



PUBLIC LAW NEWS LETTER

OUR APPROACH

Our public law practitioners adopt a collective and proactive approach to advice government and corporate clients on all matters relating to public law. They take interest in, and strive to understand their client's business to enable early identification, minimization, and management of legal risks. Where possible, they assist clients to avoid litigation through dispute resolution mechanisms; but they have the specialist expertise to offer effective litigation services should this become a necessary last resort.

OUR SERVICES

- Interpretation of, and compliance with the PFMA and MFMA;
- Public procurement procedures, due diligence and tender reviews;
- Administrative decision making process and reviews;
- Local government; and
- Dispute resolution

JUDICIAL INTERPRETATION OF SECTION 7(1) OF PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA)

City of Cape Town v Aurecon South Africa (Pty) Ltd [2017] ZACC 5

The Constitutional Court on the 28th of February 2017 delivered a judgment which now sets out the law relating to time frames for organs of state within which to apply to court to have their own decisions reviewed and set aside. In this matter between *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5, the Constitutional Court had to decide, among other things, the issue of when exactly does the period of 180 days provided for by section 7(1) of PAJA begin to run. The City applied for judicial review of a decision it had made on 31 October 2011 on the basis of irregularities committed during the tender process. It had only become aware of these irregularities on 22 October 2012. It lodged the application on 16 April 2013 (532 days after the decision). The City of Cape Town's argument was that their application was done within the 180 day period because the clock begins to tick at the time when the organ of state learns or becomes aware of the potential illegality with the decision it took.

The Constitutional Court rejected the City's argument and held that if the city's argument and its interpretation of Section 7(1) of PAJA is accepted, this would have undesirable results in the sense that 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. Further, that this result is untenable as it disregards the potential prejudice to [Aurecon] and the public interest in the finality of administrative decisions and the exercise of administrative functions" - (para 42). The court held that the correct interpretation of Section 7(1) of PAJA is that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant. It therefore held that the city was out of time.

If you are out prescribed timeframe i.e. 180 day period, this is not the end of the world. Section 9 of PAJA gives the courts discretionary powers to consider and grant or refuse applications for condonation for lodging application outside the prescribed time frame. The courts may grant such application if it is in the interest of justice to do so. When

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considering the application for condonation, courts will take the following into account: the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised and the prospects of success. In the City of Cape Town case, the court dealt with application for condonation. It quoted a principle enunciated in its majority decision in the case of *Kirland Investment v MEC for Health Eastern Cape*, as follows:

“There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.”

The court held that the city failed to give a satisfactory explanation for the delay. The application for condonation was accordingly refused.

COMMENTS

In this matter, the court did not go into the merits of the case and deal with alleged irregularities, some of which were that Aurecon South Africa (Pty) Ltd was involved in the preparation of specifications; bid committees not properly constituted; renewal of validity periods not properly done; etc. This may suggest that there was some failure to comply with procurement prescripts which could mean that the decision to award was unlawful. No valid contract can be entered into if the preceding tender process was irregular and unlawful. The City of Cape Town could not bring their application to review its decision on time and is consequently confronted by an undesirable outcome i.e. it is now compelled to enter into a potentially invalid contract. Organs of state must try by all means to avoid engaging in an unlawful business transactions. They are required by the constitution to strictly observe the constitution and the laws of the country at all times.

HOW TO MINIMISE THE RISK OF ACTING UNLAWFULLY

It is our view that conducting due diligence either before the award or shortly after the award of a tender would assist organs of state to identify any irregularities during procurement process and deal with them within the prescribed time frame.

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