



REPORTABLE

CASE NO: SA 40/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ARANDIS POWER (PTY) LTD

Appellant

and

PRESIDENT OF THE REPUBLIC OF NAMIBIA

First Respondent

CABINET OF THE REPUBLIC OF NAMIBIA

Second Respondent

MINISTER OF MINES AND ENERGY

Third Respondent

NAMIBIA POWER CORPORATION (PTY) LTD

Fourth Respondent

XARIS ENERGY (PTY) LTD

Fifth Respondent

SINOHYDRO CORPORATION LIMITED

Sixth Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 1 March 2018

Delivered: 16 March 2018

Summary: This appeal brought by Arandis Power (Pty) Ltd concerns the review of a multibillion dollar tender award for the erection of a power plant by the power parastatal, Namibia Power Corporation (Pty) Ltd (fourth respondent). The tender

was awarded to Xaris Energy (Pty) Ltd (fifth respondent). The review application in the court *a quo* was dismissed with costs on the basis that the appellant had unduly delayed in bringing the review application.

A series of events occurred before the appellants launched the review application in the High Court on 3 February 2016. After the tender bidding process had run its course, NamPower informed appellant (Arandis) on 21 October 2014 that it had been selected as the reserve bidder for the tender whilst Xaris was informed that it has been appointed as the preferred bidder on 24 October 2014. On 30 March 2015, NamPower resolved to award the tender to Xaris (Arandis was not informed of this decision, it was however posted on NamPower's website on 15 April 2015). In the meantime, on 13 April 2015, the Minister of Mines and Energy 'directed' NamPower in writing to postpone the award of the contract. NamPower complied with this directive. On 15 May 2015, the putting on hold of the award was reported by the media and on 29 June 2015, the President of Namibia confirmed this in a media release. On 8 July 2015, Arandis requested a meeting with the Minister of Mines and Energy. This meeting took place on 17 August 2015 and according to Arandis, the Minister confirmed that the tender has been put on hold and the decision regarding the tender no longer vested with NamPower, but with the Office of the President. On 22 December 2015, the Minister announced in a media release that: 'The Government has deemed it fit to announce that NamPower shall be empowered to proceed negotiating with Xaris Energy (Pty) Ltd on the 200 MW' (power plant) subject to certain conditions. Appellant only became aware of the press release when it opened its offices on 18 January 2016. On the same day, Arandis addressed letters to the Minister, the Attorney-General and NamPower questioning the decision set out in the press release and the tender evaluation

process. Shortly afterwards, Arandis' Managing Director met with senior advisors in the President's office on 26 January 2018 and also consulted with its legal practitioner on the same date. On 28 January 2016, the Minister reverted that the matter had been referred to the Attorney-General. Appellant prepared a review application which was launched on 3 February 2016 in which urgent interim relief was also sought and set down for 12 February 2016. The review application was heard on 7 and 8 June 2016. The court *a quo* on 7 July 2016 delivered its judgment, dismissing the application with costs, upholding the opposing respondents' point that Arandis had delayed unduly in bringing its review – for some 16 months after the decision was taken. The court *a quo* found that Arandis had been aware of the preferred bidder decision on 21 October 2014 already and ought to have challenged that decision within a reasonable time after that. The court *a quo* found that the launching of the application on 3 February 2016 amounted to an unreasonable day. The court further found that Arandis had failed to place sufficient facts before the court to condone its delay.

During the course of the review proceedings, NamPower made certain concessions, namely the tender award to Xaris was made outside the period of tender validity and that Xaris's tender did not comply with the tender requirements. When making these concessions NamPower withdrew its opposition and indicated that it would abide the decision of the court. This appeal is only opposed by Xaris.

Argument on appeal revolved around the issues of leave to appeal, mootness, unreasonable delay, the awarding of the tender outside the validity period, non-compliance with the tender requirements and the remedy.

Leave to appeal – Xaris took the point that the order of the court *a quo* is of an interlocutory nature because the court only dealt with the point of delay which entailed a condonation application, consequently making it interlocutory in nature and that leave to appeal was required. The principles in *Di Savino* finding application, this court concluded that even though the delay point was raised as a preliminary point, the order of the court *a quo* was not interlocutory in nature because it finally disposed of the review application.

Held, the review application was dismissed with costs and finally disposed of. The successful invocation of the delay rule thus constitutes a defence which finally disposes of a review – as would a preliminary point that the impugned decision does not constitute administrative action and is thus not reviewable.

Mootness – Xaris referred to recent correspondence in which it appeared that the tender had been cancelled by NamPower. Xaris however intended to enforce their award. The validity of the award is the subject of this appeal. That means that the appeal is by no means moot. There is thus a live and existing dispute between the parties to this appeal concerning the validity of the tender award which is the issue raised in this appeal.

Unreasonable delay – the court *a quo* decided that NamPower was *functus officio* once it made the decision of preferred and reserved bidder status and that was when the delay clock started. Appellant argued that as it is clearly contained in the RFP terms of the tender that the determination of these statuses on 21 and 24 October 2014 did not constitute acceptance of tender or award of the tender to Xaris and that NamPower could discontinue negotiations with Xaris and proceed

with Arandis at any stage. The tender was awarded on 30 March 2015 and posted on its website on 15 April 2015, it was later put on hold pending an investigation by the Cabinet until 22 December 2015.

Held, that it is well settled that the question as to whether an applicant has unduly delayed instituting review proceedings entails a dual enquiry. The first is an objective one and concerns whether the time taken to institute proceedings was on the facts unreasonable. That enquiry is factual and does not involve the exercise of a discretion. It entails a factual finding and a value judgment based on those facts. If the court finds that the delay is unreasonable, the second enquiry arises and is whether a court would in the exercise of its discretion grant condonation for the unreasonable delay. As has been repeatedly stated, each case is to be determined on its own facts as to whether the delay is unreasonable or not.

Held, the court *a quo*'s decision concerning preferred and reserved bidder status being sufficient to trigger the appellant's duty to institute a review was incorrect.

It is further held that, it is necessary to assess the reasonableness of the delay. In this case, the decision to award the tender was made on 30 March 2015 (which gave rise to the duty to institute a review of that decision), however this decision only came to the knowledge of the appellant on 15 April 2015, and was followed by a series of events involving a cabinet investigation and putting the tender on hold until the announcement of 22 December 2015. It was not reasonable for the appellant to await the outcome of the cabinet or ministerial investigation before instituting a review.

Held further that, only after the investigation was completed and the Minister announcing that he had instructed that the tender would go ahead that the appellant was required to institute its review within a reasonable time, which the court found that the appellant did on 3 February 2016 soon after the announcement on 22 December 2015. The approach in *Keya* in the High Court and *Radebe* find application.

Remedy – respondent argued in reference to the decision in *SAPA* that, if this court finds that the court *a quo* erred in its finding the appropriate remedy would be is to refer the matter back to the High Court. Appellant contended that this court could consider the merits and set aside the tender award (appellant essentially confined itself to raising two review grounds on appeal as to why the award should be set aside, namely that the tender was awarded outside the validity period and secondly that Xaris' bid did not comply with the tender requirements).

Awarding of the tender outside the validity period – The NamPower's Tender and Compliance Policy governs compliance with tender requirements. Clause 14.8 provided that 'Tenders shall be valid for the period stipulated in the specific terms of reference of the Tender from the closing date of the Tender to allow NamPower adequate time to finalise the Tender award.' The further sub-clauses of clause 14 permit an extension of the tender validity period on good cause shown to the satisfaction of the Tender Board. The RFP in this case provided that tender proposals are valid for a period of 6 months. The tender closing date was set at 12 September 2014. This meant that tender proposals were only valid until 11 March 2015, unless the tender validity period were extended. No extension occurred and the NamPower board made its decision to award the tender on 30 March 2015 –

after the validity period had expired and against clause 33 of the policy which expressly requires NamPower to award tenders within the validity period.

Held that this policy was applicable to NamPower's procurement and tendering process, and is compulsory to all NamPower employees as emphasised by clause 11 of the NamPower's Tender and Procurement Policy.

Held that, the award of the tender to Xaris outside the validity period, in the absence of any extension, rendered it invalid.

It is further held that, given the invalidity of the award on this ground, it was not necessary for the court to consider whether the award was invalid by reason of Xaris not complying with the tender requirement relating to the capacity of the proposed power plant.

The appeal thus accordingly succeeds.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

[1] This appeal concerns the review of a multibillion dollar tender award for the erection of a power plant by the power parastatal, Namibia Power Corporation (Pty) Ltd 'NamPower' (fourth respondent) in favour of the fifth respondent, Xaris Energy Pty Ltd ('Xaris'). The review proceedings, brought by the Arandis Power (Pty) Ltd ('Arandis') (the appellant) in the High Court, were opposed by Xaris as

well as by the government respondents – the President, the Cabinet and the Minister of Mines and Energy (the Minister) as first, second and third respondents respectively. It was also initially opposed by NamPower.

[2] NamPower made certain concessions in the course of the proceedings, namely that the award to Xaris was made outside the period of tender validity and that Xaris' tender did not comply with the tender requirements. In view of what it termed 'these mistakes', NamPower then elected to abide the review relief sought in the High Court – and on appeal. Given that the appellant does not seek a cost order or any other relief against the government respondents, they too have decided to abide by the outcome of this appeal. Only the successful tenderer, Xaris, opposes the appeal.

[3] The High Court dismissed the review application with costs on the basis of a finding that the appellant had unduly delayed in bringing the review application.

[4] Arandis appeals against this decision and argues that it should be set aside and that NamPower's decision to award the tender to Xaris should be reviewed and set aside.

[5] In its opposition to the appeal, Xaris takes two preliminary points in addition to opposing the merits of the appeal. Firstly, it is contended that the High Court's decision is interlocutory and is not appealable without leave which had not been sought. This point is taken with reference to a recent decision of this court in *Di Savino v Nedbank of Namibia Ltd.*¹ The second preliminary point raised by Xaris is

¹ SA 82/2014 [2017] NASA (7 August 2017).

mootness. It is contended in the heads of argument with reference to annexures which were not attached (but provided shortly before the hearing) that the tender has been cancelled by NamPower and that the matter is now moot. These issues are dealt with in that sequence after first setting out the factual background to the delay point and the review itself.

Background facts

[6] The tender process commenced in late March 2014 with NamPower inviting expressions of interest for the joint development of a power plant with a generation capacity of up to 250 MW. Six shortlisted concerns were subsequently invited by NamPower to a bidder's meeting in June 2014 and provided with 'request for proposal' (RFP) documentation in respect of a 230-250 MW power plant. By the closing date of 12 September 2014, only three companies submitted bids in response, Arandis, Xaris and Sinohydro Corporation Limited, cited as sixth respondent in the review application.

[7] On 21 October 2014, the appellant was informed by NamPower that it had been selected as the reserve bidder for the tender. On 24 October 2014 NamPower advised Xaris of its appointment as preferred bidder for the project. This appointment did not guarantee Xaris that it would be awarded the tender in accordance with the RFP. The appointments of Xaris as preferred bidder (and Arandis as reserve bidder) received media coverage in late October 2014 in which it was alleged that the advice of an expert multidisciplinary panel (coordinated by KPMG) had not been followed. An electronic version of that expert report was anonymously placed in the possession of the appellant's Managing Director.

Arandis expressed its concerns regarding the process in writing to NamPower on 14 November 2014 and again on 8 December 2014 and 12 March 2015. Arandis also addressed the Permanent Secretary in the Ministry of Mines and Energy outlining its concerns about the tender process on 26 November 2014.

[8] On 30 March 2015, the NamPower board resolved to award the tender to Xaris. Arandis was not informed of this decision at the time although this development was posted on the NamPower website on 15 April 2015. The Minister however in the meantime on 13 April 2015 'directed' NamPower in writing to postpone the award of the contract until certain concerns regarding the tender process had been investigated and the economic impact of the project considered. On 15 April 2015, NamPower responded to the Minister and stated that 'we respect Mr Kandjoze's decision to postpone the intended award of the contract'. It was subsequently reported in the media on 15 May 2015 that the Minister had put the tender on hold. This was confirmed by the President on 29 June 2015 who announced in a media release: '(F)ollowing concerns in the energy sector, I have directed that the Xaris project be halted until it has been reviewed by experts'.

[9] On 8 July 2015 the appellant requested a meeting with the Minister. That took place on 17 August 2015. Although there is some dispute as to what was stated there, Arandis' Managing Director states that the Minister confirmed that the tender was put on hold and that the Minister informed him that the decision regarding the tender no longer vested with NamPower but with the Office of the President.

[10] The position changed on 22 December 2015 when the Minister announced in a media release that: 'The Government has deemed it fit to announce that NamPower shall be empowered to proceed negotiating with Xaris Energy (Pty) Ltd on the 200 MW' (power plant) subject to certain conditions'.

[11] Arandis only became aware of the press statement when its offices opened on 18 January 2016 after being closed over the Christmas holiday period. On the same day it addressed a letter to the Minister, the Attorney-General and NamPower questioning the decision set out in the press release and the tender evaluation process. Shortly afterwards, Arandis' Managing Director met with senior advisors in the President's office on 26 January 2018 and also consulted with its legal practitioner on the same date. On 28 January 2016, the Minister reverted that the matter had been referred to the Attorney-General.

[12] A review application was then prepared and launched on 3 February 2016 in which urgent interim relief was also sought and set down for 12 February 2016. On the latter date the parties instead agreed upon an expedited hearing of the review.

[13] The review application was heard on 7 and 8 June 2016. The High Court on 7 July 2016 delivered its judgment, dismissing the application with costs, upholding the opposing respondents' point that Arandis had delayed unduly in bringing its review – for some 16 months after the decision as to the preferred and reserved bidder was taken. The High Court found that Arandis had been aware of the preferred bidder decision on 21 October 2014 already and ought to have challenged that decision within a reasonable time after that. It found that the

launching of the application on 3 February 2016 amounted to an unreasonable delay. The court further found that Arandis had failed to place sufficient facts before the court to condone its delay.

Leave to appeal required?

[14] Mr Heathcote, who together with Ms De Jager appeared for Xaris, took the point that the order of the High Court is of an interlocutory nature and that leave to appeal is required. In support of this contention, reliance was placed upon this court's judgment in *Di Savino* where the Chief Justice carefully set out the meaning to be given to s 18(3) of the High Court Act² after a thorough survey of decisions of this court and of the approach in South Africa before (and after) the procedure on appeals had been amended there in 1982. The Chief Justice concluded:

'It would appear to me therefore that the spirit of s 18(3) is that before a party can pursue an appeal against a judgment or order of the High Court, two requirements must be met. Firstly, the judgment or order must be appealable. Secondly, if the judgment or order is interlocutory, leave to appeal against such judgment or order must first be obtained even if the nature of the order or judgment satisfies the first requirement. The test whether a judgment or order satisfies the first requirement is as set out in many judgments of our courts as noted above and it is not necessary to repeat it here.'³

[15] Mr Heathcote argued that the judgment of the High Court only dealt with the preliminary point of delay which entailed a condonation application and that it is

² Act 16 of 1990.

³ At para 51.

consequently interlocutory. That approach however fails to appreciate the approach in *Di Savino* and the nature of the defence raised in this matter.

[16] As was made clear in *Di Savino*, the underlying principle in s 18 is that judgments and orders of the High Court are appealable without leave. The exception to this is embodied in s 18(3) where leave is required for costs orders in the discretion of the court and interlocutory orders. The court in *Di Savino* found that a wide meaning is to be accorded to interlocutory orders and thus all orders upon matters 'incidental to the main dispute, preparatory to, or during the progress of the litigation – and not merely, what have been described as 'simple' or 'pure' interlocutory orders. But they would also need to have the characteristics of appealability in order to qualify for leave. The defining features of appealability have been considered in several appeals which have served before this court and are usefully referred to in *Di Savino*. Thus interlocutory orders which are appealable require leave to appeal.

[17] Was the High Court's order interlocutory? In my view not. Although the delay point was raised as a preliminary point, if successful, it would finally dispose of the review application which it did in this instance.

[18] The review application was dismissed with costs and thus finally disposed of. It could not proceed any further. The successful invocation of the delay rule thus constitutes a defence which finally disposes of a review – as would a preliminary point that the impugned decision does not constitute administrative action and is thus not reviewable. An order upholding that point would likewise dispose of the review application.

[19] This court has in *Chairperson, Council of the Municipality of Windhoek and others v Roland and others*⁴ held that the question as to whether an applicant has delayed unreasonably in launching review proceedings is not an interlocutory issue but a substantive one which may determine the rights of the parties.⁵ This is because of the consequence being the dismissal of the application.

[20] There is accordingly no substance to this preliminary point.

Mootness?

[21] After Arandis' heads were filed, it received a letter from NamPower to say that the RFP for the power plant, specifying the tender number, had been cancelled. There followed an exchange of correspondence between Arandis' and Xaris' legal practitioners concerning the effect of this communication.

[22] Arandis' position is that this appeal would in no sense be moot unless Xaris were to acknowledge that the tender has been validly cancelled and that the decision to award it is of no force and effect.

[23] Xaris declined to provide an acknowledgement to this effect and has adopted the contrary stance, namely that it does not accept that the tender has been properly cancelled and that it intends to take action as a consequence.

⁴ 2014(1) NR 247 (SC).

⁵ At para 37.

[24] The validity of that award is the subject of this appeal. That means that the appeal is by no means moot. There is thus a live and existing dispute between the parties to this appeal concerning the validity of the tender award which is raised in this appeal. A pronouncement on that issue may have a clear practical effect⁶ if the award is declared invalid. Xaris would not be able to enforce it. On the other hand, if that were not to be established, it could follow that Xaris can enforce the award.

[25] Given the live and existing controversy which would have a practical effect, it follows that the appeal is not moot. It is thus not necessary to consider whether or not to exercise a discretion to hear the appeal is in the interests of justice.⁷

Was the delay unreasonable?

[26] It is well settled that the question as to whether an applicant has unduly delayed instituting review proceedings entails a dual enquiry.⁸ The first is an objective one and concerns whether the time taken to institute proceedings was on the facts unreasonable. That enquiry is factual and does not involve the exercise of a discretion. It entails a factual finding and a value judgment based on those facts.⁹ If the court finds that the delay is unreasonable, the second enquiry arises and is whether a court would in the exercise of its discretion grant condonation for

⁶ *Prosecutor-General of the Republic of Namibia v Gomes* 2015 (4) NR 1035 (SC) para 23.

⁷ *ES v AC* 2015 (4) NR 921 (SC) para 38. *Van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC) para 19-20.

⁸ See *Keya v Chief of the Defence Force and others* 2013 (3) NR 770 (SC) paras 21-22. See also: *Kruger v Transnamib (Air Namibia) and others* 1996 (1) NR 168 (SC); *Namibia Grape Growers and Exporters Association and others v The Ministry of Mines and Energy and others* 2004 NR 194 (SC).

⁹ *South African Poultry Association and others v Minister of Trade and Industry and others* (Case No 37/2016) 17 January 2018 at para 43 ('SAPA').

the unreasonable delay. As has been repeatedly stated, each case is to be determined on its own facts as to whether the delay is unreasonable or not.

[27] Central to the conclusion of the High Court that Arandis had unduly delayed in bringing the review, is the finding that NamPower was *functus officio* once it had made the determination of preferred and reserved bidder status and that the delay clock started to run then.

[28] Mr Budlender, who together with Ms Bassinghtwaighte appeared for Arandis, argued that the decision to award preferred and reserved bidder status did not mean that the award of the tender to Xaris was inevitable. It was expressly stated in the tender document (RFP) that this did not constitute an acceptance of tender or an award of the tender and that NamPower could discontinue the negotiations at any stage. In that event, negotiations would proceed with Arandis. The award itself was determined by NamPower's board on 30 March 2015 and posted on its website on 15 April 2015. This was in turn put on hold pending an investigation by the Cabinet until 22 December 2015.

[29] Given the clear terms of RFP that the selection as preferred bidder would not constitute an award, it follows that the decision concerning preferred and reserved bidder status was in my view insufficient to trigger the appellant's duty to institute a review. Had it done so, it would have been premature as the matter was not yet ripe for review. As is stated by Professor Hoexter:¹⁰

'This doctrine of ripeness holds that there is no point in wasting the courts' time with half-formed decisions whose shape may yet change . . . Baxter suggests that

¹⁰ *Administrative Law in South Africa* (2012, 1st Ed) at 585-586.

the appropriate criterion is whether “prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not”.’

[30] The fact that NamPower’s board was *functus officio* on the issue of appointment as preferred bidder is an incorrect premise. It was not that decision which is determinative but the award of the tender. Had Arandis proceeded with a review shortly after that appointment, it would no doubt have been met with the point that the process was incomplete as a final decision to award the tender had not yet been made. Arandis was furthermore not out of contention yet. If NamPower were to discontinue the negotiations with Xaris for whatever reason, then as reserve bidder it would come into contention to be awarded the tender. Being *functus officio* on the decision concerning the selection as preferred and reserved bidders is neither here nor there when it comes to the decision for the award of the tender. Certainly irregularities at the bidder status determination stage may well be relevant and possibly taint a tender award. But it does not follow that there was an obligation to review the decision making at that stage because that phase of the decision making process was completed.

[31] The High Court thus erred in holding that the preferred and reserved bidder decisions triggered the duty to institute a review.

[32] It was the decision on 30 March 2015 by the NamPower board to award the tender which would give rise to a duty to institute a review of that decision. But in assessing whether the delay, after reasonably coming to the appellant’s knowledge on 15 April 2015, was reasonable or not, a court would take into account the factors referred to by the Judge President in *Keya v Chief of the*

Defence Force and others in the High Court.¹¹ (See also *Radebe v Government of the Republic of South Africa and others* repeatedly followed by Nam courts):

'It is now judicially accepted that an applicant for review need not rush to Court upon his cause of action arising as he is entitled to first ascertain the terms and effect of the offending decision; to ascertain the reasons for the decision if they are not self-evident; to seek legal counsel and expert advice where necessary; to endeavour to find an amicable solution if that is possible; to obtain relevant documents if he has good reason to think they exist and they are necessary to support the relief desired; consult with persons who may depose to affidavits in support of the review; and then to consult with counsel, prepare and lodge the launching papers. The list of possible preparatory steps and measures is not exhaustive; but in each case where they are undertaken they should be shown to have been necessary and reasonable. In some cases it may be required of the applicant, as part of the preparatory steps, to identify and warn potential respondents that a review application is contemplated. Failure to so warn a potential respondent may lead to an inference of unreasonable delay.'

[33] Shortly after the tender award was reported in the media, it was also reported that the line Minister had given an instruction that the tender award was to be put on hold pending an investigation. This was confirmed by the President on 29 June 2015 in this media release. Arandis sought a meeting with the Minister soon after that (on 7 July 2015) which took place on 17 August 2015. Mr Heathcote's submission that the Minister's denial of what was attributed to him at this meeting with Arandis' Managing Director is to be accepted on the basis of the rule in *Plascon-Evans*¹² does not avail *Xaris*. This is because the Minister's denial cannot be accepted on the basis of the *Plascon-Evans* test. That denial is entirely at variance with his contemporaneous correspondence and the President's media

¹¹ *Ebson Keya v Chief of the Defence Force and others* Case No A 29/2007 unreported judgment, delivered on 20 February 2009, per Damaseb JP, para 17.

¹² Set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C.

statement of 29 June 2015. The Minister's initial denial is thus so far-fetched as to be rejected on the papers and is in any event further subsequently explained by the Minister in the context of NamPower's status as an autonomous entity with its own processes for procurement.

[34] Nor can Mr Heathcote's contention that the Ministers' instructions to the NamPower board and the President's statement on 29 June 2015 referring his 'instruction in that regard be brushed aside as mere 'political statements' which had no effect (because they had no lawful basis within NamPower's governance structure). The High Court was thus entirely correct in finding that the Minister and President had no lawful basis to have given instructions to this effect as set out in the papers (except if appropriately done as shareholder within NamPower's governance structure which had not occurred). The purported instruction to put the tender on hold given by the executive branch of government certainly constituted the exercise of public power subject to legality requirements.¹³ Even though the 'instruction' was not challenged, it was in fact given effect to by NamPower despite the fact that it negated its own governance structures as an autonomous separate legal entity.

[35] NamPower certainly considered itself bound by the instruction to that effect given at the highest level of the executive branch of Government. That instruction, like the decision to award the tender, being an exercise of public power (in relation

¹³ Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa 2000(2) SA 674 (CC). The Cabinet function set out in Art 32 (1) to supervise government ministries and parastatals would not clothe the Minister with powers not accorded to him within an empowering statute or governance structures of a parastatal, it was correctly accepted by the Minister in this matter.

to procurement), existed and was to be followed unless and until set aside or withdrawn.

[36] Mr Budlender argued that the appellant was entitled to await the outcome of the Cabinet or ministerial investigation before instituting a review as the tender was put on hold. This accords with the approach articulated by the Judge President in *Keya* in the High Court and in *Radebe*.¹⁴ It was certainly more than reasonable to do so, particularly given its status as reserve bidder which, in the event of an investigation disqualifying Xaris, NamPower would in all likelihood turn to it.

[37] It was only after the investigation was completed and the Minister announced that he had essentially instructed that the tender would go ahead that the appellant was required to institute its review within a reasonable time. The review application was launched on 3 February 2016, very soon after the decision (announced on 22 December 2015) to proceed with the tender came to its attention.

[38] Upon the unique facts of this review concerning the intervention in the procurement process by the executive branch and the publicly announced postponement of the implementation of the award, it would follow that the review was instituted within a reasonable time. The High Court thus erred in finding that there was an unreasonable delay in instituting the review.

¹⁴ *Radebe v Government of the Republic of South Africa and others* 1995 (3) SA 787 (N) para 799B-G.

[39] Given this conclusion, it would not be necessary to consider the second leg of the enquiry relating to the question of condonation. But in view of Mr Heathcote's submission on this issue and because of the misdirection of the High Court, I make a few brief observations.

[40] In exercising its discretion, this court in *South African Poultry Association & 5 others v Minister of Trade and Industry and 3 others (SAPA)* emphasised:¹⁵

'As already indicated, it is incumbent upon a court in determining the criterion of the interests of justice to take into account the merits of a review, in the absence of a finding that the delay is so egregious so as to justify determining the question of condonation without consideration of the merits. The merits are thus a fundamental factor to be considered by a court in such an enquiry. The failure to do so, as occurred in this appeal, results in the application of a wrong principle in the exercise of the court's discretion which was not exercised judicially as a consequence. It follows that the court's decision on condonation is to be set aside.'

[41] Mr Heathcote argued that once a court had found delay to be of the order of 'egregious' – even if not using that adjective - then that court is not required to consider the merits. But this would miss the point of the holding in *SAPA*. A court would need to find that the delay is of such an order so as not to warrant a consideration of merits. The High Court did not make such a finding. In failing to do so, it misdirected itself by failing to consider the merits by the application of a wrong principle. The High Court's decision would in any event fall to be set aside for this reason as well.

[42] The question which arises concerns the remedy to be provided in this case.

¹⁵ Para 67.

The remedy

[43] Mr Heathcote argued that if this court were to find that the High Court erred, the appropriate remedy would be to refer the matter back to High Court in following *SAPA*.

[44] Mr Budlender contended that this court should consider the merits and set aside the tender award.

[45] Arandis essentially raised two crisp review grounds on appeal as to why the award should be set aside, namely that the tender was awarded outside the validity period and secondly that Xaris' bid did not comply with the tender requirements.

[46] These two points were raised in its supplementary affidavit after the review record was provided under rule 76 of the High Court rules. After these grounds were raised, NamPower conceded them and changed its stance from opposition of the review to abiding its outcome after not disputing these two points.

[47] It is correct that this court in *SAPA* referred the matter back to the High Court for the determination of the merits of that review. There are significant distinguishing features between that appeal and this one. In the first instance, the

merits had not been fully canvassed in the High Court in the *SAPA* matter. It also concerned decision making in a complex polycentric context. In contrast, in this matter the merits of the review were fully canvassed in the High Court. Furthermore, the decision maker in this appeal concedes that the tender was awarded outside of its validity period and that Xaris' bid does not comply with the tender requirements. These points can be determined with reference to the terms of the RFP and NamPower's Procurement Policy. If either of these points were to be decisive of the review, there would be no point in sending it back to the High Court.

[48] This court accordingly heard argument on these two issues.

Award of the tender outside validity period

[49] The starting point in considering compliance with tender requirements is NamPower's Tender and Procurement Policy. Its purpose is set out at the outset:

'The purpose of this policy document is to set procedures for NamPower staff members to ensure compliance with varying statutory requirements whilst allowing NamPower to meet its objectives. This policy applies to all procurement processes and activities undertaken by NamPower, including purchasing, ordering, tendering, contracting and disposals. It applies to all types of goods and services . . .'

[50] This policy was thus applicable to NamPower's procurement and tendering process, as was common cause between the parties.

[51] This principle is emphatically reaffirmed in the statement of intent in the Policy:

'It is NamPower's intention that its procurement activities are strictly controlled yet streamlined and effective in its operation. Therefore, all quotations, tenders and orders shall be executed by the Procurement Section NamPower. Furthermore, all tenders and quotations and purchases of supplies and/or allocation of contracts for goods and services, will be subject to the rules and regulations of the NamPower Tender and Procurement Policy.'

[52] This principle is yet again emphasised in clause 11 where it is stated that compliance with the Policy is compulsory for all NamPower employees.

[53] Clause 14.8 of the Policy deals with the tender validity and periods and extensions to it. It provides:

'Tenders shall be valid for the period stipulated in the specific terms of reference of the Tender from the closing date of the Tender to allow NamPower adequate time to finalise the Tender award.'

[54] The further sub-clauses of clause 14 permit an extension of the tender validity period on good cause shown to the satisfaction of the Tender Board. A further sub-clause expressly authorises the extension of time where the assessment of tenders is not completed within the tender validity period. The clause specifically provides that extensions would be for the minimum period needed.

[55] The RFP in this matter provided that tender proposals are valid for a period of 6 months from the closing date or such further date as NamPower may agree with the shortlisted bidders. The tender closing date was set at 12 September 2014. This meant that tender proposals were only valid until 11 March 2015,

unless the tender validity period were to have been extended. No extension occurred and the NamPower board made its decision to award the tender on 30 March 2015 – after the validity period had expired, as was conceded by NamPower.

[56] Clause 33 deals with the awarding of tenders. It expressly provides:

‘The awarding of tenders and quotations to the successful tenderers shall always be made within the tenders’ validity period and in accordance with levels of authority.’

[57] In this matter, there had been no tender award during the validity of the competing tenders. Clause 33 expressly requires that NamPower is to award tenders within their validity period. The elaborate provisions concerning securing an extension to a tender validity period had not been invoked by NamPower.

[58] Mr Budlender relied upon a trilogy of cases in South Africa as to the consequence of a tender award after the expiry of the tender validity period. Those three decisions concerned the legal consequence of a failure by a public body, to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received. The same issue arises in this review.

[59] In each of those cases, the same conclusion was reached. In the first of the trilogy, Southwood J in *Telkom SA Limited v Merid Training (Pty) Ltd and Others*; *Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others*¹⁶ concluded:

¹⁶ [2011] ZAGPPHC 1 (7 November 2011).

'The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced.'

[60] This well-reasoned approach was followed by Plasket J in *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*¹⁷ in reaching a similar conclusion:

'By the time the tender validity period has expired, there is nothing to extend because, as Southwood J said in *Telkom*, the tender process has been concluded, albeit unsuccessfully. The result, in this case, is that the RAF had no power to award the tender once the bid validity period had expired and it had no power to extend the period as it purported to do. In the language of s 6(2)(a)(i) of the PAJA, the decision-maker – the board, in this instance – 'was not authorised' to take the decision. Put in slightly different terms, there were no valid bids to accept, so the RAF had no power to accept the expired bids.'

[61] The third in the trilogy followed both previous judgments.¹⁸

¹⁷ 2014 (4) SA 148 (ECP).

¹⁸ *SAAB Grintek Defence (Pty) Ltd v SA Police Service and others* (25286/2013) [2015] ZAGPPHC 1 (16 Jan 2015).

[62] Mr Heathcote, although not disputing the correctness of these decisions, argued that a decision of the South African Supreme Court of Appeal in *Geldenhuys No v Daniels*¹⁹ should rather apply to present circumstances. This case however concerned the effect of an irrevocable offer to purchase immovable property after a stated date had passed. The offer was accepted after that date. The court held that acceptance after that date was effective as the offer had not been revoked prior to acceptance. The correctness of this decision cannot be questioned. But reliance upon it is misplaced in present circumstances. The issue is not a contractual one as to whether a tenderer's offer could be accepted or not as a matter of contract after the validity period but rather one as to the need for a public authority or organ of state to follow the dictates of its own procurement rules which are there to ensure a fair, reasonable and transparent process. NamPower's Procurement Policy determines the validity of the process. The Policy makes it clear that a tender must be awarded within the tender validity period. In the absence of an extension, it was no longer open to NamPower to accept a tender. The tender process had thus been completed upon the expiry of the validity period, albeit unsuccessfully.

[63] It follows that the award of the tender to Xaris outside the validity period, in the absence of any extension, rendered it invalid.

[64] Given the invalidity of the award on this ground, it is not necessary to consider whether the award was invalid by reason of Xaris not complying with the tender requirement relating to the capacity of the proposed power plant.

Conclusion

¹⁹ 20848/2014 [2016] ZASCA 45 (31 March 2016).

[65] The appeal accordingly succeeds. The High Court should also have set aside the award by reason of its acceptance outside the tender validity period. Arandis did not seek any relief or costs against the Government respondents on appeal. The costs order on appeal should reflect that. Nor were costs sought against NamPower after it no longer opposed the relief sought by Arandis. The cost order should likewise reflect that the engagement of two instructed counsel was not in issue between the parties and is warranted in this appeal.

[66] The following order is made:

1. The appeal succeeds with costs and the decision of the High Court is set aside and replaced with the following:
 - 1.1 “The decision of the fourth respondent (NamPower) taken on 30 March 2015 to award Tender No NPWR/2014/27 to the fifth respondent (Xaris) is reviewed and set aside;
 - 1.2 The fourth and fifth respondents shall pay the costs of the applicant jointly and severally, which costs shall include the costs of one instructing and one instructed counsel provided that the fourth respondent’s liability for costs shall be limited to such costs incurred until 23 May 2016.”
2. The costs of this appeal, to be borne by Xaris, are to include the costs occasioned by the employment of one instructing and two instructed counsel.

SMUTS JA

MAINGA JA

HOFF JA

APPEARANCES

APPELLANTS:

S Budlender, (together with N
Bassingthwaighte)

Instructed by Etzold-Duvenhage Inc

FIFTH RESPONDENT:

R Heathcote (together with B De
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