team and I had immense difficulty piecing together the truth as information had to be clawed out of PRASA management. When information was eventually provided, it came in dribs and drabs and was incomplete. Despite the fact that the means used to obtain information included a subpoena issued in terms of s 7(4) of the Public Protector Act, many of the documents and information requested are still outstanding.'

[35] Furthermore, Montana misled the new board as to the nature of the complaint made to the Public Protector, saying it was a trivial matter. And then, despite several requests by Molefe to Montana to provide a response, he had not done so before he left PRASA. Molefe said, in his replying affidavit:

'Mr Montana held sway over PRASA through the active assistance of his associates and the intimidation of those who would not do his bidding. PRASA employees who did not bend to his will were victimized, suspended or dismissed.'

[36] The board considered legal advice and 'launched this application as soon as it was in a position to do so. It did so notwithstanding the time consuming preparation that was required in order to launch the application.' In all the circumstances, said Molefe, PRASA launched the application within a reasonable time after the reasons for the decision became known to the new board.' Molefe pointed out too that senior employees who attempted to deal with irregularities at PRASA were dismissed by Montana. These included the general manager: group legal services and the group executive manager: risk, legal and compliance. And while the investigation was in progress, Montana instructed certain employees to delete electronic documents. Swifambo does not challenge the finding of the high court that Montana, who was implicated in the irregular and unlawful activities, prevented the dissemination of information to investigators even after he had left PRASA. The board was thus kept ignorant of the full extent of the wrongdoing at PRASA including the wrongful award of the tender to Swifambo.

[37] Swifambo argues on appeal that that does not matter. That the facts came to light only a few months before the application was launched is irrelevant, it asserts. Delay runs from the date of the decision (in July 2012) and not from the time when the board became aware of the unlawfulness of the decision, the full extent of which was appreciated only in late 2015. It relies in this regard on *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC), which confirmed the decision of this court in *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA). In *Aurecon* (SCA) this court said that if the period of delay started only when the entity wronged became aware of the wrong, this would 'automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its

underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to [the tenderer] and the public interest in the finality of administrative decisions and the exercise of administrative functions' (para 6). This statement was approved by the Constitutional Court (para 42) on appeal to it.

[38] In that case the City had awarded a tender and discovered much later that there might have been an irregularity in the award. It sought to have it set aside once it became aware of the irregularity. This court held that the application for review was brought out of time but nonetheless determined that there was nothing irregular in the process. The Constitutional Court held that the delay was unreasonable in the circumstances, refused condonation, and did not consider whether the award had been irregular.

[39] This case is totally distinguishable from *Aurecon*. The PRASA board once reconstituted did not ascertain the irregularity in the award of the bid to Swifambo for all the reasons stated until August 2015 and launched the application for review in November of that year. It acted as expeditiously as possible. On the assumption that there was indeed delay at common law (for just under three years), it applied for condonation. In my view, there was no unreasonable delay in all the circumstances. However, it is useful to consider whether condonation should have been granted by the high court, given the lengthy period between the award of the contract and the institution of review proceedings.

Condonation

[40] The overriding consideration in condoning delay is the interests of justice. In *Aurecon SCA* this court said (para17) that in determining whether condonation should be granted, the relevant factors that require consideration are the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice; the reasonableness of the explanation for the delay; the importance of the issues raised and the prospects of success on review. The Constitutional Court endorsed this statement.

[41] There is undoubtedly a public interest in entertaining the application for review. At least R2 billion of taxpayers' money has been spent in pursuit of a fraudulent and corrupt tender. The explanation for the delay, if such there is, is clear and plausible. It is in the interests of PRASA and the general public that the award of the contract to PRASA be reviewed. And in *Aurecon CC* the court said that if the irregularities raised had 'unearthed manifestations of corruption, collusion or fraud in the tender, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention' (para 50).

[42] In this matter, both PRASA and Swifambo were not innocent. The award of the tender to Swifambo was corrupt. And there is no reason to interfere with the exercise of the high court's discretion to grant condonation. It was in the interests of justice and in the public interest.

Equitable remedy

[43] The high court, in the exercise of its discretion, ordered that the contract between PRASA and Swifambo be set aside. Is there any reason to interfere with its decision? Swifambo argues that there is. The contract has been part performed, and the parties can continue to perform, it contends. PRASA argues, on the other hand, that if the contract were to stand, good money would be thrown after bad. While Swifambo contends that Vossloh is ready to deliver more locomotives, Vossloh is silent. There has been no confirmation by Vossloh by affidavit or otherwise that it is in a position to deliver locomotives that are fit for purpose.

[44] The locomotives already delivered to PRASA (some 13 in all) are not fit for purpose. They cannot be, and are not, used. Swifambo insists that they are in use because they have clocked up (between them) some 71 000 kms. That is not correct. They have been tested on railway lines in the country, and have been found to be unsafe.

[45] A Transnet engineering report dated 23 September 2015, for example, states that:

‘The side clearance and height of the AFRO4000 locomotive [supplied by Vossloh] exceeds that of the Transnet gauge for diesel locomotives and the locomotive can therefore not be declared compliant . . .
In addition, the height of the AFRO4003 exceeds the Vosloh dimensional drawing . . . Minor modifications could be considered to reduce the height in the silencer area . . . as well as to rectify items which result in side clearance infringements.’

[46] A report of the Railway Safety Regulator, dated November 2015, stated that the AFRO4000 series of locomotives is designed and manufactured to a height above that of the rail head. It thus exceeded the vehicle structure gauge height required for diesel locomotives. On the other hand, a report commissioned by Swifambo stated that the locomotives supplied complied with the specifications of the contract. That is hardly surprising since the specifications were drawn by Mtimkulu to match those of the Vossloh locomotives.
[47] The continued performance of the contract would serve no useful purpose. It might benefit Vossloh and Swifambo, but it would be to the detriment of the public and to the detriment of PRASA. While it is true that PRASA’s current locomotives are old and must be replaced, it assists no one to spend public money on new locomotives that are not fit for purpose. Swifambo contends that PRASA will have to start the tender process again, which will be costly and will take time. But as PRASA argues, that is unavoidable, and preferable to spending a further R1 billion on locomotives that cannot safely be used on South African railway lines.

[48] Apart from the fact that no purpose would be served in continuing with the performance of the contract, the high court was correct in saying that it would be harmful to allow a contract, concluded in a corrupt process, to stand. I see no reason to interfere with the discretion exercised by Francis J.

[49] Accordingly the appeal is dismissed with the costs of two counsel.

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C H Lewis
Judge of Appeal

APPEARANCES

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