IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Number: 4305/18

In the matter between:

CENTRAL ENERGY FUND SOC LIMITED	First Applicant
STRATEGIC FUEL FUND ASSOCIATION NPC	Second Applicant

and

VENUS RAYS TRADE (PTY) LIMITED	First Respondent
GLENCORE ENERGY UK LIMITED	Second Respondent
TALEVERAS PETROLEUM TRADING DMCC	Third Respondent
CONTANGO TRADING SA	Fourth Respondent
NATIXIS SA	Fifth Respondent
VESQUIN TRADING (PTY) LIMITED	Sixth Respondent
VITOL ENERGY (SA) (PTY) LIMITED	Seventh Respondent
VITOL SA	Eighth Respondent
MINISTER OF ENERGY	Ninth Respondent
MINISTER OF FINANCE	Tenth Respondent

and

ORGANISATION UNDOING TAX ABUSE	Amicus Curiae (Subject to Admission)

OUTA'S SELECTED BUNDLE OF AUTHORITIES

A

Notyawa v Makana Municipality and others

Constitutional Court of South Africa

B *Judgment date*: 21/11/2019 *Case No*: CCT 115/18

Before: MTR Mogoeng Chief Justice; J Froneman, CN Jafta, SSV Khampepe, M Madlanga, NZ Mhlantla, LV Theron Justices; RS Mathopo and M Victor Acting Justices

C

Administrative justice *– delay in launching review application – court's discretion to refuse a review application in the face of an undue delay in initiating* D *proceedings or to overlook the delay – pre-eminently a matter for the discretion of the court of first instance – two-stage approach proper where first a determination made whether the delay was unreasonable or not and then, once the delay found to be unreasonable, consideration given to whether the delay can be condoned – while a court has a discretion to overlook a delay, that discretion* E *must be exercised with reference to facts in that particular case which may warrant overlooking the delay.*

Review *– delay in launching application – court's discretion to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay – pre-eminently a matter for the discretion of the court of first* F *instance – interference by appeal court – court on appeal will interfere with lower court's exercise of discretion only where lower court did not exercise its discretion judicially.*

Review *– pre-eminently a matter for the discretion of the court of first instance – two-stage approach proper where first a determination made whether the delay* G *was unreasonable or not and then, once the delay found to be unreasonable, consideration given to whether the delay can be condoned – while a court has a discretion to overlook a delay, that discretion must be exercised with reference to facts in that particular case which may warrant overlooking the delay.*

H Editor's Summary

Applicant had applied for the post of municipal manager of first respondent, the Makana Municipality. Six candidates including applicant were shortlisted and interviewed by a panel set up by the Municipality. In March 2015, the municipal council of Makana Municipality resolved to appoint applicant as its municipal manager. As required by I section 54A of the Local Government Municipal Systems Act 32 of 2000 (the "Systems Act") a report on the appointment was submitted to second respondent, the MEC for Co-operative Governance and Traditional Affairs in the province. The MEC recorded that he was not satisfied that the appointment complied with section 54 of the Systems Act because applicant, in his opinion, did not meet the minimum requirements under the Systems Act. The Municipality accepted the MEC's suggestion that the post be re- J advertised and did not pursue applicant's appointment.

In July 2015 applicant launched an application in the High Court in which he sought to have the decisions of the MEC and the Municipality pertaining to the failure to appoint him as municipal manager reviewed and set aside. This application was opposed by the respondents who filed opposing papers in September 2015. Applicant took no steps to ripen the matter for hearing. The Municipality and the MEC set the matter down for hearing on 12 February 2016, as they had lodged counter-applications for an order declaring applicant's appointment to be null and void. On 12 February 2016 applicant requested a postponement to enable him to obtain a transcript of the minutes of a Municipal Council meeting so that he could supplement his founding papers. The High Court refused to postpone the matter. Applicant then withdrew his review application. The MEC then withdrew his counter-application. Applicant filed papers opposing the Municipality's counter-application. In June 2016 the Municipality withdrew its counter-application. Subsequently the Municipality re-advertised the municipal manger's post.

Thereafter applicant instituted another application in which he sought rescission of the Municipality's decision to re-advertise the post, its decision to reverse his appointment and a declarator that he was lawfully appointed as municipal manager of the Municipality.

The High Court took the view that the impugned decisions constituted administrative action to which the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") applied and that the delay in bringing the application had to be assessed in terms of PAJA. The High Court pointed out that section 9 of PAJA required a substantive application for condonation and that applicant had failed to make a substantive application for condonation. In any event, the explanation furnished for the delay was found to be unsatisfactory. The High Court concluded that the delay was unreasonable. It further found that the matter had become moot and that the prospects of success were poor. The High Court exercised its discretion against granting condonation and extending the 180day period stipulated by PAJA. It pointed out that even if the matter were to be approached on the assumption that it was a legality review, it would have come to the same conclusion.

The High Court dismissed the application. It refused to grant leave to appeal against its decision, as did the Supreme Court of Appeal.

Applicant then approached the Constitutional Court seeking leave to appeal.

The Constitutional Court dismissed the application for leave to appeal.

In a unanimous judgment (*per* Jafta J) the Court observed that whether it was in the interests of justice to grant leave depended upon whether the High Court had exercised its discretion improperly. The condonation of a delay by an applicant in instituting review proceedings was pre-eminently a matter for the discretion of the court of first instance. The exercise of that discretion could not be interfered with on appeal on the basis that the decision was incorrect. Whether the appeal court would have exercised its discretion differently was irrelevant. An appeal court could be justified in intervening only on narrow specified grounds. The test was whether the court whose decision was challenged on appeal had exercised its discretion judicially.

The High Court had concluded that the delay was unreasonable. In then proceeding to consider whether it could be condoned the High Court took into account not only the unsatisfactory explanation but also the fact that the order sought would have no practical effect and that there were poor prospects of success in the main review application. This two-stage approach – first determining whether the delay was unreasonable and then, once it was found to be unreasonable, considering whether the delay could be condoned – was the correct approach, as the Constitutional Court had previously affirmed. The High Court had applied the correct principles to the correct facts. While a court had a discretion to overlook a delay, that discretion had to be exercised with reference to the facts of the particular case which might warrant overlooking the delay.

In the result, the application for leave to appeal was dismissed.

In a separate concurrence Froneman J observed that the High Court had found that by the time the application for review was eventually heard the purpose of the review – to order consequential relief in the form of ordering the Municipality to conclude a written employment contract with applicant – had become moot. Section 57(6) of the Systems Act provides that a municipal manager who is already in office when municipal elections take place may hold office for not more than 12 months from the date of those elections. In this case municipal elections had indeed been held and the twelve month period would expire within days of the hearing. Any determination on the merits would have no practical effect for anybody. In the absence of any compelling considerations bearing on the broader public interest, there was no basis for the Constitutional Court to exercise its discretion in favour of adjudicating a dispute that was moot. On that basis alone it was not in the interests of justice to grant leave to appeal and there was accordingly no need to entertain questions relating to the High Court's treatment of the delay enquiry.

Judgment

Jafta J:

Introduction

[1] The main issue for determination in this application for leave to appeal is whether it is in the interests of justice to grant leave. The answer to this question depends on whether in refusing to overlook the unreasonable delay on the part of the applicant to institute review proceedings, the High Court of South Africa, Eastern Cape Division, ("High Court") has failed to properly exercise its discretion.

Statutory framework

[2] In terms of section 54A of the Local Government: Municipal Systems Act[1] ("Systems Act"), a municipal manager is appointed by the relevant municipal council. A municipal manager is the head of the administration of each council.[2] The section obliges every council to appoint a suitably qualified candidate in terms of skills, expertise, competencies and qualifications.[3] These are prescribed by the regulations made by the relevant Minister. The provision nullifies any appointment made in contravention of the Systems Act, including an appointment of a person who does not possess "the prescribed skills, expertise, competencies and qualifications".[4]

[3] Section 54A(3) provides:

> "A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if –

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1 32 of 2000.

2 S 54A(1) provides:

> "The municipal council must appoint –
> (a) a municipal manager as head of the administration of the municipal council; or
> (b) an acting municipal manager under circumstances and for a period as prescribed."

3 S 54A(2) provides:

> "A person appointed as municipal manager in terms of sub-section (1) must at least have the skills, expertise, competencies and qualifications as prescribed."

4 *Id*.

(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
(b) the appointment was otherwise made in contravention of this Act."

[4] The section lays emphasis on the appointment of suitably qualified municipal managers owing to the position they hold in the administration of a municipality. The role played by the managers is crucial to the delivery of services to local communities and the proper functioning of municipalities whose main function is to provide services to local communities. The section envisages that candidates who are best qualified for the job must be recruited. It obliges municipalities to "advertise the post nationally to attract a pool of candidates nationwide" and select from that pool a manager who meets the prescribed requirements for the post.[5]

[5] If a municipal council fails to attract suitably qualified candidates, it may approach the relevant Member of the Executive Council ("MEC") with a request that a suitable official in her department be seconded to the municipality to act as a municipal manager until a suitable candidate has been appointed. If the MEC fails to do so within 60 days, the municipality in question may direct the request to the relevant Minister.[6]

[6] But where a suitably qualified person was appointed, the provision requires that a report on both the appointment process and the decision to appoint be submitted to the relevant MEC within 14 days.[7] The MEC must satisfy herself that the appointment complies with the Systems Act. If she is not satisfied that the Act was followed, the MEC is empowered to take appropriate steps to enforce compliance by the municipal council. These steps include litigation against the municipal council which has failed to comply.

[7] Section 54A(8) provides:

> "If a person is appointed as municipal manager in contravention of this section, the MEC for local government must, within 14 days of receiving the information provided for in sub-section (7), take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to a court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council."

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5 S 54A(4) provides:
"If the post of municipal manager becomes vacant, the municipal council must –
(a) advertise the post nationally to attract a pool of candidates nationwide; and
(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post."

6 S 54A(6) reads:
"(a) The municipal council may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed.
(b) If the MEC for local government has not seconded a suitable person within a period of 60 days after receipt of the request referred to in paragraph (a), the municipal council may request the Minister to second a suitable person, on such conditions as prescribed, until such time as a suitable candidate has been appointed."

7 S 54A(7) provides:
"(a) The municipal council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.
(b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister."

[8] It is quite apparent that Parliament has entrusted the MEC to monitor compliance with the Systems Act. But where the MEC fails to perform this function, the Minister may intervene and perform the function herself.[8] However, in special circumstances a municipal council may request the Minister to waive any of the requirements prescribed by the Act. The Minister may grant a waiver if good cause is shown and that the municipality was unable to attract suitable candidates.[9]

[9] Section 54A forms part of the backdrop against which the delay, which was central to the High Court's decision, must be assessed. The section prescribes short periods within which certain steps are to be taken in the process of filling in a vacancy for the post of a municipal manager. This is the position even in the case of a stop-gap. The section precludes the appointment of acting municipal managers for a period in excess of three months. And where an extension is granted by the MEC, it may not exceed a further three months. This indicates that the section envisages that the appointment of a permanent municipal manager must be done within six months.

[10] Where this is not possible, the section affords two options to municipalities. The first is to solicit a secondment of a suitably qualified official from the MEC. If the latter fails to do so within 60 days, the municipality concerned is allowed to approach the relevant Minister who is required to second a suitable official to the municipality without delay. Even where an appointment is made, the monitoring function by the MEC must be carried out within 14 days from the date on which a report is received. For its part, a municipality is obliged to submit the report within 14 days from the date of appointment.

[11] All these tight time frames are not a surprise. The entire scheme of section 54A is predicated on having suitably qualified persons appointed as municipal managers. And having those appointments made within a short span of time because municipal mangers are vital to the proper administrative functioning of municipalities.

Factual background

[12] In November 2014 Makana Municipality ("first respondent") published an advert that invited suitably qualified candidates to apply for appointment as a municipal manager. Mr Mbulelo Paul Gladstone Notyawa ("applicant") was one of the candidates who submitted an application in response to the advert. At the time, Mr Notyawa was a councillor at the Municipality. Six candidates including Mr Notyawa were shortlisted.

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8 S 54A(9) provides:
"Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that sub-section."

9 S 54A(10) provides:
"A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in sub-section (2) if it is unable to attract suitable candidates."

These candidates were interviewed by a panel established by the Municipality. They were also required to take a competency test.

[13] Meanwhile Mr Notyawa who was a member of the African National Congress ("ANC"), one of the political parties represented in the municipal council, was requested by the ANC to withdraw his application. He declined. This led to his expulsion from the ANC. Nothing turns on this.

[14] The appointment process proceeded with Mr Notyawa still being one of the candidates. In March 2015 the municipal council of Makana Municipality resolved to appoint Mr Notyawa as its municipal manager. He had recused himself from the meeting that took the resolution to appoint him.

[15] As required by section 54A, a report on this appointment was submitted to the MEC for Co-operative Governance and Traditional Affairs: Eastern Cape ("second respondent"). Having perused the report the MEC responded by letter dated 24 April 2015 addressed to the Mayor of Makana Municipality. In it the MEC recorded that he was not satisfied that the appointment complied with section 54 as Mr Notyawa, in the MEC's opinion, did not meet the minimum requirements under the Systems Act. The MEC demanded that the vacancy be re-advertised because none of the candidates who were shortlisted met the statutory requirements. He offered technical expertise from his department to help the Municipality in starting the process afresh. It appears that the Municipality accepted the MEC's suggestion and did not pursue Mr Notyawa's appointment. This gave rise to litigation.

Litigation in the High Court

[16] During July 2015 Mr Notyawa initiated an application in the High Court in which he sought to have reviewed and set aside decisions of the MEC and the Municipality pertaining to the failure to appoint him. This application was opposed by the Municipality and the MEC who filed opposing papers in September 2015. Mr Notyawa took no steps to ripen the matter for hearing.

[17] The Municipality and the MEC set it down for hearing on 12 February 2016, as they had lodged counter-applications for an order declaring Mr Notyawa's appointment to be null and void. On that date, Mr Notyawa sought a postponement of the matter which was opposed by the respondents. The postponement was sought to enable him to obtain a transcript of the minutes of the Municipality's meeting of 8 May 2015 so that he could supplement his founding papers. The High Court refused to postpone the matter and Mr Notyawa's legal team withdrew his review application.

[18] Upon the withdrawal of the review application, the MEC withdrew his counter-application. It appears from Mr Notyawa's affidavit that when the matter was heard on 12 February 2016, he had not filed a replying affidavit in the review application and had not filed opposing papers in the counter-applications. Papers opposing the Municipality's counter-application were filed later and in June 2016, the Municipality withdrew its counter-application. Subsequently the Municipality re-advertised the municipal manger's post.

[19] Mr Notyawa responded by launching an application to restrain the Municipality from filling the post. The application was instituted on 13 October 2016. The Municipality opposed it. Once again Mr Notyawa's affidavit reveals that he did not pursue the matter further. It is not clear from the papers what the outcome of his application was.

[20] Hardly four days later, on 17 February 2017, Mr Notyawa instituted the current application in which he sought rescission of the Municipality's decision to re-advertise the post, its decision to reverse his appointment and a declarator that he was lawfully appointed as municipal manager of the Municipality. He cited the Municipality, the MEC and Ms Pamela Yako as respondents. The latter was the administrator of the Municipality before the impugned decisions were taken and no relief was sought against her. As a result she took no part in the proceedings.

[21] The Municipality and the MEC opposed the application on various grounds which included that Mr Notyawa's appointment was invalid because he did not have experience at a senior management level within the administration of a municipality. It will be recalled that he was a councillor from 2011 to 2016. The experience he had at management level was obtained in entities which were not municipalities. The respondents also raised the issue of delay. They pointed out that the application was late by about 23 months and as a result Mr Notyawa was not entitled to bring it without condonation being granted under section 9 of the Promotion of Administrative Justice Act[10] ("PAJA"). They asserted that the applicant had failed to make out a case for a PAJA condonation.

[22] In reply Mr Notyawa confirmed that the application was not brought under PAJA and that as no reference was made to PAJA, the suggestion that PAJA applied was misplaced. He alleged that the application was "brought as a common law review" and that "the test for any delay in bringing the application is that it must be brought within a 'reasonable period' of time". He then referenced paragraphs 20–37 of his founding affidavit as supporting the request for condonation.

[23] The High Court took the view that the impugned decisions constituted administrative actions to which PAJA applied and proceeded to evaluate the explanation contained in paragraphs 20-37 against the PAJA standard for condoning delay. In summary, the explanation was that Mr Notyawa did not pursue the first application to finality because he needed a transcript of the Municipality's meeting of 8 May 2015 and hence he unsuccessfully sought a postponement of the matter on 12 February 2016. But this did not explain Mr Notyawa's inaction for periods of time that ran into months. The High Court pointed out that, on the authorities of the Supreme Court of Appeal, section 9 of PAJA required a substantive application for condonation and that Mr Notyawa had failed to make such application.[11]

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10 3 of 2000.

11 *Notyawa v Makana Municipality* 2017 JDR 1429 (ECG) (High Court judgment) at paras [47]–[50].

[24] But even if the matter was approached on the charitable footing that a substantive application was made on the papers, said the High Court, the explanation furnished for the delay was unsatisfactory. It did not cover the entire period of more than 20 months. For example, no explanation was given for inaction between September 2015 when the respondents filed answering affidavits in the withdrawn review and 12 February 2016 when Mr Notyawa withdrew it, following the refusal to postpone.

[25] In a comprehensive analysis of the explanation, the High Court pointed out that no explanation was furnished for why the transcript of the meeting of 8 May 2015 was not sought timeously in terms of rule 53 of the Uniform Rules of Court. That Court also noted that it was the respondents who set the matter down for hearing on 12 February 2016 in circumstances where Mr Notyawa had displayed a lack of desire to proceed with the matter, as he had not filed a reply.[12]

[26] The High Court also observed that there was no explanation for Mr Notyawa's inaction for the period between 12 February and October 2016 when the application for an interdict was launched. No explanation, the High Court further held, for taking no steps between October 2016 and February 2017. In the circumstances the High Court concluded that the delay was unreasonable.[13]

[27] The High Court proceeded to consider whether that delay may be overlooked. The Court took into account the fact that throughout the entire period the Municipality had to operate without a permanent municipal manager and that was prejudicial to it. The Court also noted that when the matter was heard on 26 July 2017, in terms of section 57(6) of the Systems Act, Mr Notyawa could only be appointed until August 2017. In terms of section 57(6) a municipal manager who is already in office when municipal elections take place may continue to hold office for not more than 12 months from the date of those elections. Municipal elections were held on 3 August 2019. Therefore, the High Court concluded that the matter had become moot. Added to these factors was the fact that, in the opinion of the High Court, the prospects of success on the merits were poor.

[28] The conclusion relating to prospects was premised on the undisputed facts that Mr Notyawa had no experience and expertise in the administrative functioning of a municipality. His own *curriculum vitae* revealed that he has never worked for a municipality, except as a councillor whose role does not involve performance of administrative functions. Evidently the position adopted by the MEC with regard to compliance with the Systems Act was not unreasonable. If he was of the opinion that there was no compliance, the MEC was entitled to demand that the Act be followed.

[29] Consequently the High Court exercised its discretion against condonation. That Court pointed out that even if the matter were to be approached on

12 *Id* at paras [54]–[55].
13 *Id* at para [57].

the assumption that it was a legality review, it would have come to the same conclusion. The High Court reasoned:

> "In the result, the applicant did not bring the required application in terms of section 9 of PAJA for an extension of the 180-day period and even if he had he would not have established that it would be in the interests of justice to grant such an extension. I would add that even if this was a legality review, the application of the delay rule would not have favoured the applicant. The delay was self-evidently unreasonable and not fully explained, and the same factors that I have considered would have militated against the granting of condonation. It follows that the application to review the impugned decisions cannot be considered."[14]

[30] The High Court dismissed the application with costs and refused to grant Mr Notyawa leave to appeal. His petition to the Supreme Court of Appeal was also dismissed for lack of prospects of success. He now seeks leave from this Court.

Leave to appeal

[31] By now it is settled that in order to succeed, the application for leave must establish that the case falls within the jurisdiction of this Court and that it is in the interests of justice that leave be granted. There can be no doubt that this matter engages that jurisdiction. It involves the exercise of public power which raises a constitutional issue.

[32] The question that remains for determination is whether the interests of justice favour the granting of leave. In the absence of other compelling reasons like the public interest in the final resolution by this Court of the issues raised, leave may be granted if there are reasonable prospects of success in reversing the decision of the High Court which Mr Notyawa seeks to overturn.[15] In a case like the present where no other considerations warrant the adjudication of the appeal, the prospects of success against the impugned decision become decisive of the inquiry. For it would serve no useful purpose to grant leave in a case such as this if there are no prospects that the challenged decision would be set aside.

[33] As a result the scope of the present inquiry depends on the nature of the decision taken by the High Court. It will be recalled that the High Court has declined to condone Mr Notyawa's delay in instituting the review application and effectively refused to adjudicate the merits of his application. In doing so the High Court was unquestionably exercising a narrow or strict discretion which may be interfered with on appeal only if specific grounds have been established. But before we consider if any of those grounds exist here, we must make a few observations.

Observations

[34] The parties devoted a large part of their argument in addressing whether the impugned decisions of the Municipality and the MEC may be

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14 *Id* at para [61].

15 *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras [29]–[30] and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415 (CC) at para [6].

classified as administrative action or executive action. It was contended that if we hold that they were administrative action PAJA was applicable to the assessment of the delay. If, however, those decisions were executive a different standard applied.

[35] Although there is an overlap in standards for evaluating delay under PAJA and the legality review, those tests differ in some material respects. The distinguishing features of the two tests were adequately defined by this Court in *Asla Construction*[16] and as a result there is no need to traverse them here. But that distinction has no bearing to the outcome of the present inquiry which depends on whether interference with the exercise of discretion is justified. Here both pathways lead to the same destination.

[36] Therefore, in the view I take of the matter, it is not necessary to determine whether the challenged decisions were administrative or executive actions. This is because the High Court explicitly stated that it could have reached the same conclusion regardless of whether what was before it was a legality review or a PAJA review. The nature of the review would have made no difference to the outcome. In addition, Mr Notyawa, rightly or wrongly, eschewed reliance on PAJA and asserted that "my application is brought as a common law review".

[37] In light of the decision of this Court in *Pharmaceutical Manufacturers*,[17] the description that the application was a common law review was plainly mistaken. The review of the exercise of public power is now controlled by the Constitution and statutes like PAJA. Common law principles are subsumed under the Constitution and form part of a single system of law which derives its force from the Constitution.[18] Accordingly, there are no common law reviews.

[38] As was noted in *Affordable Medicines Trust*, what was the *ultra vires* ground of review under the common law is now a breach of the legality principle under the Constitution.[19] The Constitution demands that all government decisions must comply with it, including the principle of legality which forms part of the rule of law, and which is one of our constitutional founding values. Consequently, the essence of Mr Notyawa's assertion was that his was a legality review. However, this by no means suggests that the application of PAJA to a particular review depends on the applicant's characterisation or a reference to it in the papers, as Mr Notyawa has asserted. PAJA's application depends on the nature of the impugned decision. If it is administrative, PAJA applies. But if it is executive action PAJA does not apply. In those circumstances the matter becomes a legality review.

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16 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) at paras [49]–[53].

17 *Pharmaceutical Manufacturers Association of SA, In re: Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

18 *Id* at para [33].

19 *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para [50].

[39] As the parties diverge on the characterisation of the impugned decisions here, ordinarily the determination of this issue would have been necessary. However in the present circumstances that determination has no bearing on the outcome. This is because the High Court expressly recorded that it would have reached the same conclusion even if the application was a legality review. As a result the matter would be approached on the footing that Mr Notyawa instituted a legality review. What needs to be determined is whether it is in the interests of justice to grant leave and this question depends on whether the High Court had exercised the discretion improperly.

Interference with discretion on appeal

[40] Our law vests in the court of first instance the discretion to condone a delay by an applicant in instituting review proceedings. The exercise of this discretion may not be interfered with on appeal on the basis that the decision was incorrect. Whether the appeal court would have exercised that discretion differently is irrelevant.[20] The intervention of the appeal court may be justified only on narrow specified grounds.

[41] The test is whether the court whose decision is challenged on appeal has exercised its discretion judicially. The exercise of the discretion will not be judicial if it is based on incorrect facts or wrong principles of law.[21] If none of these two grounds is established, it cannot be said that the exercise of discretion was not judicial. In those circumstances the claim for interference on appeal must fail.

Approach by the High Court

[42] The High Court rightly considered and evaluated the facts pertaining to condonation as set out in Mr Notyawa's affidavit. First, the Court pointed out that the explanation proffered did not cover the entire period of the delay and that there were substantial periods for which no explanation at all was tendered. A perusal of Mr Notyawa's affidavit confirms that this finding was based on correct facts.

[43] In its assessment of the explanation given, the High Court took into consideration that the application was first launched in July 2015 and that the respondents filed their opposing papers in September 2015. Nothing happened until February 2016 when the matter was set down for hearing by the respondents. Even then Mr Notyawa sought a postponement because he had not filed a replying affidavit. The single reason he advanced for his inaction was that he needed a transcript of the Council meeting of 8 May 2015.

[44] The High Court rejected that reason as implausible and this conclusion cannot be faulted. There is no explanation for why Mr Notyawa failed to

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20 *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para [41].

21 *Giddey NO v Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at paras [21]–[22].

compel production of the transcript after 15 days from the date on which the application was launched, as he was entitled to do so under rule 53 of the Uniform Rules of Court. Moreover, when the postponement was refused, Mr Notyawa chose to withdraw the application as he preferred to institute an action. But again he did nothing for about six months. He only sprang into action when the Municipality re-advertised the vacancy. All these facts were correctly taken into account in determining whether the delay was unreasonable.

[45] Having concluded that the delay was unreasonable, the High Court proceeded to consider if it could be condoned. In this regard the Court paid attention not only to the unsatisfactory explanation but also to the fact that the order sought would have no practical effect and that there were poor prospects of success in the main review application. Accordingly the High Court refused condonation.

[46] Evidently the High Court followed a two-stage approach in conducting the inquiry. First, it determined whether the delay was unreasonable. Second, once it found that the delay was unreasonable, the Court considered whether the delay could be condoned. That this is the correct approach was affirmed by this Court in cases like *Khumalo*[22] and *Asla Construction*.

[47] Consequently the High Court applied the right principles to the correct facts.

Reliance on *Gijima*[23]

[48] While not taking issue with the approach followed by the High Court, relying on *Gijima* Mr Notyawa contended that despite the unreasonable delay, the High Court should have entertained the review application. It is apparent from the judgment in *Gijima* that a court has discretion to overlook a delay.[24] And that the discretion must be exercised with reference to facts of a particular case which warrant the overlook.[25]

[49] The nature and extent of the illegality raised in respect of the impugned decision constitutes a weighty factor in favour of overlooking a delay.[26] Where, as in *Gijima* and *Tasima I*,[27] the illegality stems from a serious breach of the Constitution, a court may decide to overlook the delay in order to uphold the Constitution, provided the breach is clearly established on the facts before it.[28] This flows from the obligation imposed by section 172(1)(a) of the Constitution which requires every competent

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22 *Khumalo v MEC for Education*, *KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at paras [49]–[52] and [56].

23 *State Information Technology Agency SOC Ltd v Gijima Holdings* (*Pty*) *Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

24 *Id* at para [47]. See also *Khumalo* above fn 22 at para [45].

25 *Id* at paras [48]–[49].

26 *Asla Construction* above fn 16 at para [58].

27 *Department of Transport v Tasima* (*Pty*) *Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC).

28 *Asla Construction* above fn 16 at para [63].

court to declare invalid law or conduct that is inconsistent with the Constitution.[29]

[50] As was noted in *Khumalo*, prejudice that may flow from the nullification of an administrative decision long after it was taken may be ameliorated by the exercise of the wide remedial power to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution.[30] At common law, courts avoided prejudice to respondents by declining to entertain a review application. Our law has since moved on and PAJA affords courts the wide remedial power which may be exercised to protect rights of innocent parties. That power mirrors in exact terms the power contained in section 172(1)(b) of the Constitution.

[51] It must be emphasised that when a court exercises the discretion, it must always keep in mind the development brought about by the Constitution and PAJA. The key point being that the issue of prejudice may adequately be regulated by the grant of a just and equitable order. And where the unlawfulness of the impugned decision is clearly established, the risk of reviewing that decision on the basis of unreliable facts does not arise. In an appropriate case the presence of these factors would tilt the decision in favour of overlooking an unreasonable delay. What is important is to note that the exercise of discretion is no longer regulated exclusively by the common law principles which did not permit the flexibility of reversing the unlawful decision while avoiding prejudice to those who had arranged their affairs in terms of the unlawful decision.

[52] However, the present matter is distinguishable from *Gijima.* It does not involve a serious breach of the Constitution. Nor is the illegality of the impugned decisions clearly established on the facts. On the contrary, it appears that these decisions were taken in compliance with section 54A of the Systems Act. Another distinguishing factor here is that, unlike in *Gijima*, the matter was initiated by an individual and not the state in pursuit of having its own decision corrected. And it is not necessary in these proceedings to determine whether the application of the *Gijima* principle is limited to cases where the state is the applicant.

[53] Moreover, in the context of section 54A, the Municipality must have had no less than four acting municipal managers to date. This is because each acting appointment may not exceed six months. The Municipality has been without a permanent manager from 2015 and this must have impacted negatively on service delivery to its residents. In addition, Mr Notyawa can no longer obtain the relief he sought. By law he cannot be appointed a municipal manager of the Municipality. Faced with this difficulty he contended that he seeks a declarator that the impugned decisions were invalid so as to pave way for a damages claim. However, his

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29 In peremptory terms s 172(1)(a) of the Constitution provides:

"(1) When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

30 *Khumalo* above fn 22 at para [53].

counsel conceded rightly that the declaration in question may still be sought in the action he contemplates bringing.

[54] In the circumstances, granting leave to appeal here would serve no purpose. It is therefore not in the interests of justice to do so. Consequently, the application should be dismissed.

Costs

[55] Since the matter raises constitutional issues, it falls within the ambit of *Biowatch*.[31] Despite losing, Mr Notyawa should not be ordered to pay the respondents' costs. Both of them are Organs of State.

Order

[56] In the result the following order is made:

The application for leave to appeal is dismissed.

(Mogoeng CJ, Froneman, Jafta, Khampepe, Madlanga, Mhlantla, Theron JJ Mathopo and Victor AJJ concurred in the judgment of Jafta J.)

Froneman J:

[57] I agree that the application for leave to appeal must be dismissed, but for perhaps more direct and robust reasons than merely those relating to the propriety of the discretion exercised by Roberson J in the High Court in respect of the applicant's delay in bringing the review. She was right in that regard, as my brother Jafta J explains in the first judgment, but she was also right in regard to all other aspects that she made findings on. Those findings precede the delay issue and accordingly offer the most immediate and unassailable grounds for disposing of the application for leave to appeal.

[58] The first is mootness.[32] The High Court found that by the time the application for review was eventually heard the purpose of the review – to order consequential relief that the Municipality must conclude a written employment contract with the applicant – had become moot. This was because section 57(6) of the Systems Act provides that a municipal manager who is already in office when municipal elections take place may hold office for not more than 12 months from the date of those elections. Municipal elections had been held and the twelve months was to expire within days of the hearing.[33]

[59] Before us this finding was not challenged, but the applicant changed tack. The consequential relief was no longer sought, but he submitted that a

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31 *Biowatch Trust v Registrar*, *Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

32 S 16(2)(a)(i) of the Superior Courts Act 10 of 2013 identifies mootness as a sufficient ground for the dismissal of an appeal:

> "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

33 High Court judgment above fn 11 at para [59]. This is noted in the first judgment at [27].

live controversy between the parties remained. This related to what further consequential remedy, in the form of a claim for damages, might be available to the applicant. This would be pursued in different proceedings.

[60] This change in strategy cannot avail the applicant, not least because the point is being raised for the first time in this Court. There was nothing to prevent the applicant from seeking an amendment to the relief he sought in the High Court. Yet there is no explanation why he did not do so, nor why this Court should do so as a court of first instance. That this should not readily be countenanced was recently re-affirmed by this Court in *Tiekiedraai*.[34] There is no reason to do so here.

[61] A prerequisite for the exercise of the discretion to grant leave to appeal in spite of mootness is that any order which this Court may make will have some practical effect either on the parties or on others.[35] It is doubtful whether this separation of an application for a review and consequential relief flowing from it in separate proceedings presently constitutes a live issue between the parties. No separate proceedings have been instituted by the applicant and this is not a case where the applicant seeks a remittal to the High Court to determine an outstanding live issue between the parties. Nothing prevents the applicant from pursuing a damages claim, except perhaps the fear that the claim might have prescribed.

[62] Neither would a determination on the merits of the review have a practical effect on others that might tilt the interests of justice in favour of granting leave to appeal.[36] The merits depend on whether the determination made by the second respondent that the applicant did not meet the requirements of section 54 of the Systems Act, in that he had no experience and expertise in the administrative functioning of a municipality, was correct. The High Court found that it was. But even if it were wrong, the finding involves no constitutional or legal issue that would have an effect on others. It is essentially a factual finding contingent on the particular circumstances relating to the applicant. In the absence of any compelling considerations bearing on the broader public interest, there is no basis for this Court to exercise its discretion in favour of adjudicating a dispute which is moot.

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34 *Tiekiedraai Eiendomme* (*Pty*) *Limited v Shell South Africa Marketing* (*Pty*) *Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC) at paras [19]–[24].

35 *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para [11].

36 In *Director-General Department of Home Affairs v Mukhamadiva* [2013] ZACC 47; 2013 JDR 2860 (CC); 2014 (3) BCLR 306 (CC) at para [40], this Court identified several relevant factors that could be considered when exercising discretion to entertain a moot matter:

> "The fact that a matter may be moot in relation to the parties before the court is not an absolute bar to the court considering it. The court retains discretion, and in exercising that discretion it must act according to what is required by the interests of justice. And what is required for the exercise of this discretion is that any order made by the court has practical effect either on the parties or others. Other relevant factors that could be considered include: the nature and extent of the practical effect the order may have; the importance of the issue; and the fullness of the argument advanced. Another compelling factor could be the public importance of an otherwise moot issue."

[63] So, for mootness alone, it is not in the interests of justice to grant leave.

[64] The High Court considered that the decision sought to be reviewed was administrative action that fell under PAJA and that, in any event, the prospects of success on the merits were not good.[37] I consider both these findings to be unassailable as well, but it is not necessary to go into any further detail on that. Suffice it to say that, in considering the prospects of success as part of her inquiry into the delay issue, she may have been in anticipatory compliance with what was stated about the need to do so in state self-review by this Court in *Asla Construction*.[38]

[65] The contextual similarities and possible dissimilarities in a delay inquiry under PAJA review and legality review (and state self-review as a subcategory of the latter) are, however, not directly relevant or crucial here and need not be pursued.

For the applicant:
A Beyleveld SC and *I Bands* instructed by *Wheeldon Rushmere and Cole Incorporated*

For the first respondent:
TJM Paterson SC and *N Molony* instructed by *Whithersides Attorneys*

For the second respondent:
RG Buchanan SC and *G Appels* instructed by *NN Dullabh and Company*

The following cases were referred to in the above judgment:

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37 High Court judgment above fn 11 at paras [46] and [60]–[61].
38 See discussion in *Asla Construction* above fn 16 at paras [55]–[58].

Valor IT v Premier, North West Province and others

SUPREME COURT OF APPEAL

MB MOLEMELA, FE MOKGOHLOA, C PLASKET, MJD WALLIS JJA AND PA KOEN AJA

Date of Judgment: 9 JUNE 2020 Case Number: 322/19

Sourced by: A MDLETSHE Summarised by: DPC HARRIS

Constitutional and Administrative law – Procurement – Award of contract – Unlawfulness of contract due to failure to follow applicable legal prescripts – Agreement entered into in settlement of dispute regarding termination of unlawful agreement not capable of recognition as it gave effect to the unlawful arrangement.

Editor's Summary

The appellant ("VIT") was one of a number of entities that were accredited by the State Information Technology Agency ("SITA") as approved suppliers to Organs of State of information technology requirements. In 2011, VIT submitted an apparently unsolicited proposal to the Department concerning an enterprise content management ("ECM") system, to manage its records. A few months later, the Department directed a request for quotations for the rendering of services on a "Records Management solution" to entities that were accredited by SITA. One of them was VIT. In August 2011, VIT was informed of its successful bid. VIT and the Department signed an agreement that they called a service delivery agreement ("SDA"). The fee that VIT would be entitled to for the work was R498 000. However, the contract price escalated over about three years from that to R41 729 647.

At the heart of this matter lay the question of whether the contractual relationship between VIT and the Department was lawful. That was because following the termination of the contractual relationship by the provincial government, VIT applied for a declaratory order that the termination was unlawful and that it was entitled to payment of a further amount of R146 473 747,49 as damages.

Held – Provincial government's prospects of success on the merits were strong. The scheme in terms of which VIT purported to provide services, and for which it was handsomely remunerated, was unlawful from start to finish.

Section 217 of the Constitution requires organs of State such as the Department, when it procures goods and services, to do so in terms of a system that is fair, equitable, transparent, competitive and cost-effective. In this case, no public tendering process was ever held in respect of the SDA or any of the agreements that followed it. The SDA was awarded to VIT after it and two other firms had responded to a closed request for quotations.

The subsequent entering into of a settlement agreement by the parties was unlawful. The settlement agreement sought to give effect to the unlawful arrangement, and was correctly rescinded by the court below.

The appeal was dismissed with costs.

Notes

For Administrative Justice see:

- *LAWSA* (3ed) (Vol 2, paras 1–74)
- JR de Ville, *Judicial Review of Administrative Action in South Africa*, LexisNexis, Durban, 2005
- Devenish, Hulme, Govender *Administrative Law and Justice in South Africa* LexisNexis, Durban, 2001
- Y Burns *Administrative Law* (5ed) LexisNexis, Durban, 2019

For Constitutional law (Bill of Rights) see:

- *LAWSA* (2ed) (2012, Vol 5(4), paras 1–215)
- Cheadle MH; Davis DM and Haysom NRL *South African Constitutional Law: The Bill of Rights* (2ed), LexisNexis Durban 2005 Service Issue 36 (last updated in November 2016)

Cases referred to in judgment

Judgment

PLASKET JA:

[1] This appeal concerns the strange tale of how a public procurement contract awarded to the appellant, Valor IT CC ("VIT"), by the third respondent, the Department of Sports, Arts and Culture in the government of the North West Province (the Department and the provincial government respectively) escalated over about three years from its tender value of R498 000, excluding VAT, to R41 729 647 (including the payment of R22,8 million in "damages"), the total amount that was paid to VIT by the provincial government; and how all of this occurred without any *bona fide* attempt to comply with the public procurement processes that have their origin in section 217 of the Constitution.[1] At the heart of this matter lies the question of whether the contractual relationship between VIT and the Department is lawful.

[2] That question arises because, following the termination of the contractual relationship by the provincial government, VIT applied for a declaratory order that the termination was unlawful and that it was entitled to payment of a further amount of R146 473 747,49 as damages. In the court below, the North West Division of the High Court, Mahikeng, Gura J

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1 S 217 of the Constitution provides:

"(1) When an Organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Sub-section (1) does not prevent the Organs of State or institutions referred to in that sub-section from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in sub-section (2) must be implemented."

dismissed VIT's application and granted the provincial government's counter-application in which it sought, *inter alia*, the setting aside of all contracts between VIT and the Department. Gura J refused VIT leave to appeal, but leave was granted by this Court on petition.

Background

[3] VIT is engaged in the information technology industry. It was one of a number of entities that were accredited by the State Information Technology Agency ("SITA") as approved suppliers to Organs of State of information technology requirements.

[4] In January 2011, VIT submitted an apparently unsolicited proposal to the Department concerning an enterprise content management – or ECM – system, to manage its records. The Department considered the proposal and had discussions with VIT. As a result, in March 2011, VIT gave the Department another, more detailed and costed, proposal.

[5] The proposal was said to be specific to "the Department's Business requirements", and was "geared to analysing the requisite infrastructure, business systems and IT systems required by the Department to enable the Department to successfully meet their strategic aims and goals". VIT stated that if it was successful in being given the task, it would "obviously welcome the chance to work together with other consultants of the Department's choice in subsequently implementing fully working end-to-end business and IT solutions that all integrate with each other".

[6] In its overview of what it offered the Department, VIT said that a number of steps had to be taken to "ensure that the records management solution is successfully designed, controlled and implemented". It listed eight steps that started with a preliminary investigation and ended with a post-implementation review. It then said:

> "The first of these steps will be tackled in the first stage of the engagement namely the preliminary investigation. This step will provide an understanding of the organisation, together with the administrative, legal, business and social context in which it operates. The investigation will identify current record keeping strengths and weaknesses within the department as well as building a solid foundation on which the scope of the record keeping program can be built. The information collected in this step will be crucially important as progress is made through the project and decisions need to be made relating to record keeping systems and activities. The initial steps of the process are resource intensive, it is therefore important to ensure that appropriate time and resources are assigned to the tasks in these steps."

[7] Later in the document, the first step in the process was identified as "Phase 0". In a table, the key activities involved in phase 0 were set out. They included: determining and defining the scope of the investigation; collecting sources of information that needed to be analysed; interviewing "relevant stakeholders/business units etc"; drafting a report of the investigation that would include the major findings of the investigation and recommendations "related to the scope, conduct and feasibility of the proposed records management program"; and the drafting of a "proper plan" based on the findings in the report. The proposed price for this work was R498 000 excluding VAT. (Certain other costs were also excluded.)

[8] In July 2011, the Department directed a request for quotations to entities that were accredited by SITA. One of them was VIT. The Department requested quotations for the rendering of services on a "Records Management solution" for the Department. Under a heading "*Task Directive/Terms of Reference*", the request for quotations specified that the work would entail an assessment of the Department's records management needs, an information audit, the design of a records management system, the automation of manual records management systems, the implementation, monitoring and evaluation of the proposed system and the training of personnel in its use and feedback on "the findings and strategic records management implementation plan".

[9] By letter dated 4 August 2011 addressed to VIT, the Head of the Department informed it of its successful bid. She stated:

> "It is a great pleasure to inform you that the North West Department of Sports, Arts and Culture has pursuant to your presentation to my office on 3 August 2011 resolved that your proposal for the assessment, development and management of records, and information system for the North West Provincial Government be awarded to VALOR IT CC for an amount of R498 000 – (Four hundred and ninety eight thousand rand, excluding VAT)."

[10] The Head of the Department stipulated that the project was to commence within 14 days of the date of her letter and that VIT's appointment was subject to a number of conditions. They were that: it accept the appointment in writing; sign a contract with the Department; provide a payment schedule in accordance with work done; attend an "engagement meeting" in order to be introduced to "management" before the commencement of the project; and that the "tendered amount will be considered fixed for the project". The estimated delivery period for the project was six weeks.

[11] On 4 October 2011, VIT and the Department signed an agreement that they called a service delivery agreement – an SDA – in respect of an "enterprise content management solution" for the Department. Clause 1.1.27 defined the scope of work envisaged by the SDA to mean "the description of the Deliverables, timeframes and Delivery Dates of the Services, scope, plan and payment schedule/s as set out in Schedule 1". This schedule was the only schedule that formed part of the SDA. A reference to another schedule was deleted and initialled by the parties. Clause 30 of the SDA provides that "[t]his Agreement constitutes the entire Agreement between the Parties for the provision of Services by [VIT]" and that "[a]ny prior arrangements, agreements, representations or undertakings are superseded".

[12] Schedule 1 refers, in its heading, to "*Scope of Work Phase 0*". Immediately below the heading it is stated that the schedule and its annexures "*is based on this Agreement agreed to between the parties*". Phase 0 is described as involving an information audit and scoping in which the "deliverables" are: the collection of information; the collation, evaluation and interpretation of the information; the compilation of a "comprehensive report" containing findings and recommendations; determining the strategic objective of records management in the Department; the assessment of the availability of "sufficient human resources" within the Department; the assessment of "the availability and use of records classification systems"; the assessment of the availability of "policies, procedures and processes"; the assessment

of "MISS compliance and confidentiality of classified records"; the assessment of the availability and use of registers and other record keeping systems; the assessment of the systems and practices then in use for "storage, maintenance and transfer of electronic metadata, media and related technologies" and whether these conform to the standards set in the National Archives of South Africa Act 43 of 1996; and the assessment of the "processes involved in the transfer of records to an archival repository". The fee that VIT would be entitled to for this work was "R498 000 (Four hundred and ninety eight thousand rand) Excluding VAT".

[13] On 26 October 2011, the Department paid VIT the amount of R567 720, made up of R498 000 plus VAT. Even though phase 0 had now been concluded, that did not end the relationship between the Department and VIT. On 2 December 2011, they signed a document titled "Schedule 2: Scope of Work – Phase 1". In VIT's founding affidavit, it was claimed that, on that date, the parties "signed the schedule attached to the main agreement wherein they agreed on a two phased approach namely phase 0 and phase 1A for the implementation of the ECM project with a total cost of R498 000 and R9 800 000 respectively". As was pointed out in the answering affidavit, however, this was not factually correct: the SDA was signed on 4 October 2011 and related only to phase 0, having a total value of R498 000 (excluding VAT), while schedule 2, relating to part of phase 1, was signed on 2 December 2011, having a total value of R9 800 000 (excluding VAT). Schedule 2 was not part of the SDA, having been expressly excluded. It appears that the Head of the Department and VIT wanted to create the false impression that schedule 2 had always been part of the SDA.

[14] In terms of schedule 2, VIT was engaged, over a period of four months and for a fee of R9 800 000, excluding VAT, to develop "provincial governance instruments", which included, *inter alia*, appointing records managers and creating and implementing "records life-cycle processes"; putting in place "governance instruments"; and rolling out a change management plan. (VIT stated that the original budget for phase 1 was R20,1 million but "due to budgetary constraints", this phase was divided in two: the agreed amount of R9 800 000 was payment for what VIT called phase 1A.) While VIT claimed to have completed the work and to have been paid R9 800 000, the provincial government disputes this on two scores. First, it stated that only R8 132 695,52 was paid to VIT, over the period between January and July 2012. Secondly, it said:

> "Despite this huge payment, no evidence of outputs was attached nor could they be submitted in electronic format and/or verified in copies. To date, doubt exists whether the outcome of the project produced tangible progress with documents, record and archive management for the province. The applicant has failed to satisfy numerous requests for proof of deliverables."

[15] In August 2012, as a result of a lack of funds to pay for the work that VIT proposed to do, the Head of the Department applied for funding from the Premier's discretionary fund. She sought a total of R22 million for the completion of phase 0, phase 1B and phase 2. This amount was later reduced to R18,6 million in respect of only phase 0 and phase 1B. The Premier granted R20 million. As a result of these funds being made available, the Department and VIT agreed to a schedule of activities that VIT would perform in respect of Phase 1B at a cost of R12 882 000.

[16] When supply chain management problems began to arise, with the result that payments of invoices were refused, the arrangement was "formalised". On 15 October 2012, the Department and VIT entered into what they termed a service level agreement in respect of phase 1B at a total cost (including VAT) of R12 882 000. This appeared to open the money taps again, with the result that the Department paid VIT an amount of R3 472 200.

[17] VIT then submitted a request to the Department that it purchase software from it at a cost of R37 million, and pay it, in addition, an annual maintenance fee of R6,7 million. A deputy director general was given the task of formulating a view on this proposal. He concluded that it could not be accepted because it had to go out to tender in order to comply with legal procurement requirements, but recommended that VIT be invited to "present detailed specifications and requirements", that the Premier's office and other Departments be drawn into a consideration of the need for the proposed solution, that VIT then be asked to prepare a presentation on the costs and benefits of the current system as against what it proposed, and that a "final position regarding a submission to Extech/Exco and a review of the present proposal could be formulated thereafter". The Head of the Department accepted these recommendations and communicated her view to VIT. This drew a response from VIT.

[18] In a letter to the Head of Department dated 27 October 2011, VIT's Chief Executive Officer set out VIT's position. He said:

> "It has come as quite a surprise to us that you indicate that the department now has to go out on tender for the next phase/s of the project. Our understanding of the SDA that was signed between [the Department] and [VIT] It is as follows:
>
> 1. The project was awarded by [the Department] to [VIT] as an end to end ECM Solution.
> 2. That the Phase 0 was only for a period of 6 weeks and that the full implementation of the ECM project spans 3 years with an option to renew if required as per the SDA.
> 3. That the project will be broken down into a phased approach in terms of the deliverables (Phase 0 then Phase 1 and finally Phase 2)
> 4. That any other further enhancements, developments, etc, for the ECM project will form Phase 3 as a deliverable/s.
> 5. That at the end of each Phase a Schedule of Work, Payment Schedule and a Project Plan will be developed for the following Phase that needs to be delivered. . .
> 6. That the SDA signed between [the Department] to [VIT] fully encompasses the total ECM Solution Implementation, Phase 0 was purely an assessment stage.
> 7. On the presentation on 27 September 2011 to DMC in Potchefstroom, a costing of R20,1 mil for Phase 1 was presented.
> 8. On the meeting at 5 October 2011 at your office boardroom in which the signing of the SDA took place, you indicated that we needed to provide a project plan, scope of work and payment schedule for Phase 1. You also removed the Scope of Work Schedule from the SDA as it was not supported by the Project Plan and Payment Schedule. You also asked if we could carry on with assisting with the development of the

> Government Instruments and asked us to review and use what [the Department] already has in place if possible. You will no doubt agree that this forms part of Phase 1.
>
> Please also find attachments with various extracts that indicate clearly that the project was an end to end solution broken down into phases. It also clearly shows that Phase 1 will follow Phase 0 and that Phase 1 must start immediately over a period of 6 months. Please refer also to slide number 25 which you yourself presented and indicated that Phase 1 is included."

[19] By this time, as a result of constant concerns being expressed by supply chain management officials about irregular expenditure, the relationship between the Department and VIT appears to have attracted the attention of, *inter alia*, the Auditor-General. On 1 October 2013, the Department cancelled the agreement with VIT. It did so on a number of bases including that the award of the contract did not comply with section 217 of the Constitution and the other procurement-related prescripts that give effect to it. In response to the cancellation, VIT instituted proceedings against the Department in which it claimed damages of R152 073 768.

[20] The matter was then settled on the advice of the Chief State Law Advisor and, on 13 February 2014, the settlement agreement was made an order of the North-West Division of the High Court, Mahikeng. The settlement agreement provided as follows:

> "1. The termination of the agreement between [the Department] and [VIT] was unlawful.
> 2. The status quo before the termination of the contract as aforesaid is hereby restored with immediate effect.
> 3. [VIT] and/or the personnel belonging to [VIT] will be allowed on site, government premises to resume their contractual obligations in terms of the agreement with immediate effect.
> 4. The nature of the ECM solution contract will be re-defined as a transversal term contract so as to comply with Treasury Regulations 16A6.5.
> 5. The Office of the Premier together with the Department of Finance will engage one another regarding the roll-out of the project to provincial departments.
> 6. The litigation matter between [the Department] regarding the termination of the contract will be withdrawn by [VIT], in its capacity as the applicant.
> 7. The parties agree to substantiate the main agreement on ECM solution with an addendum and plans for deliverables to be rolled-out to provincial departments.
> 8. The parties agree that compensation to [VIT] is justified under the circumstances for loss of profit and other damages.
> 9. The North West Provincial Government hereby agrees to pay the settlement amount of R22,8 million to [VIT] in full and final settlement of all costs related to the unlawful termination of the contract including any monies that might have been owing as at the time of the termination of the contract.
> 10. The settlement amount shall be paid into the bank account of [VIT] within seven working days from 5 February 2014.
> 11. The parties agree that this settlement agreement shall be made an order of Court after all the parties have signed."

[21] VIT was paid R22,8 million in terms of the order. Thereafter, VIT was paid further amounts: it was paid R213 750 in respect of phase 1B,

R2 100 021,51 in respect of phase 0 (for all of the provincial government's remaining Departments) and R1 750 000, also for phase 0. By this stage, the provincial government had paid VIT a total of R41 729 647.

[22] Advice was sought from legal practitioners external to the provincial government. That advice was to the effect that the award of the "contract" to VIT was irregular and flew in the face of section 217 of the Constitution. On 9 January 2015, the provincial government again cancelled the contract. That resulted in the current proceedings, in which VIT sought a declaratory order that the provincial government's "unilateral termination" of the contract was unlawful and an order directing the provincial government to pay VIT R146 473 747,49 as damages. The provincial government opposed that application and brought a counter-application for the setting aside of the SDA and "all subsequent agreements" entered into between the Department and VIT, and for the setting aside or rescission of the settlement agreement.

The issues

[23] The case raises a number of issues. The first is a point taken by VIT that the provincial government's attorney has no authority to represent it in this appeal. The second is that condonation for the late filing of the answering affidavit and of the reply in the counter-application should not have been granted by the court below. If those issues are to be decided in favour of the provincial government, three issues remain to be decided. They are: whether the provincial government's delay in bringing its counter-application was unreasonable and, if so, whether condonation should be granted; whether the award of the SDA to VIT and the subsequent extensions were lawful or not; and, if they were unlawful, the effect of the settlement agreement that was made a court order, and whether it should have been rescinded.

The preliminary points

[24] The point that the provincial government's attorney has no authority has no merit. Attached to the provincial government's heads of argument is a power of attorney signed by one of the provincial government's administrators (appointed to administer the province in terms of section 100 of the Constitution). In the power of attorney, he confirmed the attorney's mandate to represent the provincial government in this appeal.

[25] The second preliminary point is that condonation should not have been granted for the provincial government's late filing of its answering affidavit and its replying affidavit in the counter-application. The explanation given for the delay was, in summary, that because of the long and complex history of the matter, it had been necessary to appoint a senior bureaucrat to investigate precisely what had transpired and to compile a report. It was only when these tasks had been completed that Counsel could be properly briefed and consultations with potential deponents could take place. This was a complicated and time-consuming exercise. In addition, in respect of the late filing of the reply in the counter-application, the provincial government had changed Counsel and the newly briefed Counsel required time to acquire an understanding of the matter and draft the reply. It was submitted that the prospects of success

were good, that VIT stood to suffer no prejudice, and that, by contrast, the prejudice to the provincial government if condonation was refused, would be immense.

[26] Gura J, in the court below, considered the explanation to be a reasonable one; that VIT suffered no prejudice as a result of the delay; that the provincial government's prospects of success were good; and that, significant sums of public funds being involved, there was an overwhelming public interest in favour of the matter being heard on a full set of papers. In the exercise of his discretion, he granted condonation. The exercise of that discretion can only be set aside on appeal if it was not exercised judicially – if, in other words, the court below had exercised it on the basis of incorrect facts or incorrect legal principles.[2] That cannot be said of Gura J's exercise of discretion in this case, with the result that the attack on the granting of condonation has no merit.

The delay in bringing the counter-application

[27] The counter-application seeks, in effect, the review and setting aside of the award of the SDA to VIT (as well as all subsequent agreements). The provincial government thus applied to set aside its own decision. Its jurisdiction to do so emanates from the principle of legality that is sourced in the founding constitutional value of the rule of law, and not from the Promotion of Administrative Justice Act 3 of 2000 (the "PAJA").[3]

[28] That means that, in terms of the common law, it was required to apply for the setting aside of the award of the SDA within a reasonable time.[4] The test entails a two-stage enquiry. First, it must be determined whether any delay in bringing the application was reasonable or unreasonable. If it was unreasonable, the second stage comes into play: the Court must decide whether the unreasonable delay may be overlooked and condonation granted.[5]

[29] According to *Khumalo and another v Member of the Executive Council for Education, KwaZulu-Natal*,[6] no specific application is required in a legality review for the condonation of an unreasonable delay in launching proceedings. An objection that the delay in so doing is unreasonable is

2 *Notyawa v Makana Municipality and others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC) para [41].

3 *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) para [37],*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) para [45].

4 *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 380C–E [also reported at [1965] 1 All SA 92 (C) – Ed].

5 *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C–D [also reported at [1978] 1 All SA 369 (A) – Ed]; *Gqwetha v Transkei Development Corporation Ltd and others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) para [33],*Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape and others* 2001 (4) SA 294 (C) at 306H–307G; *Beweging vir Christelik-Volkseie Onderwys and others v Minister of Education and others* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA) para [46], *Notyawa v Makana Municipality and others* (fn 2) para [46].

6 *Khumalo and another v Member of the Executive Council for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) para [44].

"pre-eminently a point which the respondent or the Court should raise because the respondent and the Court are best able to judge whether, having regard to the respective spheres of influence of each, the lapse of time which has occurred merits the raising of an objection".[7]

[30] Whether a delay is unreasonable is a factual issue that involves the making of a value judgment.[8] Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a "factual, multi-factor and context-sensitive" enquiry[9] in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.[10]

[31] The decision to award the bid to VIT on the basis of its quotation, and to conclude the SDA with it, was taken in early August 2011. Thereafter, the scope of the work was steadily increased and significant amounts of money were paid to VIT as a result. Despite concerns being raised from time to time about the propriety of this arrangement, it continued until early October 2013 when the provincial government cancelled the SDA. That led to VIT's first application. A State law advisor gave patently poor advice that the provincial government should settle the dispute. The result was the settlement agreement, which was made a court order on 18 February 2014, and the continuation – and extension – of the contract. It was only after independent legal advice had been obtained that the contract was cancelled again, on 23 January 2015. VIT's second application was launched on 21 May 2015 and the counter-application was filed on 15 October 2015.

[32] There can be no doubt that the delay in challenging the lawfulness of the award of the SDA to VIT was unreasonable. As I have shown, it took more than two years for the provincial government to cancel the contract for the first time, only to reverse its decision. It took a further 15 months before the provincial government cancelled the contract again and another nine months before it applied for the setting aside of the contract and the rescission of the order of court embodying the settlement agreement.

[33] In these circumstances, one would have expected a full and thorough explanation for the delay. That was not to be. Instead, the provincial government gave an explanation for its delay in filing its answering affidavit, and later, for its delay in filing its reply in the counter-application. That only accounts for the period between the service of the founding papers and the filing of the answering affidavit and reply in the counter-application respectively. In order to understand why the provincial

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7 *Scott and others v Hanekom and others* 1980 (3) SA 1182 (C) at 1193B–C.

8 *Gqwetha v Transkei Development Corporation Ltd and others* (fn 5) para [24]; *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape and others* (fn 5) at 307E–F.

9 *Department of Transport and others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) para [144].

10 *Gqwetha v Transkei Development Corporation Ltd and others* (fn 5) paras [31]–[35]; *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape and others* (fn 5) at 307G.

government delayed for more than four years before it challenged what was a patently unlawful contract, one has to trawl through the papers and draw inferences from the facts found there. That is far from satisfactory, but is necessary if the interests of justice are to prevail.

[34] It is clear that officials in the Department played a pivotal role in the scheme, from the initial award of the SDA to VIT to its progressive extensions thereafter. This ongoing involvement explains why the legality of the scheme was not challenged prior to the first cancellation. It was only after the provincial government had been placed under administration, with new officials looking afresh at the relationship between the Department and VIT, that that was done.

[35] Furthermore, when VIT went too far by claiming an entitlement to sell software for a price of R37 million, and to an annual maintenance fee of R6,8 million, the Head of the Department baulked. The result, when taken together with ongoing concerns about irregular expenditure in relation to VIT, was that matters were taken out of her hands, and the provincial government cancelled the contract with VIT for the first time. (It is noteworthy that, in the letter of cancellation, it was stated that the Head of Department had not had the authority to contract with VIT.)

[36] One would have imagined that the first cancellation would have put an end to the saga. That was not to be, because a State law advisor gave inexplicably wrong advice that VIT's application to challenge the cancellation should be settled on terms favourable to VIT. The provincial government, it would appear, had no way of knowing that the advice it had been given was wrong, and this problem was compounded by an ill-conceived settlement agreement that was made a court order.

[37] Once the matter had been settled, the provincial government had little choice but to comply with the order to which it had agreed. It was only when it obtained independent legal advice that it found out that the State law advisor's advice had been wrong, and that it should cancel the agreement again. In due course, the counter-application was brought to set aside the SDA and everything that followed it. This accounts for the period between the first cancellation and the second cancellation.

[38] One of the factors that must be considered whenever condonation is sought is the applicant's prospects of success on the merits. It must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point).[11]

[39] As I shall demonstrate in the following paragraphs, the provincial government's prospects of success on the merits are strong: the scheme in terms of which VIT purported to provide services, and for which it was

11 *United Plant Hire (Pty) Ltd v Hills and others* 1976 (1) SA 717 (A) at 720E–G [also reported at [1976] 2 All SA 253 (A) – Ed]; *Darries v Sheriff, Magistrate's Court, Wynberg and another* 1998 (3) SA 34 (SCA) at 40H–41E [also reported at [1998] JOL 2154 (A) – Ed].

handsomely remunerated, was unlawful from start to finish. As a result, even if it were to be found that the explanation for the provincial government's delay was wanting, the interests of justice, in the light of its strong prospects of success, require condonation to be granted.

The merits

[40] Section 217 of the Constitution requires Organs of State such as the Department, when it procures goods and services, to do so in terms of a system that is "fair, equitable, transparent, competitive and cost-effective". Its purpose is to prevent patronage and corruption, on the one hand, and to promote fairness and impartiality in the award of public procurement contracts, on the other. In order to do so, statutes, such as the Public Finance Management Act 1 of 1999 (the "PFMA"), subordinate legislation made under the PFMA, such as the Treasury Regulations, and supply chain management policies that have to be applied by Organs of State, all give effect to section 217.

[41] In *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others*,[12] Froneman J said of this legal framework that compliance with it was required for a valid procurement process and its components were not mere "internal prescripts" that could be disregarded at whim. The consequence of non-compliance is clear: in *Municipal Manager: Qaukeni Local Municipality and another v FV General Trading CC*,[13] Leach JA held that a public procurement contract concluded in breach of the legal provisions "designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced".

[42] From the facts that I have set out above, it is apparent that no public tendering process was ever held in respect of the SDA or any of the agreements that followed it. The SDA was awarded to VIT after it and two other firms had responded to a closed request for quotations. VIT's quotation was for an amount of R498 000, excluding VAT. It would appear that the purpose of the exclusion of VAT was to ensure that the amount was lower than R500 000: VIT and the Department thought that if the amount was below this figure, an open tendering process did not have to be embarked upon, and a contract could be awarded on the basis of a consideration of the competing quotations.

[43] On this score they were mistaken. Regulation 16A6.1 of the National Treasury Regulations provides that the procurement of goods and services by Organs of State, "either by way of quotations or through bidding process, must be within the threshold values as determined by National

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12 *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para [40].

13 *Municipal Manager: Qaukeni Local Municipality and another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) para [16] [also reported at [2009] 4 All SA 231 (SCA) – Ed]. See too *Premier, Free State and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para [30] [also reported at [2000] 3 All SA 247 (A) – Ed]; *Eastern Cape Provincial Government and others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) paras [8]–[9] [also reported at [2001] 4 All SA 273 (A) – Ed].

Treasury". National Treasury Practice Note 8 of 2007/2008, made in terms of section 76(4)(c) of the PFMA, is intended to "regulate the threshold values within which accounting officers/authorities may procure goods, works and services by means of petty cash, verbal/written price quotations or competitive bids".[14] Section 3.4 deals with procurement above the transaction value of R500 000, VAT included. In such instances, section 3.4.1 provides that "[a]ccounting officers/authorities should invite competitive bids". (There was no suggestion that urgency or emergency circumstances justified a departure from this prescript, and it is not suggested that the procedure for such a deviation was followed.)[15] As a result, the awarding of the SDA on the basis of a request for quotations, as opposed to an open tender process, was unlawful and invalid.

[44] Thereafter, VIT and the Department purported to enter into new agreements on two further occasions before the first cancellation. These related to what VIT and the Department referred to as phase 1A, to the value of R9,8 million, and phase 1B, to the value of R12 888 000. The award of these contracts was unlawful and invalid because their award had not been preceded by an open procurement process in accordance with the required constitutional and legal prescripts. This was the state of affairs that prevailed when the provincial government cancelled the SDA and the agreements that followed it for the first time. I turn now to consider the effect of the settlement agreement.

The settlement agreement

[45] It is necessary in the first place to detail precisely what the settlement agreement purported to achieve in respect of the contractual arrangement between VIT, the Department and the provincial government. It is clear that it is a one-sided document in that all of the benefits that it bestows accrue to VIT, and all of its obligations, including a payment of R22,8 million, fall to the provincial government to meet.

[46] The core provisions of the settlement agreement provided that: (a) the "status quo before the termination of the contract" was "restored"; (b) VIT's staff would be permitted to "resume" their "contractual obligations in terms of the agreement"; (c) the "nature" of the contract would be "re-defined as a transversal term contract" in order for it to comply with the Treasury Regulations; (d) and the contract would be extended by being "rolled-out to provincial departments".

[47] The effect of the settlement agreement was that the unlawful contractual arrangements between VIT and the Department would remain in force, with two important qualifications. First, in an apparent acknowledgement that the arrangement in place was indeed unlawful, the parties agreed to call it something else in order to create the impression that it was compliant

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15 See too *Joubert Galpin Searle Inc and others v Road Accident Fund and others* 2014 (4) SA 148 (ECP) para [79] [also reported at [2014] 2 All SA 604 (ECP) – Ed]: "What emerges from the instruments that I have discussed is that, generally speaking, when the value of the tender exceeds R500 000 a competitive, open procurement process must be followed. It is only in exceptional circumstances that deviation from this norm will be justified."

with the requirements of the Treasury Regulations. Secondly, the parties agreed, not only to the restoration of the *status quo ante*, but to the further extension of the already extended unlawful contractual arrangement. They applied to have this arrangement made a court order.

[48] Two issues arise for determination. The first is the effect of the attempt to "repackage" the arrangement in order to comply with the Treasury Regulations. The second is the effect of having made the settlement agreement a court order and, more particularly, if the settlement agreement was unlawful, whether a court could have made it an order.

[49] In *Gibson v Van der Walt*,[16] Van der Walt had placed bets on credit with Gibson, a bookmaker. Van der Walt lost and owed Gibson money as a result. He undertook to pay by a future date, and Gibson agreed to the proposal. When no payment materialised – and Gibson had rejected the offer of a race horse in payment of the debt – he sued Van der Walt on the undertaking to pay, rather than on the underlying gambling agreement which, being contrary to public policy, was unenforceable. Fagan JA held that the undertaking was also unenforceable, setting out the test as follows:[17]

> "The test in such a case, to my mind, should be whether the Court is asked, in effect, to enforce the unenforceable claim; in other words, is the later transaction on which the plaintiff relies merely a device for enforcing his original claim, is it merely his original claim clothed in another form or with some term or condition added to it, or a ratification or even novation of the original claim which leaves its essential character unchanged; if so, the plaintiff must fail."

[50] I do not believe that calling the contractual arrangement between VIT and the Department a "transversal term contract" altered the fact that it is unlawful and invalid because of non-compliance with procurement prescripts required by the law. *Gibson v Van der Walt* is authority for the proposition that if the underlying contract suffers from a defect, such as unenforceability, dressing it in different garb will not alter that fact. In other words, the settlement agreement has had no effect on the unlawfulness of the contractual arrangement between VIT and the Department: it remained an unlawful agreement whatever the parties chose to call it.

[51] I turn now to the second issue – the effect of the settlement agreement having been made a court order. The first point that must be made is an obvious, but necessary, one: the parties asked the court to make their settlement, that purported to confirm the continuation and extension of their unlawful agreements, an order that could, presumably, be enforced by execution or contempt proceedings – to give it the court's stamp of authority.

[52] In *Eke v Parsons*,[18] a contractual dispute between two private individuals, the Constitutional Court considered the nature and effect of settlements being made court orders. Madlanga J held that first, it is not anything agreed to by the parties that can be made an order: the order must be

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16 *Gibson v Van der Walt* 1952 (1) SA 262 (A) [also reported at [1952] 2 All SA 1 (A) – Ed].
17 At 270A–B.
18 *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).

"competent and proper" in the sense that it relates to the dispute with which the court was seized.[19] Secondly, it may not be objectionable from either a legal or a practical perspective: its terms, in other words, must "accord both with the Constitution and the law" and they may not be "at odds with public policy".[20]

[53] A similar issue arose, but in a public law context involving public procurement by an Organ of State, in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*.[21] The Municipality awarded a contract to Asla Construction without having complied with the required procurement processes. It later applied to set aside its own decision, but did so only after having delayed unreasonably. It failed to set aside the award on this basis in the Supreme Court of Appeal but, after its appeal had been argued in the Constitutional Court, the parties settled their dispute. The Municipality brought an application for leave to withdraw its appeal and to have the settlement agreement made an order. That settlement confirmed that Asla Construction would continue with the disputed contract, and also included in it other contracts unrelated to the dispute before the court.

[54] In these circumstances, the court refused to make the settlement agreement an order. The contract awarded to Asla Construction remained unlawful and, the court held, that "inconsistency with the Constitution cannot be cured by a settlement agreement". If such an order was made, it would be inconsistent with the Constitution.[22]

[55] So too in this case. For the reasons I have given above, the contractual arrangement between VIT and the Department was unlawful. The settlement agreement sought to give effect to that unlawful arrangement and should, as a result, not have been made an order. It was correctly rescinded by the court below.

The order

[56] I make the following order:

The appeal is dismissed with costs, including the costs of two Counsel.

(Mokgohloa, Molemela, Wallis JJA and Koen AJA concurred in the judgment of Plasket JA.)

For the appellant:
PW Makhambeni instructed by *Makhubela Attorneys* c/o *Kgomo Attorneys*, Mahikeng and *Symington De Kock*, Bloemfontein

For the respondents:
V Soni SC and *H Cassim* instructed by *ME Tlou Attorneys*, Mahikeng and *Moroka Attorneys*, Bloemfontein

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19 Para [25].
20 Para [26].
21 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* (fn 3).
22 Para [30]. See too *Shabangu v Land and Agricultural Development Bank of South Africa and others* [2019] ZACC 42; 2020 (1) SA 305 (CC); 2020 (1) BCLR 110 (CC) para [33]; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and others* [2018] ZACC 33; 2019 (5) SA 1 (CC); 2019 (2) BCLR 165 (CC) para [13].

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) NOT REVISED.

15/07/2020
DATE

SIGNATURE

CASE NO: 27286/2015

In the matter between:

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
MINISTER OF TRANSPORT	Second Applicant
and	
OPPRESSED ACSA MINORITY 1 (PTY) LTD	First Respondent
(formerly known as AFRICAN HARVEST STRATEGIC INVESTMENTS (PTY) LTD)	
UP-FRONT INVESTMENTS 65 (PTY) LTD	Second Respondent
AIRPORTS COMPANY OF SOUTH AFRICA SOC LIMITED	Third Respondent

PYBUS THIRTY-FOUR (PTY) LTD	Fourth Respondent
AIRPORTS MANAGEMENT SHARE INCENTIVE SCHEME COMPANY (PTY) LTD	Fifth Respondent
LEXSHELL 342 INVESTMENT HOLDINGS (PTY) LTD	Sixth Respondent
TELLE INVESTMENTS (PTY) LTD	Seventh Respondent
ADR INTERNATIONAL AIRPORTS SOUTH AFRICA (PTY) LTD	Eighth Respondent
G10 INVESTMENTS (PTY) LTD	Ninth Respondent
MINISTER OF FINANCE	Tenth Respondent

JUDGMENT

YACOOB J:

1. This is, unusually, an application for rescission of an order obtained by consent, encapsulating an agreement between certain of the parties, alternatively an application for leave to appeal against the order. It is a chapter in more wide-ranging litigation.

2. The applicants are the Government of the Republic and the Minister of Transport. I shall refer to them collectively as “the government”. The third respondent, ACSA, makes common cause with the government, although it formally abides these applications. The first and second respondents, who refer to themselves as “the oppressed minorities”, oppose the applications. I shall refer to them as “the minority shareholders”. None of the other respondents participated in these proceedings.

3. The order at issue was made on 01 August 2017 by Matojane J, to settle proceedings brought by the minority shareholders against ACSA and its shareholders, including the government. The order was substituted on 21 December 2017, in an order made by Mudau J, in which the original order was amended by the insertion of an identified referee in the place of the procedure for identifying a referee. This application seeks to set aside both orders. If the original order is set aside the amendment must follow, similarly, if there is no basis on which to set aside the original order, the amended order will also stand.

4. The government contends that it was not party to the settlement agreement that was made an order of court and therefore that the order ought not to have been made against it. It contends also that the agreement is unlawful in that it contravenes provisions of the Public Finance Management Act 1 of 1999 ("the PFMA") and the Companies Act, 71 of 2008 ("the Companies Act"). These contentions form the basis of both the applications for rescission and leave to appeal.

5. The minorities, on the other hand, contend that government's conduct in challenging the order encapsulating the settlement agreement is particularly egregious because government has a particular duty to obey court orders. They seek punitive costs against government. They contend that there is no basis for either the application for rescission or the application for leave. In addition, the minorities suggest that government does not have the right to challenge the order. They also contend that condonation should not be granted for the lateness of the applications.

6. In terms of the order, ACSA is to acquire the shares of the minority parties at a price to be determined by a referee, as at the date of the order. The order also sets out parameters to be used by the referee in carrying out the valuation. The substituted order recorded that ACSA and the minorities had identified Riscura Solutions (Pty) Ltd ("Riscura") as the referee.

Factual Background

7. The oppressed minorities approached the court in terms of section 163 of the Companies Act, on the basis that they were prejudiced both by ACSA not being listed on the stock exchange by way of an Initial Public Offering, and also by ACSA being conducted in a manner they contend is not commercially sound. Their application was opposed by both ACSA and the government, and was set down for hearing on 01 August 2017.

8. In the days leading up to the hearing, as is often the case, the parties, in particular ACSA and the minorities, began negotiating a settlement. This settlement did not include the government, although the minorities contend that government in fact "brokered" the settlement. The settlement was, according to the government and ACSA, not finally agreed to and at the hearing of the matter ACSA applied for a postponement. The postponement was refused. Counsel for the government indicated that the settlement appeared to be between ACSA and the minorities, and not government. Counsel for ACSA made submissions on certain aspects of the draft order that was handed up. Thereafter, the order was made an order of this court.

9. The application for leave to appeal was filed on 17 July 2018 and the application for rescission on 25 July 2018. The affidavit annexed to the application for rescission seeks condonation for the late filing of the application, although there is no prayer for condonation in either notice.

10. In the meantime Riscura had completed its determination and there is at present pending both an application to have the court adopt the determination in terms of section 38 of the Superior Courts Act, 10 of 2013, and to order ACSA to take transfer of and pay for the minorities' shares in terms of the determination,[1] and a counter-application application to set aside Riscura's determination. The application to adopt the determination was filed before the applications for leave to appeal and rescission.

11. According to the government, the reason for the filing of its applications late is that, due to the change of government in February 2018, the new Minister of Transport only became aware of the outcome of the original application when the application to adopt the determination was brought. The deponent to the government's affidavit states that she was "unable to ascertain" whether proper instructions were obtained from the government at the time the order was made. This is the closest the government comes to implying that there may have been, at best, some incompetence or lack of proper scrutiny on its part.

[1] The total outlay for these shares would amount to more than R700 million.

12. The minorities, unsurprisingly, submit in this regard that the government is bound by the decisions of its predecessors, and cannot without more rely on being new incumbents. They suggest that an application for review would have been the appropriate mechanism. They contend also that this application is simply an attempt to avoid the consequences of the unpalatable determination produced by Riscura.

13. I will deal with the question of condonation at the end of this judgment, since the overriding consideration is the interests of justice. What the interests of justice demand depend very much on the merits of the applications for leave to appeal and/ rescission.

14. The government relies on similar grounds for both applications, it is convenient to consider the grounds before determining any appropriate remedy.

Whether there are grounds on which the order may be challenged

15. The government submits that the order is inconsistent with the applicable law on the bases that:

15.1. the agreement affects the government but government was not party to it;

15.2. the court which made the order did correctly apply s163 of the Companies Act;

15.3. the agreement requires ACSA to act in a manner inconsistent with

15.3.1. the PFMA,

15.3.2. the Companies Act, and

15.3.3. its Memorandum of Incorporation ("MOI");

15.4. ACSA did not have authority to enter into the agreement;

15.5. the agreement and the resulting order consequently require government to act in a manner inconsistent with the applicable law, in particular the PFMA.

Was government party to an agreement that affects it?

16. The government contends that the agreement and order clearly affect it, as they require ACSA to buy shares from the minorities for an unspecified amount of money, committing ACSA regardless of whether ACSA is able to meet the commitment, and in a manner which may impact negatively on the government.

17. It is clear from the terms of the order and the transcript of court proceedings that government was not part of the agreement and that its legal representative was of the view that the agreement was between ACSA and the minorities and did not affect government. He submitted that government's understanding was that the two parties had come to an agreement that did not affect government's rights, that "we don't understand what has happened this morning" but that "we were persuaded to agree to the draft".

18. The minorities contend that although the agreement was between ACSA and the minorities, the government cannot pretend not to have been part of it because, in essence, the government brokered the agreement, and also did not object to the agreement being made an order of court.

19. In addition they contend that the government does not have *locus standi* to challenge the order or the agreement, as neither has anything to do with the government. In particular, the government does not have any legal interest and cannot bring this application.

20. The minorities' position regarding the government's *locus standi* does not seem to me to have any merit. First of all if the government had no legal interest in the way in which the proceedings were settled, then there was no reason to join the government in the original application, yet this is what the minorities have done.

21. Secondly, it is clear from the MOI and the related statutes that the relationship between ACSA and the government is a closer one than may be the case between a shareholder of a company that is not a public entity and that company. Both the government and ACSA's board have responsibilities that have their bases both in the fact that ACSA fulfils a public function and that ACSA's financial position has an effect on the public purse.

22. The fact that the government was represented and that its counsel expressed to the court the view that the agreement did not affect the government cannot necessarily support an order which may force the government and ACSA to act in a manner that bypasses the legislative provisions that are intended to safeguard public assets and funds, if it later becomes clear that this was a mistaken view.

23. In my view, it is clear that the government both has *locus standi* to bring these applications and is affected by an order which requires ACSA to make a payment that at the time was completely undetermined. The order in effect is a blank cheque which a public entity and therefore government is obliged to honour, regardless on the effect of the fiscus or its compliance with the applicable regulatory framework.

24. As far as the contention that the government was active in brokering the agreement goes, it is not clear from the papers to what extent the government's involvement went, and to what extent the unlimited nature of the agreement was something that the government was privy to before the matter came to court. In any event, whatever the government's involvement on the sidelines, it is the objective effect of the agreement and its objective lawfulness that have to be relevant. Any other approach would subjugate the legal and constitutional provisions put in place to regulate the government's financial activities to the vagaries of those who do not have ultimate responsibility.

25. It is clear from the terms of the order that the government was not a party to the agreement and that the government is at least potentially affected by it.

Section 163 of the Companies Act

26. The government contends that it was not open to the court to make the agreement an order of court because the agreement is a remedy in terms of section 163(2) of the Companies Act which may only follow upon a finding of oppressive conduct in terms of section 163(1). There was no such finding and therefore the court could not make the order.

27. The minorities contend that, where the parties have settled the dispute between them on certain terms, there is no need for the court to make any finding at all.

28. In my view the minorities are correct. Where a dispute is settled, it is common for it to be done on a basis where no finding or admission is made of adverse conduct on the part of one of the parties. In this case, there is no contention that ACSA may not have bought out the minorities in the absence of any court proceedings, had all the appropriate procedures been followed and had the parties wished.

29. There is therefore in my view no merit in this ground.

Compliance with the PFMA

30. ACSA's MOI records that ACSA is subject to the PFMA. The PFMA, too, lists ACSA as a major public entity in schedule 2 of the PFMA.

31. ACSA's board is the accounting authority of ACSA for purposes of the PFMA and is required to exercise "the duty of utmost care" to protect ACSA's assets, and also to manage ACSA's assets and liabilities, and ensure that it complies with the PFMA and other legislation.

32. The contention of the government is that the order requires ACSA to act in a manner inconsistent with the PFMA by buying the shares of the minorities for an undetermined price without applying the safeguards in the PFMA.

33. The government relies first on section 54(2)(c) of the PFMA which requires the Minister of Finance to approve the acquisition or disposal of a significant shareholding in a company.

34. The minorities point out that their shareholding in ACSA is not at all significant, despite the apparently significant value, and that in any event, the section applies to the acquisition or disposal of shares in another company, not in ACSA itself.

35. The wording of the section is clear and I agree the section cannot apply to ACSA shares being acquired by ACSA.

36. The government contends also that the agreement forces ACSA to fall foul of section 66 of the PFMA, which prohibits ACSA from entering into an arrangement that may result in any future financial commitment without the approval of the Board.

37. The minorities contend that the transaction is not necessarily a future financial commitment since it was not known how much ACSA would have to pay and whether it would have to happen over more than one financial year.

38. In my view that is the point. At the time the order was made it was not known what kind of commitment the payment in terms of the order would entail. The section applies to any transaction or arrangement that ***may*** result in binding ACSA to a future financial commitment. Once the possibility exists, the section applies.

The Companies Act

39. The government suggests that section 46(1) of the Companies Act prohibits the buy back of shares unless the board has authorized the buy back by resolution, and it appears that the solvency and liquidity test would be satisfied immediately after the shares have been bought back.

40. The minorities in response contend that the solvency and liquidity test could only be applied after the shares were valued, and that therefore there is no merit in this ground.

41. It is correct that the test could only be applied after the shares were valued. However, to the extent that the order simply requires the valuation to be applied and the buy-back effected without more, it may be that the order requires ACSA to act inconsistently with the law. As the government points out, a court would then have to set aside the acquisition of shares *if* the test was not satisfied.

42. In my view this ground would not have been sufficient on its own to set aside the order as there would still be room for a court to be approached at the time when the test is applied, and if the test would not be satisfied.

ACSA's MOI

43. ACSA's MOI requires a special resolution and/ or a board resolution for certain kinds of transactions, as well as PFMA compliance.

44. In particular, a special resolution is required for the termination or conclusion of any agreement between ACSA and a shareholder.

45. The Minister's[2] approval is also required for the transfer of shares from one shareholder (unless that shareholder is the Minister) to "any party", and the Minister is entitled to set conditions on the transfer.

46. In addition, entering into a transaction that may bind ACSA in a future financial commitment requires not only compliance with the PFMA but also a Special Resolution of Shareholders, which is defined as 75% of the voting shares present at a General Meeting, Shareholders Meeting or by shareholders other than at a meeting.

47. According to ACSA, the agreement was not approved by the Board. An in principle agreement was reached, but it was made clear that ACSA's representatives could not agree without the Board's approval. The Board at its meeting had resolved that a postponement should be sought. The minutes of the Board meeting reflect that the matter would then be discussed with the Minister and shareholders would be informed.

48. However, the basis of the application for postponement was not that ACSA needed time to follow the required processes. Instead, the transcript reflects that the application for postponement was made from the Bar and that counsel gave as a

[2] Of Transport

reason that ACSA had been informed late of the hearing and was not ready to proceed.

49. The minorities deny that they were informed that there was no authority for the agreement to be concluded. They allege that they told ACSA's representatives to ensure that whoever attended the settlement meeting on 31 July 2017 had authority to settle, and that it is not open to ACSA so long after the fact to contend that there was no authority. However the minorities' affidavit falls short of alleging that there was any suggestion at the settlement meeting itself that the agreement had been authorised. In fact, the affidavit glosses over the meeting itself, and relies on the fact that ACSA had been told before the meeting to ensure that authority was obtained, for the conclusion that there was in fact authority.

50. In addition, after the meeting ACSA's representatives emailed a draft to the other parties' representatives, saying that it had been "finished", which in context apparently means "furnished" to their client (ACSA) for "their consideration and feedback later this afternoon". So, it is clear that even after the meeting the minorities' representatives were aware that ACSA had not approved the draft order, and therefore that ACSA's representatives did not have the authority to do so.

51. ACSA's counsel's conduct on the morning of the hearing, in seeking a postponement on the pretext of not being ready to argue, also could not have furthered anyone's belief that ACSA had properly authorised a settlement in the terms that the minorities say had been authorised.

52. Taking into account that Mr Mathopo afterwards made submissions on the terms of the order, at best for the minorities there was some doubt. There does not appear to have been a clear indication of authority, contrary to the minorities' submission and assertion.

53. Not only was there no Board resolution, there does not appear to have been a special resolution, nor was there consent by the Minister. The consistency of the order with ACSA's MOI is therefore at least in doubt.

54. The order permits, or even requires, the bypassing of the requirements set out in the MOI, as well as the PFMA.

55. In these circumstances then, the order is inconsistent with the applicable regulatory framework and the question arises what the appropriate remedy is.

Review

56. The minorities submitted that the appropriate steps to be taken by the government or ACSA are to bring an application to review either the decision to consent to the Court order, or, if the valuation results in a transaction that is inconsistent with the PFMA or the Companies Act, to review the valuation by Riscura.

57. The first contention, that the decision to consent must be reviewed, holds no water. Firstly, even if there was consent, reviewing it would not automatically result in the

court order falling away. For the very reasons which the minorities submit that the court order is not open to challenge, the order itself will stand until it is set aside. Proceedings would have to be brought to set aside the court order in any event. There is no obligation to set aside the underlying agreement first.

58. As for the second submission, for the reasons I have set out above, this may be valid for the requirements of the Companies Act. However the PFMA requires its provisions to be applied even if the transaction *may* implicate the relevant section. This is consistent with the higher level of scrutiny required when public funds are at issue.

Government's obligation to obey court orders

59. The minorities' contention that the government's obligation to obey court orders is fundamental to the supremacy of the Constitution and the rule of law is irrefutable. Similarly the submission that government's duty towards the courts and other litigants requires it to treat both the courts and other litigants with the respect the Constitution requires.

60. However, these contentions cannot be used to avoid judicial oversight of government conduct, and to force compliance with an order which results or may result in illegality. While the government must treat the courts with due respect, the government is as much at liberty as any other party to follow the full process of the courts when this is indicated as necessary.

61. If the government had brought these proceedings simply to delay compliance with an entirely unexceptionable order, sought and obtained in circumstances which did not raise the questions the one under scrutiny in this judgment does, the minorities' contentions may have been apposite. As it is, in this case the government followed the appropriate procedure in dealing with a problematic court order. It did not simply ignore it, or comply with it regardless of the legalities or otherwise that may result, but sought to follow the correct processes in order to deal with it.

62. The government cannot be bound by its obligations to the rule of law and the Constitution to follow a court order that results in consequences which may not be lawful.

Rescission or leave to appeal

63. The application for leave to appeal in this case also raises difficulties, both because it was brought late (as was the application for rescission) but also because it was brought before a different judge. It is true that when an allocation was sought, the government brought to the attention of the office of the Deputy Judge President that it may be appropriate for Judge Matojane to deal with the matter. However, the application for leave was not brought directly to the attention of Judge Matojane which would have ordinarily been the case.

64. In view of the conclusion I have eventually reached, I deal first with the rescission question.

65. There are clearly defined and limited circumstances in which rescission of a judgment is permitted. This is because of the need for certainty in the law, and because a court, once it has made a decision, is *functus officio*.

66. The Uniform Rules make provision in Rules 31[3] and 42 for rescission of judgments and orders. The common law also provides for rescission.

67. In its founding affidavit, the government relies explicitly on Rule 42(1)(a) and on the common law to found its application for rescission.

68. Rule 42(1)(a) permits rescission where an order was erroneously sought or erroneously granted in the absence of any party affected thereby.

69. Accepting that the government was affected by the order, the order was not granted in the absence of the government. The government's counsel was present, and expressed himself to be of the view that the order had nothing to do with his client. His view was incorrect, but he was present and therefore the government was present.

70. In the founding affidavit the government contended that Rule 42(1)(a) applied because the order was erroneously granted as it was not competent for the court to grant the order. This may have been the case but the Rule also requires the absence of the party, which was not the case here.

[3] For rescission of default judgments.

71. The government is then left with the common law.

72. The grounds on which a judgment may be rescinded at common law are fraud; *justus error*;[4] where new documents have been found; where default judgment had been granted, and on the grounds of *justa causa* where a consent judgment is not supported by a valid agreement.[5]

73. In the founding affidavit the government proceeded on the basis that rescission under the common law requires the applicant for rescission to merely show good cause, a reasonable explanation, and that there is a *bona fide* defence. Again, these are the requirements for rescission where judgment has been granted on default, in the absence of the affected party. Despite this, what is entirely clear from the affidavit is that the fundamental basis of the application is the illegality of the order and its consequence.

74. In its heads of argument, the government proceeded to submit that the real basis of the common law rescission ground is *justus error*, on the basis that the error vitiated true consent. The consent allegedly vitiated is that of ACSA, because ACSA's officials and representatives lacked authority to consent. However there is no basis for a conclusion that either ACSA or its representatives were labouring under any error regarding whether there was authority, particularly in the light of the application for postponement.

[4]In very limited circumstances.
[5] *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC)

75. The government also submitted in its heads of argument that the order should be set aside because it is just and equitable to do so, that is, that there is good cause. For this the government relied on the power of the Court in terms of section 172(1)(b) of the Constitution, read with section 173. That is, the power to grant any order that is just and equitable in a constitutional matter, and the power of the court to regulate its own process and develop the common law in the interests of justice.

76. This, in the context of the problematic nature of the order as set out above, is in my view the most compelling ground put forward by government for the rescission, and also the only one with any real merit. However, it is not one that appears to have been relied upon with any regularity in the courts, if at all.

77. At the hearing of the matter the government submitted that it was appropriate for the order to be set aside, whether by means of rescission or by means of an appeal, because the court granting the order did not comply with its duties to scrutinise the agreement, and to give reasons (although the court was not asked for reasons) and because the settlement agreement was not consistent with the law, both because of a lack of authority and because of substantive non-compliance.

78. Again, and possibly because the focus was on the incompetence of the order, it was not entirely clear to me what the basis would be of the Court's power to rescind the order in those circumstances. Those grounds ought perhaps more properly to have been raised in an application for leave to appeal before Judge Matojane. Nevertheless, as I have already found, they do show that the order is impeachable,

and, being seized with the matter, I must decide what the consequence ought to be.

79. The unceasing evolution of the government's argument may be the basis of the minorities' submission at the hearing of the application, that the government does not make it clear whether it relies on the Rules or the common law for its application for rescission. In fact the government states clearly that it relies both on Rule 42(1)(a) and on the common law. But the government's reliance on the common law did evolve quite substantially. Nevertheless, it was clear by the time of the hearing what the basis of the government's attack was, and the minorities cannot complain of not having had sufficient notice that the fundamental basis for the application for rescission is that the order is unlawful and it is therefore just and equitable to set it aside. In addition the factual bases of the arguments were comprehensively ventilated in the papers.

80. In *Medicines Control Council and others v Adcock Ingram and others*,[6] Bertelsmann J found it appropriate to set aside an order granted by consent because the settlement was *ultra vires* and lacked legality. The applicant for rescission did not have the statutory authority to enter into the particular settlement agreement at issue. This was the only basis on which the court found it appropriate to rescind the order.

[6] An unreported judgment of Bertelsmann J, case number 57976/11; 15 November 2011.

81. In *Eke v Parsons*[7] the Constitutional Court confirmed that a settlement agreement must be lawful and a court must satisfy itself that the order is competent and proper. Its terms must be consistent with the Constitution and the law. However, that case dealt with an appeal, and was considering grounds on which an order making a settlement agreement an order of court may be appealed. It did not deal with the question of rescission.

82. The Ciskei High Court in *MEC for Economic Affairs, Anvironment and Tourism v Kruisenga*[8] considered that a judgment which owes its existence to a compromise between the parties or an agreement to consent to the judgment is subject to the validity of the agreement. It found that the absence of a binding agreement may be *justa causa* for setting aside the judgment since the court would not have granted the order if it had known there was no binding agreement. However in the circumstances of that case the court dismissed the application for rescission. The issue in that case was the attorney's authority to settle.

83. The SCA in the appeal *MEC for Economic Affairs, Environment and Tourism,Eastern Cape v Kruizenga and Another*[9] confirmed that the MEC could not rely on the State Attorney's lack of authority to seek rescission. It upheld the High Court's finding that the MEC was estopped from denying the authority of the State Attorney, but pointed out that estoppel is a defence of justice and equity and a court could disallow a defence of estoppel on the grounds of justice and equity. In that case those grounds did not militate against estoppel.

[7] 2016 (3) SA 37 (CC)
[8] 2008 (6) SA 264 (CkHC)
[9] 2010 (4) SA 122 (SCA)

84. It must be pointed out that these cases deal with the authority of the attorney rather than the statutory authority of the client, which is in my view more fundamental. To the extent that the attorney in this case represented that he had authority to settle, it is vitiated by the lack of statutory authority. In my view the minorities ought to have been aware of the statutory requirements and may well have been taking advantage of the fact that the legal representatives of the government and ACSA had not pointed these out.

85. The Supreme Court of Appeal in *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd*[10] again confirmed that if a court is misled into believing that the parties have consented to a judgment, the judgment must be set aside. However, the court criticised the distinction made in the High Court in *Kruisenga* between judgments passed on the merits of a dispute and judgments not passed on the merits of a dispute. There is no difference, once a judgment or order is granted, between one granted by consent and one granted when the court makes a decision on the merits. The important question is not what vitiates the agreement or compromise between the parties, but what vitiates the judgment itself. The judgment must be dealt with first and on its own merits.

86. In *Minister of Police v Kunene and Others*[11] this division rescinded an order obtained by consent on the basis that there was no authority, despite the ostensible authority of the State Attorney. The lack of authority and the factual lack of consent

[10] 2017 (5) SA 508 (SCA)
[11] [2020] 1 All SA 451 (GJ)

constituted *justa causa* for the rescission of the judgment. The court relied on *Kruisenga* for the proposition that a judgment may be rescinded on the basis of *justa causa*. With respect I agree that *justa causa* may provide a basis for rescission of a judgment but not on the basis set out in *Kruisenga*. The basis has to be that of the requirements of the rule of law and the Constitution.

87. An agreement that is unlawful in the way in which the agreement at issue in this case cannot be allowed to be enforced by the Courts simply because it was agreed to. This would make a mockery of all the safeguards put in place to ensure that public money is dealt with lawfully and carefully. It would also mean that the non-government parties to agreements which are concluded without adherence to the required safeguards would always be able to benefit regardless of what the law provides.

88. The minorities' argument that the government is bound by its predecessors' decisions must also be seen in that light. The government must be bound by the decisions of its predecessors that were lawful at the time they were taken. The proposition cannot be put any higher than that.

89. While I was grappling with this judgment the government placed two further judgments before me, without comment, and with notice to the other parties, on the basis that they were relevant to the issues.

90. The first of these, *Department of Agriculture, Forestry and Fisheries and others v B Xulu and Partners Incorporated and others*[12] dealt again with an attempt to enforce an order that had been made by consent, but which later was repudiated by a government department on the basis that there had been no agreement and no authority to agree to the extent that it had been held out to the respondent that there was agreement. In that case the Department had not been represented in court, and the rescission could be granted in terms of Rule 42(1)(a). That is an important distinction.

91. The second case brought to my attention by the government is a judgment of the SCA, *Valor IT v Premier, North West Province and Others*.[13] The facts of that case are on all fours with the facts of this case. Again there was an agreement to settle court proceedings brought against a government party, this time the North West Province. Again, the government entity baulked at paying too large an amount that was not properly authorised and put its foot down. And again, when applicant sought to enforce the judgment encapsulating the settlement, the Province brought an application for rescission. The application for rescission was brought only as a counter-application, and after a delay that in ordinary circumstances would have been unreasonable.

92. The SCA found that the prospects of success of the rescission application outweighed the unreasonable delay in the Province bringing the application. It also found that the order making the settlement agreement an order of court was

[12] (6189/2019) [2020] ZAwchc 3 (30 January 2020)
[13] [2020] ZASCA 62 (09 June 2020)

correctly rescinded by the court below because the contractual arrangement was unlawful. The settlement agreement would give effect to an unlawful arrangement and should not have been made an order.

93. For the reasons set out above, bolstered by the judgment of the SCA in *Valor IT*, it is plain that not only is rescission permitted in the circumstances of this case, it is required.

94. There is therefore no reason for me to consider whether it is appropriate for me to deal with an application for leave to appeal.

Condonation

95. For the reasons already referred to in the *Valor IT* case, it is clear that condonation must be granted. The interests of justice demand it. If condonation were not granted an unlawful state of affairs would not only continue, it would continue with the imprimatur of the court.

Citation of the Minister of Finance

96. For the reasons already set out in this judgment it is clear that the Minister of Finance has a legal interest in these proceedings.

97. To the extent that the government has not followed the correct processes in seeking to join the Minister, it is not clear to me that, where the government as a whole is a party, and the Minister is, in terms of the Constitution, part of the government, formal joinder needs to be made. The Minister is to all intents and

purposes already before the court, and his citation is clearly simply a matter of convenience to ensure that the matter comes to the attention of his office.

98. To the extent necessary, the Minister is joined to these proceedings.

Conclusion

99. I see no reason why costs should not follow the result.

100. For the reasons set out above, I make the following order:

1. The Minister of Finance is joined to these proceedings as the tenth respondent.
2. The orders granted by this court on 1 August 2017 and 21 December 2017 under the case number 27286/15 are rescinded.
3. The first and second respondents are to bear the costs of this application jointly and severally.

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

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Counsel for the 1st & 2nd respondents:	J Wasserman SC & G Girdwood SC
Instructed by:	Falcon and Hume Inc
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Instructed by:	Edward Nathan Sonnenbergs
Date of hearing:	30 October 2019
Date of judgment:	15 July 2020