



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 610/2021

In the matter between:

**MINISTER OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

FIRST APPELLANT

**DIRECTOR-GENERAL:
DEPARTMENT OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

SECOND APPELLANT

**DEPARTMENT OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

THIRD APPELLANT

and

**SIMEKA GROUP (PTY) LTD
REGIMENTS CAPITAL (PTY) LTD
LEMASCENE (PTY) LTD
SERENDIPITY INVESTMENTS SA LLC
SIMEKA INVESTMENT GROUP (PTY) LTD**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT**

Neutral citation: *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* (610/2021) [2023] ZASCA 98 (14 June 2023)

Coram: PETSE DP and MAKGOKA and MOTHLE JJA and KGOELE and WINDELL AJJA

Heard: 16 August 2022

Delivered: 14 June 2023

Summary: Constitutional and administrative law – procurement process – legality review – self-review by an organ of state – proper approach to establish whether irregularities occurred as a matter of fact – evaluation whether irregularities constitute tenable grounds of review – determination of whether there had been deviation from procurement prescripts and, if established, the materiality of such deviation from legal requirements of procurement process – determination of whether the manifest purpose sought to be served by the procurement process had been substantially accomplished.

Delay in instituting a legality review – whether delay unreasonable and if so, whether delay should nevertheless be condoned – legality self-review not subject to strictures of s 7(1) of Promotion of Administrative Justice Act 3 of 2000 – nevertheless legality self-review required to be instituted without unreasonable delay – whether delay is unreasonable is a question of fact – whether unreasonable delay should be condoned entails a value judgment dictated by constitutional values.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J, sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the high court is set aside and in its place is substituted the following order:
 - '1 The late institution of the application for a legality review is condoned.
 - 2 The award of the tender for the appointment of a development partner for the design, construction, operation, maintenance and financing of a suitable and sustainable office and residential accommodation for South African diplomatic missions in Manhattan, New York City, New York pursuant to a request for proposal (DIRCO 10/2015/16) to the joint venture comprising Simeka Group (Pty) Ltd and Regiments Capital (Pty) Ltd is declared constitutionally invalid and therefore unlawful.
 - 3 The award of the tender referred to in paragraph 2 of this order is reviewed and set aside.
 - 4 The Project Management Agreement concluded between the Department of International Relations and Cooperation and Lemascene (Pty) Ltd pursuant to the award of the tender is declared to be of no legal force and effect, reviewed and set aside.
 - 5 The respondents, jointly and severally, are ordered to pay the costs of this application, including the costs of two counsel where so employed.'

JUDGMENT

Petse DP (Makgoka and Mothle JJA and Kgoele and Windell AJJA concurring):

Introduction

[1] Since the advent of our constitutional democracy, the procurement of goods and services by all organs of state must now comply with certain stringent constitutional and statutory procurement prescripts. The *fons et origine* of those prescripts is s 217 of the Constitution.¹ Section 217(3), in particular, decrees that the State must provide legislative measures to give effect to the requirements of s 217(1) of the Constitution. As a result, this constitutional decree gave birth to two important pieces of legislation, the first being the Public Finance Management Act² and, the second, the Preferential Procurement Policy Framework Act.³

[2] This appeal is one of the multiple cases, too many to enumerate, that have served before this Court since the advent of the constitutional order ushered in by the Constitution.⁴ The dispute in this appeal has its genesis in the award of a tender by the third appellant, the Department of International Relations and Cooperation (the Department), to a joint venture comprising the first respondent, Simeka Group (Pty) Ltd (Simeka Group), and the second respondent, Regiments Capital (Pty) Ltd (Regiments Capital), on 17 May 2016.

¹ Constitution of the Republic of South Africa, 1996.

² Public Finance Management Act 1 of 1999.

³ The Preferential Procurement Policy Framework Act 5 of 2000.

⁴ At first the Interim Constitution of the Republic of South Africa Act 200 of 1993 and later the Constitution of the Republic of South Africa Act 108 of 1996.

[3] Briefly, the tender was for the appointment of a development partner for the design, construction, operation, maintenance and financing of a suitable and sustainable office and residential accommodation for South African diplomatic missions in Manhattan, New York City, New York in the United States of America (the USA). The substantive question in this appeal ultimately turns on whether the award of the tender to Simeka Group and Regiments Capital as a joint venture by the Department was constitutionally valid. For convenience, Simeka Group and Regiments Capital shall be referred to collectively as the Joint Venture. As alluded to above, there is an ancillary question that requires determination, namely whether there was an inordinate delay by the Department in instituting its legality review and, if so, whether such a delay is inexcusable.

[4] The Department, together with the first appellant, the Minister of International Relations (the Minister) and the second appellant, the Director-General of the Department (the Director-General), as co-applicants in the Gauteng Division of the High Court, Pretoria (the high court) contended that the award of the tender to the Joint Venture was fraught with multiple material irregularities that rendered the award unconstitutional and unlawful. Consequently, they sought an order declaring the award constitutionally invalid and unlawful and, as a consequence, reviewing and setting it aside. Because of the identity of interest amongst the three parties, the Minister, the Director-General and the Department shall, for convenience, be referred to collectively as the government parties. However, whenever the context dictates otherwise they will be identified by their individual appellations.

[5] The third respondent, Lemascene (Pty) Ltd (Lemascene), fourth respondent, Serendipity Investments SA LCC (Serendipity) and fifth respondent, Simeka

Investment Group (Pty) Ltd (Simeka Investment), resisted the grant of the relief sought by the government parties.

[6] I pause here to mention that Lemascene, which was specifically incorporated for this purpose was, on the one hand, designed to implement the South African part of the project. On the other hand, Serendipity which is a company incorporated in the USA was established to carry out the USA's portion of the project.

[7] In the event, the high court (per Hughes J) held that the government parties' delay in instituting the review proceedings was: (a) inordinate; (b) the explanation proffered for the delay was woefully inadequate; and (c) the delay itself was unreasonable. Accordingly, the high court declined to condone the delay and thus dismissed the application with costs, including the costs of two counsel. Thus, the government parties were non-suited solely on the basis of delay. Indeed, the high court called into question the bona fides of the government parties in instituting their legality self-review, and opined that the institution of the review application was actuated by ulterior motives. It further held that the 'Department [sought] to evade its constitutional obligation by way of a self-review' in order 'to avoid a declaration that [the Department] is responsible for fruitless and wasteful expenditure'. On 14 May 2021 the high court granted the government parties leave to appeal to this Court, hence the present appeal.

Factual background

[8] As alluded to above, on 4 March 2016 the Department issued a Request for Proposals (the RFPs) for the appointment of a development partner for the design, construction and financing of suitable and sustainable office and residential

accommodation for the South African diplomatic missions in the USA. This was pursuant to an advertisement placed by the Department in the Government Tender Bulletin requesting proposals. More specifically, the Department made it perfectly clear that it sought to enter into what it termed a 'long term lease' or, in the alternative, a 'lease to buy property' option, with a South African incorporated entity that had 'presence or collaboration' in New York and 'able to finance, procure and maintain accommodation and act as landlord to the Government' of the Republic of South Africa.

[9] To achieve the Department's objective, prospective bidders were explicitly requested to 'identify and secure land' – self-evidently in Manhattan, New York City – and to 'design and develop or redevelop' such land in accordance with the Department's tender specifications. And, beyond this point, the successful tenderer would be required to operate, manage and maintain the facilities. This entailed, as expressly required by the RFPs, that the successful tenderer was expected to 'raise the required funding to finance both the capital and operational costs of acquiring and managing the facilities' for the beneficial use of the Department.

[10] The process for accepting any responsive bid entailed the following:

- (a) bids would be screened to determine whether they complied with the requirements of the RFPs, which, inter alia, were:
 - (i) that each bidder should provide audited financial statements for the immediate past three years;
 - (ii) in the case of a Joint Venture or Consortium, each one of the parties forming part of the Joint Venture or Consortium would be required to provide audited financial statements;

- (b) bidders were required to provide proof that they would be able to raise the required capital to fund the project;
- (c) as required by Treasury Regulations with respect to procurement of goods and services for organs of state, the bids would be evaluated by the Bid Evaluation Committee (BEC) and if they met the required threshold, they would then proceed to the Bid Adjudication Committee (BAC) which was tasked with the responsibility of adjudicating the bids to determine if they met the requirements of the bid as required by the RFPs.

[11] Presumably, because of the magnitude of the scope of the work required in terms of the RFPs and the substantial financial injection that the project entailed, only two bids were received by the Department. The one bid was that of the Joint Venture whilst the other was received from a consortium comprising Lephuthing Investment CC and Menzibali Construction CC (Lephuthing/Menzibali Construction). On 16 May 2016, and after due consideration of the two competing bids received, the BEC concluded that the bid submitted by Lephuthing/Menzibali Construction was non-responsive. It was, as a result, disqualified. Instead, the BEC recommended the bid submitted by the Joint Venture. It bears mentioning that the Lephuthing/Menzibali Construction consortium was disqualified solely on the basis that it had not submitted audited financial statements of the parties comprising the consortium. Curiously, the Joint Venture, too, failed to meet this express requirement of the RFPs and yet it was allowed to proceed to the next stage of the process ostensibly because the BEC was satisfied with the Joint Venture's proposal with reference to both its financial and capability attributes. I shall revert to this aspect later.

[12] As already indicated above, the BEC recommended to the BAC that the Joint Venture be awarded the contract for the project envisaged in the RFPs. For its part, the BAC accepted the recommendation and, on 16 May 2016, forwarded its own recommendation to the Director-General, further indicating that it 'concurs with the recommendation' of the BEC.

[13] In addition, the BAC recommended that 'the Project Team travels to New York to conclude the selection process of the three (3) shortlisted site[s]; supported by the officials from the missions through site inspection'. The Director-General accepted the recommendation and awarded the tender to the Joint Venture. Consequently, on 17 May 2016, the Director-General wrote to the Joint Venture in accordance with a draft letter prepared for him by the BAC – awarding the tender to the Joint Venture, advising the latter that it was appointed as 'the preferred bidder for the ... project'.

[14] It is apposite at this juncture to emphasise that the RFPs made plain that the successful bidder was itself required to provide finance for the construction of the office and residential accommodation as stipulated in the RFPs. There was no doubt that the RFPs contemplated that the Department would become purely a lessee either to hire the accommodation for the duration of the lease, alternatively, the Department would lease the accommodation with a view of purchasing it when the lease ultimately terminated by effluxion of time. Accordingly, no capital outlay of whatever nature would be required from the Department. This is evident from the scope of the work spelt out in the RFPs that the successful tenderer would be required to provide.

[15] Following the award of the tender, a Steering Committee was established comprising representatives of the Department, the Joint Venture and the National Treasury and its primary objective was to monitor the implementation of the project. Its chairperson was Ms Bernice Africa, the Department's Chief Director: Property and Facilities Management. The committee proposed, amongst other things, that the envisaged lease agreement should constitute a finance lease. In terms of s 76(3) of the Public Finance Management Act 1 of 1999 (the PFMA) read with Regulations 13.2.4 and 16 of the Treasury Regulations,⁵ a finance lease requires the approval of the National Treasury. The Treasury Regulations make provision for four categories of approval, namely Treasury Approval I (TA I); Treasury Approval IIA (TA IIA); Treasury Approval IIB (TA IIB) and Treasury Approval III (TA III). Upon being approached to grant the requisite approvals, the National Treasury instead granted exemptions in relation to TA I, TA IIA and TA IIB, stating that the exemptions were granted by virtue of 'the developments that have already taken place'. However, the National Treasury insisted on due compliance with respect to TA III. To this end, the National Treasury required that the Department submit certain documentation, namely:

- (a) the final draft Public Private Partnership (PPP) agreement;
- (b) the final draft nominee agreement;
- (c) the final financial model, including detailed information on contingent liabilities and the impact of exchange rate movements on project cash-flows;
- (d) the PPP contract management plan; and
- (e) documents indicating the preferred bidder's capacity and track record in the financing, design and construction of buildings (American company) and facilities management (South African company).

⁵ The Regulations were published in Government Notice R225, Government Gazette no 27388 dated 15 March 2005.

[16] At the first meeting of the Steering Committee held on 21 June 2016 attended by representatives from both Simeka Group and Regiments Capital on the one hand, and the Department on the other, it was, inter alia, agreed that:

- (a) an offer to purchase the land had been 'verbally accepted by the current owners' and that it was envisaged that a written agreement should be concluded by 30 June 2016 with a deposit of US \$1 million payable within 60 days thereafter;
- (b) that the transaction had by then metamorphosed into a finance lease and that the Department would consider contributing towards the purchase of the land;
- (c) that Simeka Group would represent the Department as the latter's agent in the acquisition of the land with the South African Government in effect becoming the purchaser of the land.

[17] At its subsequent meeting held on 19 January 2017, the Steering Committee agreed that the Department would pay a non-refundable deposit of US \$60 million towards the acquisition of land for the project in terms of a Project Preparation Agreement (the PPA) that was at that stage envisaged.

[18] At this juncture two points of fundamental importance should be made. First, it was by now envisaged that the Department would finance both the acquisition of the land and the construction of the offices and residential accommodation. Second, this development represented a radical departure from what the RFPs had envisaged and required when the project went out on tender. As a rationale for this radical departure from what the RFPs contemplated, it was explained that it would be best for the Government 'to take title of the property for purposes of [diplomatic] immunities and privileges'. The Steering Committee further agreed that:

- (a) the PPA should be submitted by 27 January 2017;

(b) TA III application should be submitted to the National Treasury by 31 March 2017; and

(c) the 'targeted' date for the TA III approval was 30 April 2017.

[19] What happened next was that on 25 March 2017 the Government, represented by the Department, on the one hand and Lemascene and Regiments Capital on the other, concluded the PPA. In terms of clause 4.1 of the PPA, Lemascene would represent the Government and, as the latter's agent, identify potential project sites and 'enter into negotiations with owners [of land]' and thereafter 'present such [p]roject [s]ites in their order of priority to the Department' for it to identify a preferred site of its choice. Following this, Lemascene would then 'procure ... the Land Purchase Agreement' to be concluded between Lemascene and Serendipity as agents for the Department. The PPA explicitly provided in clause 4.5 thereof that Lemascene and Serendipity 'shall have no beneficial interest or rights nor assume any obligations in terms of or in the Land Purchase Agreement or the chosen site ... ' This meant that the Department would be the sole party to purchase the land and generally fund the project. This was, of course, at variance with the explicit requirements of the RFPs that provided that the successful tenderer would solely bear such an obligation.

[20] Clause 7 of the PPA, inter alia, provided that '[t]he Department shall make an advance payment of US\$ 9 000 000.00 (nine million US Dollars), representing ... twenty per cent (20%) of the purchase price of the Project Sites ... to Lemascene for the execution of the Preparatory Work' which is inclusive of the payment of a deposit of US \$5 million. It bears mentioning that the total purchase price of the property in

terms of the agreement concluded on 29 June 2017 between Serendipity – in its representative capacity – and the land owners was US \$47 850 000.

[21] On 29 August 2017, and as explicitly provided for in the PPA, the Department acting in collaboration with Lemascene, prepared a letter under the hand of its then Director-General addressed to the National Treasury in terms of which an application was made for the TA III approval. In support of its application, the Department provided the National Treasury with a report in terms of Treasury Regulation 16.5.6. The Department also expressed its confidence as to the feasibility of the project as well as its 'strategic operational and financial benefits ownership' that it had 'interrogated thoroughly', emphasising that the project 'would provide value for money for [the] Government'. The Department, being overly confident of the viability of the project, proposed to the National Treasury that it 'be afforded the opportunity to present the project to the National Treasury colleagues on 11 September 2017'.

[22] But there was a new twist of events that ultimately scuppered the entire project. In the wake of allegations that had enjoyed wide-spread publicity to the effect that a member of the Joint Venture, ie Regiments Capital, was associated with a notorious family perceived to have corruptly siphoned vast sums of money from the government and more especially from State-owned entities, the National Treasury expressed grave misgivings about granting the required TA III approval.

[23] In order to circumvent and allay what by all accounts had become justifiable concerns raised by the National Treasury, Simeka Group wrote to the Department confirming that it had taken note of the 'concerns raised by the National Treasury

committee' that had convened to consider 'the TA III approval application of the project'. It then proposed that Regiments Capital should withdraw from the Joint Venture so that Simeka Group could then proceed with the project on its own. This proposal found favour with the Department. Pursuant thereto Simeka Group, Regiments Capital, Lemascene and Serendipity concluded a termination agreement during December 2017 in terms of which Regiments Capital terminated the Joint Venture. Regiments Capital further undertook to, inter alia: (a) relinquish any and all of its rights, title and interest in the project; and (b) irrevocably procure the resignation of directors nominated by it to the board of directors of Lemascene.

[24] Although the sole objective of the termination agreement was to enable Simeka Group, as an untainted entity, to proceed with the implementation of the project to its intended conclusion, the National Treasury was still not convinced and, as a result, refused to grant TA III approval. The entrenched position taken by the National Treasury in refusing to grant the TA III approval precipitated a crisis for both the Department and Simeka Group. In an endeavour to extricate itself from the resultant quagmire, the Department consulted the State Attorney who, on 29 June 2018, wrote to the attorneys representing the respondents indicating, inter alia, that the award of the tender to the Joint Venture was fraught with irredeemable irregularities. Consequently, the Department went on to intimate that it would bring a review application to the high court to have the award of the tender to the Joint Venture declared constitutionally invalid and unlawful. Some three months thereafter this litigation commenced.

[25] On 10 October 2018, the government parties instituted review proceedings in the high court seeking the following relief:

- '1 Declaring the award of the tender for the appointment of a development partner for the design, construction, operation, maintenance and financing of a suitable and sustainable office and residential accommodation for South African diplomatic missions in Manhattan, New York City, New York (DIRCO 10/2015/16) to the joint venture comprising the first and second respondents to be unlawful and / or unconstitutional and /or invalid;
- 2 Setting aside the award of the aforesaid tender to the joint venture comprising the first and second respondents;
- 3 Setting aside the Project Preparation Agreement concluded between the third applicant and the third respondent pursuant to the awarding of the tender to the first and second respondents;
- 4 Directing the first, second, third and / or fourth respondents to repay to the third applicant the Rand equivalent of US \$9 million, together with interest thereon at the prescribed rate of interest calculated from the date of this order to date of payment.'

In this Court, as was the case in the high court, the relief sought in terms of paragraph 4 of the notice of motion was not pursued. Thus, nothing more need be said of this prayer.

[26] As already mentioned, the review application failed before Hughes J who dismissed it solely on the basis of delay. Consequently, the high court did not enter into the substantive merits of the review.

[27] It is timely at this juncture to observe that in its review, the government parties relied on a number of alleged irregularities in the tender process. In particular, they asserted that:

(a) the two parties that had responded to the RFPs were not treated equally in that Lephuthing/Menzibali Construction's bid was disqualified because it had not provided the required audited financial statements whereas the Joint Venture was

not, despite the fact that it too had failed to provide the required audited financial statements;

(b) as for Regiments Capital as a party to the Joint Venture, no financial statements at all were provided;

(c) both the BEC and BAC ignored the requirements of the RFPs in order to favour the Joint Venture;

(d) the Joint Venture failed to meet the RFPs' requirement to provide proof that it had the ability to raise the requisite funding for the project;

(e) once the tender was awarded to the Joint Venture, and pursuant to decisions taken by the Project Steering Committee, the Department was burdened with the obligation to fund the project whereas this should have been the sole responsibility of the Joint Venture in compliance with both the RFPs and the contract concluded between the parties.

Nature of the review

[28] It is helpful at this juncture to get one uncontentious preliminary issue out of the way. The logical point of departure in a matter such as this is to determine whether the review is one to be dealt with under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality. I have above said that the issue is, in the context of the facts of this case, uncontentious. The parties are in agreement that this review falls to be dealt with under the principle of legality,⁶ since it is the Department that seeks to invalidate its own decision. Whilst cognisant that *Gijima* generated widespread interest amongst academic commentators and even

⁶ See, for example in this regard: *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC) (*Gijima*) para 41; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (*Kirkland*).

attracted trenchant academic criticism, it is, however, not necessary for present purposes to say more on that score.⁷

[29] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,⁸ the Constitutional Court said that: 'It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law'.⁹

The Constitutional Court went on to elaborate that:

'... a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* the Supreme Court of Canada held that:

"Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed,

⁷ See, for example, in this regard: C Hoexter 'South African Administrative Law at Crossroads: The PAJA and the Principle of Legality' (2018) *Administrative Law in the Common Law World*, available at <https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paj-and-the-principle-of-legality/>; S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 784; R H Freeman (2019) *Constitutional Court Review* Vol 9, 521-535.

⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374; 1998 (12) BCLR 1458 (*Fedsure*).

⁹ *Fedsure* para 58.

their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source".¹⁰ (Footnotes omitted.)

[30] Almost two years later, in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*,¹¹ the Constitutional Court explained that the principle of legality is 'an incident of the rule of law'¹² which is a founding value of the Constitution itself.¹³ Ngcobo J further clarified the principle of legality in *Affordable Medicines Trust and Others v Minister of Health and Another*,¹⁴ as follows:

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'¹⁵

[31] On this score, it is as well to remember that s 2 of the Constitution decrees that the Constitution is 'the supreme law of the Republic' and that 'conduct inconsistent with it is invalid. In that event, s 172(1)(a) of the Constitution enjoins the courts to declare any conduct inconsistent with it to be invalid. What is clear from this Constitutional imperative is that once a court has found that any conduct is, as a fact, inconsistent with the Constitution, such a court is obliged to declare it

¹⁰ Ibid para 56.

¹¹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674; 2000 (3) BCLR 241.

¹² Ibid para 17.

¹³ The source of this is s 1 of the Constitution which provides that:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) *Supremacy of the constitution and the rule of law.*' (My emphasis.)

¹⁴ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

¹⁵ Ibid para 49.

invalid. It has no choice in the matter. It is therefore against this backdrop that the application by the government parties in the high court seeking the review of the Department's own decision in awarding the contract to the Joint Venture in the first place and the subsequent wholesale variation of the requirements of the RFPs by the Steering Committee, thereby relieving the Joint Venture of its contractual obligations, falls to be considered.

Brief contentions of the parties

[32] In this Court, as in the high court, the overarching contentions of the government parties is that the Joint Venture woefully failed to satisfy even the barest minimum of the criteria prescribed by the RFPs in that:

- (a) the Joint Venture failed to submit audited financial statements for the three years preceding the tender as required;
- (b) that the bid documents were submitted solely in the name of Simeka Group whereas the RFPs dictated that in the case of a joint venture, the parties to the joint venture ought to do so;
- (c) the Joint Venture failed to provide proof of its ability to raise the requisite funding for the project and, instead, only submitted a letter that purported to prove the ability of Simeka Group and the latter's associate shareholders; and
- (d) for what they were worth, the financial statements submitted by the Joint Venture, such as they were, revealed that the Joint Venture lacked the financial ability to perform the project.

[33] Moreover, the government parties contended that the agreement concluded pursuant to the tender was a radical departure from what the RFPs had required and envisaged. Insofar as the delay in instituting the review proceedings is concerned,

upon which the review application faltered in the high court, the edifice of the government parties' case rested on three pillars. First, it was argued that there was no delay, but if there was, such delay was adequately explained, and in any event, not unreasonable. In addition to this, it was contended that the high court's decision to the contrary was due to a misconception of the true facts on its part. Lastly, the government parties submitted that the pervasive unlawfulness in the award of the tender in the first place and the subsequent conclusion of the PPA, militated in favour of the delay being overlooked and for the review and setting aside of the award of the tender to follow as an inevitable consequence.

[34] For its part, the Joint Venture contended that the non-suiting of the government parties solely on the basis of delay is unassailable. With regard to the substantive merits of the review, the Joint Venture submitted that the contention that the 'responsiveness criteria' were not satisfied, thus justifying the setting aside of the award on this basis, has not been established on the papers. Counsel argued that even if they were established, these were neither material nor did they occasion any prejudice to the Department and therefore cannot provide a basis for the award of the tender to be set aside.

[35] It was further submitted on behalf of the Joint Venture that the conclusion of the PPA bore no relevance to the award of the tender and that, in any event, the financial contribution by the Government to the acquisition of the land as envisaged in the PPA was not proscribed by the RFPs. Accordingly, this case requires this Court to determine first and foremost whether there was any non-compliance with the requirements of the RFPs. If so, whether, once established, such non-compliance with the tender requirements as required by the law was material. Of course, the

constitutional and legislative procurement framework and prescripts will be central to the determination of the dispute between the protagonists in this litigation.

Constitutional framework

[36] The logical point of departure in a case such as this is of course s 217 of the Constitution itself. The section 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) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection 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 subsection (2) must be implemented.

Statutory framework

[37] The most relevant legislation in the context of the facts of this case is the PFMA. According to its Preamble, the PFMA seeks, inter alia, to 'regulate financial management in the national and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively'. The object of the PFMA is set out in s 2 thereof. It is 'to secure transparency, accountability, and sound management of revenue, expenditure, assets and liabilities of the institutions¹⁶ to which [the PFMA] applies'. In addition,

¹⁶ Section 3 provides, inter alia, that the Act applies, to the extent indicated, to departments which are defined s 1 of the PFMA to mean 'a national or provincial department or a national or provincial government component.'

s 51(1)(a)(iii) of the PFMA requires that an accounting authority for a department must ensure and maintain 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective'.

Legal approach

[38] It is apposite at this juncture to say something about the proper approach to the role that procedural requirements play in procurement matters. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*,¹⁷ the Constitutional Court disapproved of this Court's approach to procedural requirements when this Court opined that these should 'not be considered on their own merits, but instead through the lens of the final outcome'.¹⁸ The Constitutional Court cautioned that such an approach 'conflates the different and separate questions of unlawfulness and remedy'. It emphasised that '[i]f the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had the procedural requirements been properly observed'.¹⁹ This dictum assumes, in my view, significance in this case for reasons that will become apparent later. The Constitutional Court went on to observe, with reference to international authority,²⁰ that 'deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process'.²¹ The Constitutional Court then proceeded to explain that insistence on compliance with process formalities served a three-fold purpose, viz:

¹⁷ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*Allpay Consolidated*).

¹⁸ *Ibid* para 24.

¹⁹ *Ibid* para 24.

²⁰ Transparency International *Handbook For Curbing Corruption In Public Procurement* (2006) at 35 & 42.

²¹ *Allpay Consolidated* para 27.

- (a) it ensures fairness to participants in the bid process;
- (b) it enhances the likelihood of efficiency and optimality in the outcome; and
- (c) it serves as a guardian against a process skewed by corrupt influences.²²

[39] Insofar as the requirement of materiality is concerned, O'Regan J aptly captured the core of this requirement in *African Christian Democratic Party v Electoral Commission and Others*²³ when she said that in essence the question is 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'.²⁴ And, as already indicated above, the logical starting point in this enquiry is s 217 of the Constitution. On this score, what Moseneke DCJ said in *Steenkamp NO v Provincial Tender Board of the Eastern Cape (Steenkamp)*²⁵ is instructive. The learned Deputy Chief Justice said:

'Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1).'²⁶

Hot on the heels of *Steenkamp*, this Court explained this theme in *Millennium Waste Management* as follows:

'The final Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s217). The section requires that

²² Ibid.

²³ *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006(3) SA 305 (CC); 2006(5) BCLR 579 (CC).

²⁴ Ibid para 25.

²⁵ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

²⁶ Ibid para 33.

the tender process, preceding the conclusion of contracts for the supply of goods and services, must be "fair, equitable, transparent, competitive and cost-effective".²⁷ (Footnotes omitted.)

[40] In similar vein, Schutz JA, in emphasising the importance of adhering to relevant legal prescripts, had occasion to observe in *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd (Firechem)*, that:²⁸

'One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender. One of the results of the adoption of a procedure such as Mr McNaught argues was followed is that one simply cannot say what tenders may or may not have been submitted, if it had been known generally that a fixed quantities contract for ten years for the original list of products, and some more, was on offer. That would deprive the public of the benefit of an open competitive process.'²⁹

[41] Finally, it is necessary to make reference to the National Treasury Regulations issued in terms of s 76 of the PFMA. The Treasury Regulations place a high premium on the need to develop and implement an effective and efficient supply chain management system in regard to the procurement of goods and services. That system is required to be fair, equitable, transparent, competitive and cost-effective as decreed by s 217 of the Constitution. The learned author of *The Law of Government*

²⁷ *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; [2007] SCA 165 (RSA); 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) para 4.

²⁸ *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA); [2000] 3 All SA 247 (A) (*Firechem*).

²⁹ *Ibid* para 30.

*Procurement in South Africa*³⁰ says the following in regard to the underlying rationale for a competitive and fair procurement process:

'One of the primary reasons for the express inclusion of the five principles in section 217(1) of the Constitution is to safeguard the integrity of the government procurement process. The inclusion of the principles, in addition to ensuring the prudent use of public resources, is aimed at preventing corruption.'³¹

[42] Of fundamental importance in the context of the facts of this case is Treasury Regulation 16A which pertinently regulates supply chain management processes in relation to, inter alia, government departments. In *Allpay Consolidated*, the Constitutional Court emphasised, albeit in a difference context, that '[t]he facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-efficiency – may lead to...'.³² As already indicated above, in awarding the tender and pursuant to which the Department concluded the contract and PPA with the Joint Venture, the Department was exercising public power. And as we are here dealing with a self-review by a government department, the principle of legality is the only permissible avenue through which the decisions at issue here may be reviewed. Accordingly, as Madlanga J and Pretorius AJ observed in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited (Sita)*,³³ the pertinent question is:

'[d]id the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.'³⁴

³⁰ Bolton *The Law of Government Procurement in South Africa* 2007.

³¹ Ibid at 57.

³² *Allpay Consolidated* para 43.

³³ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).

³⁴ Ibid para 40.

[43] In this case there was no dispute that the process preceding the award of the tender did not accord with the dictates of s 217 of the Constitution. This is because the BEC and the BAC, both of which were central to the ultimate award of the tender, failed at every turn in conscientiously discharging their constitutional and statutory responsibilities. This then raises the question as to whether the Department acted contrary to the dictates of the Constitution which is the supreme law in this country.³⁵

[44] Before us, lead counsel for the government parties addressed the substantive merits of the review first, and the issue of delay last. In this judgment, I shall adopt the same approach.³⁶

[45] It is timely at this stage to address the substantive merits of the review itself. Two important points in this regard need to be emphasised. First, in a review of administrative action taken under the procurement process, courts are enjoined to assess the evidence that impugns the procurement process to establish whether such evidence justifies the conclusion that any one of the grounds of review has been established. And, as the Constitutional Court held in *Allpay Consolidated*, albeit in a different context, if the reviewing court finds that 'there are valid grounds for review, it must declare the procurement process to be constitutionally invalid and set it aside.'³⁷

[46] What the Constitutional Court said in *Allpay Consolidated* bears repeating. The Constitutional Court stated that:

³⁵ Section 2 of the Constitution decrees that the Constitution 'is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

³⁶ Compare: *South African National Roads Agency Limited v City of Cape Town* [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) para 81.

³⁷ *Allpay Consolidated* paras 44 and 45.

'The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved.'³⁸

[47] In dealing with the substantive merits of the review itself, it will be helpful to set out again in broad terms what the RFPs required of prospective bidders for the tender under consideration in this case. The following represents the key components of the tender gleaned from the RFPs that were not met by the Joint Venture:

- (a) bidders were required to submit audited financial statements for the three-year period preceding the tender;
- (b) the successful bidder was required to acquire the land and provide office and residential accommodation at own cost;
- (c) the prospective bidders were required to demonstrate that they had the requisite financial resources to undertake the project; and
- (d) where a bid is submitted by a consortium or joint venture, each member of the consortium or joint venture was required to submit audited financial statements for the three-year period preceding the bid.

[48] As already indicated in paragraph 10 above, only two bids were received by the closing date. One of them was disqualified at the outset since it had not provided audited financial statements for the preceding three financial years as required. The remaining tender, submitted by the Joint Venture, was referred to the BEC for evaluation. Having considered the bid, the BEC recommended to the BAC that it ought to be accepted. For its part, the BAC, in turn, recommended to the Director-General that the Simeka Group's bid should be accepted. This

³⁸ Ibid para 58.

recommendation found favour with the Director-General who accepted it and thereafter concluded an agreement with Simeka Group.

[49] Against the foregoing backdrop, the complaints raised by the government parties will now be considered. In order to avoid prolixity, not all of the complaints raised against the award will be traversed in this judgment. This judgment will be confined to those complaints that either individually or cumulatively lead to one conclusion that the BEC or BAC or both deviated in material respects from the requirements of the RFPs.

Failure to submit complete set of audited financial statements

[50] Amongst the criteria stipulated in the RFPs, is that set out in clause 7.1.2. It required bidders who submit bids either as a consortium or joint venture, to submit audited financial statements for each member of the consortium or joint venture. Simeka Group does not have qualms with this criterion, nor does it dispute that it failed to provide audited financial statements for the preceding three years. Simeka Group attributes its failure to do so to the fact that it was in the process of changing its auditors. The failure by Simeka Group to meet this requirement was heavily relied upon by the government parties both in the heads of argument and in oral argument before us.

[51] Whilst accepting that Simeka Group failed to submit audited financial statements, counsel for the respondents argued that the BEC required to evaluate the bid elected to overlook this requirement presumably because it 'saw no difficulty with this requirement' for the reason that it considered that the requirements of clause 7.1.2 had been satisfied. Instead the BEC 'urged that the financial statements ... must

be forwarded to Internal Audit for [thorough investigation] of the financial position of the company'. Building on this, it was contended that the BEC must be taken to have either waived this requirement because the provisions of the RFPs permitted waiver, or, alternatively, decided to 'prequalify the Simeka Group' provided that its unaudited financial statements were 'sent to Internal Audit for thorough investigation'.

[52] I do not think that the contentions advanced on behalf of the respondents can avail them. To uphold these contentions would undermine the letter and spirit of s 217 of the Constitution that seeks to ensure that the procurement of goods and services by organs of state is 'fair, equitable, transparent, competitive and cost-effective'. As the Constitutional Court aptly put it in *Allpay Consolidated*:

'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that ... may [be] disregard[ed] at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.'³⁹

[53] In these circumstances counsel's reliance on *Airports Company South Africa v Tswelokgotso Trading Enterprises CC (Airports Company)*⁴⁰ does not assist the respondents. *Airports Company* was concerned with an entirely different issue and the passage upon which counsel relied was made in the context of the facts of that case. Nor is it helpful for the respondents to invoke the case of *City of Cape Town v Aurecon South Africa (Pty) Ltd (Aurecon)*.⁴¹ What the Constitutional Court said in

³⁹ Para 40.

⁴⁰ *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* [2018] ZAGPJHC 476; 2019 (1) SA 204 (GJ) para 28.

⁴¹ *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC).

Aurecon,⁴² was in the context of determining the question whether the delay in instituting the review was unreasonable or not. And the Constitutional Court there, said that since the BEC and BAC were domestic committees mandated by the City itself for purposes of the tender process their knowledge had to be imputed to the City.⁴³

Failure to submit relevant documentation by each member of the Joint Venture

[54] The RFPs required, in terms of clause 7.1.3 thereof, that where a bid is submitted in the name of, for example, a Joint Venture, the bid documents must be submitted in the name of all the parties to the joint venture. Here, the crux of the complaint is that the bid documents were submitted in the name of Simeka Group only, excluding Regiments Capital that was said to be a party to the Joint Venture. In this case, there is no dispute that the bid documents were in the name of Simeka Group only. The submissions advanced by the respondents in contesting this ground are multi-pronged. The first is that the Department itself had, in its letter of 26 April 2018 addressed to the National Treasury, effectively asserted that this ground lacked substance. It was therefore argued that the Department has not explained why it later changed tack in its review application and contended that its acceptance of the bid documents of Simeka Group was an error without explaining how the error came about.

[55] Moreover, counsel for the respondents relied on *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited (Asla)*⁴⁴ in which Cameron J in a

⁴² Ibid para 39.

⁴³ Ibid.

⁴⁴ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC).

minority judgment emphasised that courts '[s]hould be vigilant in ensuring that state self-review is not brought by state officials with a personal interest in evading the consequences of their prior decisions'.⁴⁵ I do not think that the respondents' reliance on the remarks of Cameron J in *Asla* is necessarily helpful for present purpose. What is clear from this passage is that Cameron J's remarks were made in the context of determining whether an unreasonable delay ought to be overlooked. What is of paramount importance is whether there is evidence that the state officials have brought the self-review application for ulterior motives. In this case the conspectus of the evidence, such as it emerged from the record, does not suggest that this is the position. Thus, the passage from *Asla* seized upon by the respondents finds no application in the present context where the issue has solely to do with non-compliance with the requirements of the RFPs which is not in dispute. In *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd*,⁴⁶ this Court was dealing with a similar situation when it stressed that the conduct of the officials who institute a legality review should be scrutinised to ensure that they do not unjustifiably claim high moral ground in circumstances where it is through their own malfeasance that the illegality complained of came about.

The Joint Venture's ability to raise the required funding

[56] Insofar as the Joint Venture's ability to raise the required funding is concerned, the government parties invoked clause 7.1.6 of the RFPs. This clause stipulated, amongst others, that the 'minimum requirements to be met by bidders in order to proceed to the next round of the evaluation process' were 'proven ability to raise the required funding in the form of a financial institution letter'. Allied to this clause are

⁴⁵ Ibid para 139.

⁴⁶ *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* [2021] ZASCA 34; [2021] 2 All SA 700 (SCA); 2021 (4) SA 436 (SCA) para 45.

clause 2, Item 3 of clause 7.2.2 and clause 9.6.5. The latter clauses stipulated that the successful bidder must be 'able to finance, procure and maintain, accommodation and act as landlord to the Government of the RSA' and to 'demonstrate its ability to finance the property acquisition ... at ... own cost and risk' respectively. To that end 'the audited financial statements of the Bidders' would be scrutinised.

[57] The clauses to which reference has been made in the preceding paragraph were no doubt designed to serve at least three critical purposes. The purpose of clause 7.1.6 was to require the bidders to satisfy the Department by way of objectively verifiable information that the bidders had sufficient funds to deliver on what the RFPs contemplated, hence bidders were required to demonstrate their ability to do so. Finally, bidders had to demonstrate their ability to raise the required funding by providing a letter from a financial institution to do so. The letter of 12 April 2016 submitted by the Joint Venture from Rand Merchant Bank (RMB) purported to demonstrate the Joint Venture's ability to raise the required funding. However, at best for the Joint Venture this letter confirmed only one thing, namely that 'Simeka and its shareholders' were long-standing clients of the Firststrand Group and therefore RMB expressed confidence in the ability of Simeka's shareholders 'to provide the requisite equity and deliver the project successfully'.

[58] The government parties contended that the shortcomings in the letter from RMB were palpable. First, the letter said nothing about the ability of the Joint Venture to raise the required funding. Second, on its fair reading, the letter did not purport to confirm that the Joint Venture had the ability to provide the requisite funding having regard to the fact that the project would cost in excess of US \$159 000 000. More fundamentally, argued the government parties, the

conclusion of the PPA represented a radical departure from what the RFPs had required. Consequently, there was in fact no competitive process, so the argument concluded. It was submitted that the terms of the PPA reinforced the notion that the Joint Venture lacked the ability to raise the required funding. It was therefore argued that the cumulative effect of these factors was that the public was deprived of the benefit of an open competitive process. In support of these contentions, the government parties called in aid the decision of this Court in *Firechem*.⁴⁷

[59] The common thread running through the respondents' counter argument is that none of the complaints raised by the government parties has merit. The broad stroke of the argument is that the BEC and BAC had both satisfied themselves that the requirements of the tender had been met. As to the letter from RMB, it was argued that it 'confirm[ed] a number of things', namely that: (a) RMB stated its ability to fund the transaction; (b) RMB was aware of the nature of the Project that it was willing to finance; (c) it was aware that the Project involved Simeka and Regiments Capital as a joint venture; (d) Serendipity had been incorporated; and (e) it knew what was required in terms of funding.

[60] However, what is beyond question is that the RMB's letter did not explicitly state that Simeka Group and Regiments Capital, as parties to the Joint Venture, individually had the requisite ability to raise the required capital. The RFPs required bidders themselves to demonstrate their ability to fund the project and not, as has been seen in this case, the ability of RMB to fund the project. Differently put, the ability required by the RFPs is that of the Joint Venture and not RMB.

⁴⁷ *Firechem* para 30. See also: *Asla* paras 89-92.

[61] As is invariably the case when it comes to procurement of goods and services by organs of state, the RFPs is designed to serve at least two crucial purposes. First, it informs the prospective bidders of what is required of them. Second, it foreshadows the terms of the contract that would be concluded between the organ of state and the successful bidder to be incorporated in the contract. In the context of the facts of this case, there can be no doubt as to what the RFPs required.

[62] This judgment therefore concludes that the Joint Venture was not able to provide what the Department desired and unambiguously required. Furthermore, having regard to the irregularities of which the government parties complain in this litigation, a finding that such irregularities have been established and are material must ineluctably lead to the conclusion that the ensuing contract concluded between the Department and the Joint Venture during May 2016 falls to be declared constitutionally invalid and thus unlawful.

Delay

[63] This then brings me to the issue of delay. Insofar as the substantive merits of this case are concerned, this judgment has already concluded above that the award of the tender was contrary to the dictates of s 217 of the Constitution and the RFPs itself. Coupled with this, is the fact that those intimately involved in the implementation of the project subsequently agreed on something that was fundamentally at variance with the requirements of the RFPs. Therefore, it is now timely to determine whether the admitted delay was, as the high court found, both unreasonable and unexplained. In the event that the delay is found to be unreasonable, it will be necessary to determine whether it should nevertheless be overlooked.

[64] It is as well to remember that here, we are dealing with a legality review which is not subject to the time constraints prescribed by s 7(1) of PAJA.

[65] Nevertheless, even before the advent of our constitutional order and the enactment of PAJA, our courts had long held that reviews must, as a general rule, be instituted without undue delay. The rationale for this time-honoured requirement was explained by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others*⁴⁸ as follows:

'It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would 'validate' the invalid administrative action (see eg *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 (SCA) 10b-d, para 27). The *raison d'etre* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 41).

The scope and content of the rule has been the subject of investigation in two decisions of this court. They are the *Wolgroeiërs* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

- (a) Was there an unreasonable delay?
 - (b) If so, should the delay in all the circumstances be condoned?
- (See *Wolgroeiërs* 39 C-D.)

⁴⁸ *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] 4 All SA 133 (SCA) paras 46 – 48.

The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosana* 86G). The investigation into the reasonableness of the delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (See *Setsokosane* 86E-F).⁴⁹

[66] Cameron J endorsed this abiding principle in *Merafong City Local Municipality v AngloGold Ashanti Limited*⁵⁰ and reiterated that:

'... The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'⁵¹

[67] In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (Khumalo)*⁵² Skweyiya J, whilst acknowledging the indisputable existence of the delay rule, observed that courts nevertheless have a discretion to overlook a delay where appropriate. He said:

'[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'⁵³

⁴⁹ See *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A) at 86 E-F.

⁵⁰ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC)

⁵¹ *Ibid* para 73.

⁵² *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

⁵³ *Ibid* para 45.

[68] In support of this statement Skweyiya J relied on s 237⁵⁴ of the Constitution and held:

'... Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.

This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.⁵⁵ (Footnotes omitted.)

[69] However, it is as well to remember, as the Constitutional Court in *Sita* emphasised, that '[n]o discretion can be exercised in the air' and that '[t]here must be a basis ... to do so'. The Constitutional Court there concluded that '[t]hat basis may be gleaned from facts placed [before the court] by the parties or objectively available factors'.⁵⁶

⁵⁴ Section 237 which is headed 'Diligent performance of obligations' provides: 'All constitutional obligations must be performed diligently and without delay.'

⁵⁵ *Khumalo* paras 46 – 48.

⁵⁶ *Sita* para 49.

[70] Reverting to the aspect of the discretion vesting in a court to condone a delay in instituting review proceedings, it bears emphasising that the Constitutional Court cautioned that:

'While a court "should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power", it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review'⁵⁷ (Footnotes omitted.)

[71] In determining the issue of whether the delay in instituting the review proceedings was unreasonable, the high court held, with reference to judicial authority,⁵⁸ that the delay in this instance was unreasonable. And that the extent of the delay militated against such delay being overlooked.

[72] In essence, the high court reasoned:⁵⁹

'The conduct of the Department is unacceptable. This is apparent from the fact that National Treasury on 26 January 2018 actually placed the Department on terms to take action in light of the irregularity they had determined. The Department ... was dogmatic when it did not heed the advice of the irregularity provided on 16 October 2017. In fact, it proceeded ahead as though the pronouncement by National Treasury had not been made and that the Department was correct in awarding the tender to Simeka.

... the Department has failed to be open, responsive, forthright and accountable, as a State organ ought to be, who seeks a self-review ... the Department ... has not submitted a full explanation for the unreasonable delay in launching this review application.'

⁵⁷ *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (*Tasima I*) para 160.

⁵⁸ *Tasima I* para 48. See also: *Asla* paras 48 – 54; *Khumalo* paras 48-49.

⁵⁹ High court judgment paras 45-46.

[73] It then continued:

'The crucial correspondence of 16 October 2017⁶⁰ has been omitted and no reason is advanced for such omission. There is no information regarding how the decision was researched to do an about turn after it had been persisting with the project even in light of the irregular pronouncement. In essence, the conduct of the Department from the beginning was that they need not seek condonation and when called to explain just provided a weak response. Thus, where there is no full explanation this amounts to no explanation to explain the delay.

Therefore, there is no basis upon which I can overlook the inordinate delay, that being the case, I therefore cannot be expected to exercise my discretion to afford the Department the relief it seeks.⁶¹ (Footnotes omitted.)

[74] The high court was nevertheless cognisant of the implications of the National Treasury's refusal to grant the TA III approval for the project, describing the refusal as 'monumental'. It also acknowledged that the inevitable consequence of the National Treasury's refusal to grant the TA III approval meant that 'the lease of the

⁶⁰ This was a reference to the letter addressed by National Treasury to the Department which reads:
'PROCUREMENT OF OFFICE AND RESIDENTIAL ACCOMODATION FOR SOUTH AFRICAN MISSION IN NEW YORK CITY

I refer to the meeting between your department and the National Treasury (NT) on 19 January 2018 concerning the procurement of land and development for the mission in New York City. I also refer to the procurement process issues identified by the Office of the Chief Procurement Officer of NT communicated to your department in a letter dated 16 October 2017 (attached.)

The National Treasury will not be in position to issue Treasury Approval III for the Public Private Partnership (PPP) to implement the project if the procurement issues are not resolved by your department. It is therefore advisable that the department starts a new tender process and ensures that the correct procurement processes are followed.

As accounting officer you, should decide whether either-

- (a) to continue with procuring the land through the appointed service provider which is likely to entail irregular expenditure given the procurement issues raised by the OCPO and/or the absence of Treasury approval III for the PPP; or
- (b) to cancel the transaction with the service provider, which will result in fruitless and wasteful expenditure if the deposit for the purchasing of the land is forfeited.

The department should consider soliciting its own legal opinion on the purchase of the land in the light of the procurement process issues identified by the Office of the Chief Procurement Officer and all legal requirements applicable to the transaction.'

⁶¹ High court judgment paras 47-48.

land already secured in the United States of America ... brings the entire project to an abrupt halt'.⁶²

[75] The high court, however, concluded that 'Simeka [was] now at the short end of the stick, due to the Department seeking to avoid a declaration that it is responsible for fruitless and wasteful expenditure'.⁶³

[76] I interpose here to observe that the implication of the statement quoted in the preceding paragraph is that the review proceedings were not instituted bona fide and that the government parties were instead actuated by ulterior motives, thereby in effect seeking 'to evade [their] constitutional obligation by way of a self-review'. In coming to this conclusion the high court relied on a decision of this Court in *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*.⁶⁴

[77] Ultimately, the high court exercised its discretion and, as already indicated, refused to condone the delay concluding that 'the possible breach of legality does not outweigh the undue delay *absent an explanation*'. (Emphasis added.)

[78] The high court's refusal to condone the delay in this case raises the question whether in so doing, it exercised its discretion judicially. On this score, it is as well to bear in mind that the discretion vesting in the high court was a narrow discretion

⁶² High court judgment para 51.

⁶³ Ibid para 63.

⁶⁴ *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) paras 69 – 70.

that is invariably called a discretion in the true sense.⁶⁵ And accepting, as one must, that courts are enjoined to 'exhibit vigilance, consideration and propriety' before overlooking a late review, this then sharply raises the question whether in the context of the facts of this case, the interests of justice dictate that the admitted delay should be overlooked.

[79] That the government parties delayed in instituting the review proceedings (which the protagonists agreed was – in a worst case scenario – approximately 29 months) brooks no argument to the contrary. The government parties sought to overcome this procedural obstacle by proffering an explanation therefor. In essence, they asserted that:

- (a) whilst this is admittedly a self-review, it was however explained that once the National Treasury was adamant that procurement processes undertaken by the Department were irregular, it became necessary to consult with members of the BEC in order to 'ascertain whether they had an answer' to the National Treasury's statement questioning the regularity of the procurement process;
- (b) because the members of the BEC 'were all in diplomatic missions scattered around the world' assembling them for consultation with counsel in South Africa turned out to be a protracted and time-consuming mission;
- (c) on 26 April 2017, and after consulting members of the BEC, the Department responded to the National Treasury's queries;
- (d) in the interim, on 26 January 2018, the National Treasury painted its colours to the mast and unequivocally stated that it would not grant the requisite TA III approval;

⁶⁵ See in this regard: *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* [1992] 2 All SA 453 (A); 1992 (4) SA 791 (A) at 800G-H.

(e) on 15 and 18 May 2018, the National Treasury again indicated in no uncertain terms that it remained unpersuaded and persisted in its stance that the tender process was irregular and therefore remained resolute that the TA III approval would not be granted; and

(f) finally, given the enormity of the task, collating the mound of documentation provided to counsel for purposes of drafting the founding papers, the preparation of the review application papers was, despite best endeavours by counsel, also time-consuming.

[80] In *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa*,⁶⁶ a delay of three years was condoned in circumstances where the full extent of malfeasance at PRASA was concealed from the Board.⁶⁷ There, this Court, inter alia, held that some of the important considerations that would weigh heavily with a court considering the question as to whether to condone delay, are the interests of justice⁶⁸ and the public interest. In the context of the facts of this case these considerations loom large, especially in the light of the breath-taking amount of public funds involved and the extent to which the requirements of the RFPs were deviated from both during evaluation and adjudication stages and, significantly, when the PPA was concluded. And as the Constitutional Court observed in *Allpay Consolidated*, the 'facts of each case will determine what any shortfall in the requirements of the procurement system' as prescribed by s 217 of the Constitution should lead to.⁶⁹

⁶⁶ *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa* [2018] ZASCA 167; 2020 (1) SA 76 (SCA) (*Swifambo*).

⁶⁷ *Ibid* paras 34 and 36.

⁶⁸ *Swifambo* paras 40-42. See, for example, *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 51.

⁶⁹ *Allpay Consolidated* para 43.

[81] In *Aurecon*, the Constitutional Court held that '[t]he interests of clean governance ... require judicial intervention' where irregularities uncovered by an investigation raised a spectre of corruption, collusion or fraud in the tender process. In such circumstances a court might well be justified in 'look[ing] less askance in condoning the delay'.⁷⁰ Although the government parties have disavowed any reliance on corruption, collusion or fraud in this case, both in their heads of argument and before us, it is to be noted that in *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others*,⁷¹ this Court said that, as a general rule even innocent counterparties are not entitled to benefit or profit from an unlawful contract.

[82] The substantive merits of the appeal have already been addressed above.⁷² The conclusion reached in relation thereto, and for the reasons already articulated, is that the entire procurement process in this matter was riddled with unexplained irregularities. This is borne out by objective facts which reveal that the requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system were flouted at every turn. What is more, is that once the tender was awarded to the Joint Venture, the members of the Steering Committee arrogated to themselves the power to deviate from the requirements of the RFPs in a most fundamental way that was at odds with both constitutional⁷³ and statutory prescripts.⁷⁴

⁷⁰ *Aurecon* para 50.

⁷¹ *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2022] ZASCA 54; 2022 (5) SA 56 (SCA) para 42.

⁷² See paras 48 – 64.

⁷³ Section 217 of the Constitution.

⁷⁴ See, for example, ss 2, 3(a) and 38 of the Public Finance Management Act 1 of 1999.

[83] Whilst the RFPs, for example, envisaged a long term lease or 'lease to buy property option' that entailed that the entity ultimately awarded the tender would 'identify and secure land', 'design and develop' the land to the Department's specifications, 'operate, manage and maintain the facilities' and, importantly, 'raise the required funding to finance both the capital and operational costs of acquiring and managing the facilities', all of these were altered in material respects after the award of the tender. This material and extra-ordinary deviation had the effect of relieving the Joint Venture of its financial obligations which thereafter became the sole responsibility of the Department contrary to what the RFPs had required. Consequently, the requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system were subverted in the most egregious manner.

[84] It bears emphasising that all of this occurred against the backdrop that the project in issue was massive and required substantial financial resources from the successful bidder. It is therefore unsurprising that ultimately, the RFPs caught the attention of only two bidders, one of which was disqualified at the outset for failing to meet the requirements of the RFPs.

[85] Whilst one must accept that the Department could have acted with more urgency than it did in unravelling the facts, given that it sought to review its own decision, sight should nevertheless not be lost of the fact that the bureaucratic machinery is notorious for moving slowly even though the exigencies of a particular case might require that matters be dealt with expeditiously. However, it must be emphasised that recognising this reality in no way seeks to excuse laxity. It is more to say that, notwithstanding the constitutional dictates of a responsive and

accountable public administration, the reality is that public administration in our country has over time been allowed to slide to a quagmire of inefficiency. This is a state of affairs that is antithetical to the values underpinning our constitutional order that the citizenry holds dear.

[86] In this case, the tender was awarded to the Joint Venture – which in effect was the only bidder after Lephuthing/Menzibali Construction had been disqualified at the evaluation stage – on 17 May 2016. Pursuant thereto, on 24 March 2017, the PPA was concluded. Thereafter, several steps, including applications made to the National Treasury for approval of TA I; TA II and TA III, aimed at implementing the project, were taken. Although the National Treasury had been instrumental in some of the steps taken, it subsequently began to question the propriety of the tender. This led to an exchange of correspondence between the Department and the National Treasury over several months in which the latter raised questions about the legitimacy of the procurement process. Ultimately, on 18 May 2018, the National Treasury advised the Department that it would not grant the requisite TA III approval.

[87] The review proceedings were then instituted on 10 October 2018. Thus, reckoned from the date of the award of the tender, ie. 17 May 2017, the legality review was instituted approximately 29 months thereafter. Although not entirely comparable to the facts of the present case in which corruption, collusion or fraud have been disavowed, in *Swifambo* this Court condoned a delay extending over three years.

[88] As already indicated above, in refusing to overlook the admitted delay in instituting the legality review, the high court exercised a narrow discretion. When exercising a narrow discretion a court must, in the words of Hefer JA in *Shepstone & Wylie and Others v Geyser NO*,⁷⁵ 'decide each case upon a consideration of all relevant features, without adopting a predisposition in favour of or against'⁷⁶ granting appropriate relief.

[89] Accordingly, the power of an appellate court to interfere with the exercise of such a discretion is circumscribed. The ambit of this power was described by the Constitutional Court in *Biowatch Trust v Registrar Genetic Resources and Others*⁷⁷ thus:

' the ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Thus where the discretion contemplates that the Court may choose from a range of options, the discretion would be a discretion in the strict sense ...

"[T]he ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.'⁷⁸

⁷⁵ *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA); [1998] 3 All SA 349 (A).

⁷⁶ Ibid at 1045I-J. See also in this regard: *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* [2007] ZASCA 97; [2007] SCA 97 (RSA); [2008] 1 All SA 329 (SCA); 2007 (6) SA 620 (SCA) para 16.

⁷⁷ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

⁷⁸ Ibid para 29.

The rationale for this principle is, as Cloete J aptly observed, that a narrow discretion 'requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion'.⁷⁹

[90] In *Florence v Government of the Republic of South Africa*⁸⁰ the Constitutional Court elaborated on this theme and said:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'⁸¹

[91] Therefore, for interference by this Court with the exercise by the high court of its discretion not to overlook the delay in this case to be warranted, it must be satisfied, for example, that the high court's discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Moreover, as the Constitutional Court emphasised in *Giddey NO v JC Barnard and Partners*,⁸² that '[I]f the court [of first instance] takes into account irrelevant considerations, or bases the exercise of its discretion on wrong principles, its judgment may be overturned on appeal'.⁸³ It is thus to that topic that I now turn.

⁷⁹ *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 800E-F.

⁸⁰ *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC).

⁸¹ *Ibid* para 113.

⁸² *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC).

⁸³ *Ibid* para 22. See also: *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council: Johannesburg Administration and Another* 1999 (1) SA 104 (SCA) at 109 A-B.

[92] Bearing in mind the legal principles discussed in paragraphs 65 – 70 above in regard to the proper approach when a court considers whether an unreasonable delay should nevertheless be overlooked, I proceed to deal with the question whether in this instance the high court exercised its discretion judicially when it refused to overlook the delay. For reasons that will become apparent below, it is my judgment that in the context of the facts of this case the high court failed to exercise its discretion judicially. Put differently, it exercised its discretion based on a wrong appreciation of the true facts or wrong principles of law. In *Asla*, the Constitutional Court explained that '[I]n both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken'.⁸⁴ The Constitutional Court then continued:

'The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.'⁸⁵

[93] I pause here to observe that the principle that one can extract from the passage quoted in the preceding paragraph is that where the delay is found not to be unreasonable that would in itself strongly militate in favour of overlooking the delay and thus, paving the way for the court to enter into the substantive merits of the review. Indeed, this is what the minority judgment in *Asla* recognised in instances where there was no delay, noting that in that event a declaration of unlawfulness should invariably follow describing this as a default position that accorded with the principle of legality.⁸⁶

⁸⁴ *Asla* para 49.

⁸⁵ *Ibid* para 50.

⁸⁶ *Ibid* para 118.

[94] Even in circumstances where the delay is found to be unreasonable, the Constitutional Court tells us in *Asla* that a court will still be required to determine whether such a delay should nevertheless be overlooked. This is what the Court said: 'Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.'⁸⁷ (Footnotes omitted.)

The Constitutional Court then continued:

'The approach to overlooking a delay in a legality review is flexible. In *Tasima I*, Khampepe J made reference to the "factual, multi-factor, context-sensitive framework" expounded in *Khumalo*. This entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this Court's power to grant a just and equitable remedy and this ought to be taken into account.'⁸⁸(Footnotes omitted.)

[95] Moreover, *Khumalo* also tells us that 'an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision and considering the legal challenges made against that decision'.⁸⁹ We are also reminded by *Asla* that the merits of the impugned decision 'must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious'.⁹⁰

⁸⁷ Ibid para 53.

⁸⁸ Para 54.

⁸⁹ Para 57.

⁹⁰ Para 56.

[96] The Constitutional Court went further and said:

'... [T]he extent and nature of the illegality may be a crucial factor in determining the relief to be granted when faced with a delayed review. Therefore, *this Court may consider, as part of assessing the delay, the lawfulness of the contract under the principle of legality.*'⁹¹ (Emphasis added.)

[97] Accordingly, the more egregious the non-compliance with constitutional and statutory prescripts is when viewed against the extent and unreasonableness of the delay the more a court will be inclined to overlook the delay. As it was put in *Asla*, reviewing courts are therefore enjoined to 'balance the seriousness of the possible illegality with the extent and unreasonableness of the delay'.⁹² On this score it is well to remember that maladministration is inconsistent with the rule of law and antithetical to our constitutional ethos that seeks to foster an open, accountable and responsive government.

[98] In determining the issue of whether there was a delay in instituting the review, the high court considered a number of factors. After outlining the general approach to such issue, the high court observed that courts are generally intolerant of undue delays because they undermine the court's ability to properly adjudicate disputes between parties. It further noted that there should be a satisfactory explanation for the delay. In evaluating the explanation proffered for the delay, the high court held that it was patently deficient because the Department had, inter alia, woefully failed to explain how the decision to award the tender was reached. This was further compounded, the high court opined, by the fact that the Department had initially defended its decision even in the face of grave concerns raised by the National

⁹¹ *Asla* para 58.

⁹² See minority judgment of Cameron and Froneman JJ in *Asla* para 147.

Treasury. In the event, the high court concluded that 'there was no basis upon which [it could] overlook the inordinate delay'. Hence the dismissal of the application.

[99] Insofar as the delay in instituting the review is concerned, counsel for Simeka Group argued that putting the facts in their proper perspective there can be no doubt that the delay in this case was unreasonable. Further, so argued counsel, the explanation proffered for the delay, such as it was, did not cover the entire period. In elaboration, it was submitted that the decision sought to be reviewed was made on 17 May 2016 and yet the review was instituted 29 months thereafter, on 18 October 2018. This, despite the fact that National Treasury had written to the Department on 16 October 2017 indicating that '[T]here were some irregularities – set out in detail in the letter from the National Treasury – in the appointment of Simeka Group (Pty) Ltd'.

[100] In this case, there seems to be no dispute that the government parties delayed in instituting the review proceedings. Thus, the crucial question that arises for determination is whether the delay should be overlooked. The test for determining this aspect of the case has been described as a flexible one, based on the proven facts of each case and other objectively available considerations.⁹³ Various factors bear on this issue. First, this calls for a 'factual, multi-factor and context sensitive' enquiry in which a whole range of factors are considered and evaluated.⁹⁴ In this regard a court is enjoined to take into account:

(a) any potential prejudice to interested parties;

⁹³ *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2020] ZAWCHC 164 para 290.

⁹⁴ *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) para 30.

- (b) the potential consequences of setting aside the impugned decision; and
- (c) how such potential prejudice could be ameliorated by invocation of s 172(1)(b) of the Constitution which empowers a court deciding a constitutional issue to make 'any order that is just and equitable'.

[101] Secondly, the nature of the impugned decision and the extent and nature of the illegality bear on this issue. On this score, *Asla* tells us that the stronger the prospects of success, the more will a court readily incline in favour of overlooking an unreasonable delay. Finally, the conduct of the functionaries is also relevant. Here, the court must be vigilant to ensure that a self-review is designed to 'promote open, responsive and accountable government rather than self-interest of state officials seeking to evade the consequences of their prior decision'.⁹⁵ I pause here to observe that curiously, in the context of the facts of this case, the Departmental officials persisted in their spirited defence of their decision to award the tender to the Joint Venture even in the face of relentless promptings from the National Treasury that the award was bedevilled by irredeemable irregularities.

[102] As already mentioned above, the conclusion of the high court was that the delay in instituting the review proceedings was unreasonable. It then went on to hold that:

- (a) Simeka Group was not complicit in any corruption and whatever was asserted by the Department to support the allegations of corruption was simply unsubstantiated;
- (b) the Department had always been an enthusiastic supporter of the project;
- (c) the 'entire process of attaining the land, leasing thereof, paying of the deposit and payment of preparatory works and costs, occurred within the prescripts of the

⁹⁵ *Asla* para 120.

Request for Proposals, the PPA ... with the cooperation and consent of the Department';

(d) the Department supported the award even after the National Treasury had pronounced that the award of the tender was irrational; and

(e) the Department withheld the damning letter from the National Treasury stating that '[T]here were some irregularities in the appointment of Simeka Group (Pty) Ltd'.

[103] Counsel for the respondents contended that the Department 'did nothing for the 17 month period from the award of the tender' on 17 May 2016 and when the National Treasury pointed out the irregularities on 16 October 2017. It was therefore argued that it did not avail the Department that it was oblivious to these irregularities until the National Treasury alerted it to them. This, asserted the respondents, was not the end of the Department's difficulties. When, on 26 January 2018, the National Treasury implored the Department to 'start a new tender process and ensure that the correct procurement processes [were] followed', the Department should have there and then immediately launched its review application and yet failed to do so until some eight months thereafter, on 10 October 2018. Ultimately, it was submitted that the sum total of these factors ineluctably lead to one conclusion which is that the delay was unreasonable. Therefore, so it was argued, the conclusion of the high court on this score was unassailable.

[104] In the light of the foregoing, it was submitted on behalf of the respondents that there would be no basis for this Court to interfere with the high court's exercise of the discretion vested in it not to condone the delay. That the high court was vested with a discretion in the true sense is beyond question. Thus, the powers of this Court to interfere with the exercise of such discretion are circumscribed. The

Constitutional Court explained the ambit of such a discretion, albeit in a different context, thus:

'A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'⁹⁶ (Footnotes omitted.)

On this score both *Tasima I*⁹⁷ and *Asla*⁹⁸ say that an unreasonable delay cannot be 'evaluated in a vacuum'. The court must in that event determine whether the delay ought to be overlooked, and the basis for doing so 'must be gleaned from the facts ... or objectively available factors'.

[105] It was further submitted on behalf of the respondents that the obdurate stance adopted by the Department in defending the award of the tender when the National Treasury questioned its rationality is a clear indicator that it still believed that the award of the tender was in line with constitutional prescripts. Whilst at first blush there is much to be said for the proposition that the Department is to a large extent the author of its misfortune, it is however necessary to put things in their proper perspective.

[106] Although the high court considered the question whether the delay should be overlooked and some of the relevant factors that bear on this question, it did not

⁹⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1; 2000 (1) BCLR 39 para 11. See further: *Mathale v Linda and Another* [2015] ZACC 38; 2016 (2) BCLR 226 (CC); 2016 (2) SA 461 (CC) para 40.

⁹⁷ *Tasima I* para 159.

⁹⁸ *Asla* para 53.

consider, as it appears from its judgment, the interests of justice as enjoined by judicial authority, having regard both to the requirements of the RFPs and the material deviation from what the RFPs had required. That the deviation from the requirements of the RFPs was egregious brooks no argument to the contrary. As already pointed out in para 11 above, the RFPs explicitly required that the successful bidder must itself acquire land and provide finance for the construction of the office and residential accommodation. The Department was only to be a lessee and hire the accommodation for the duration of the lease. All of this, was materially varied after the award of the tender pursuant to the decisions taken by the members of the Steering Committee.

[107] The foundation upon which the underlying reasoning of the high court rested in declining to overlook the delay has already been summarised in paragraph 7 above and need not be repeated here. Those factors were central to the way in which the high court ultimately exercised its discretion not to overlook the delay. Due to the fact that the high court was influenced by wrong principles or could not reasonably have made its decision had it properly directed itself to all the relevant facts and principles, the foundation for its decision must necessarily disintegrate. Moreover, it is not in dispute that during both the evaluation and adjudication stages there were material deviations from the requirements of the RFPs. This much was not contested by the respondents. Instead, the high water mark of their case, as I understood counsel, was that the department's role-players who were instrumental in evaluating and adjudicating the tender did not bother to take the high court into their confidence and explain why they took the decisions they did. That there was no explanation proffered from the officials of the Department who were intimately involved in these processes to explain how these deviations came about, as should have been the case,

cannot in my view redound to the benefit of the respondents. These relevant factors, too, were not adverted to by the high court in the exercise of its discretion. Nor, it seems, was the high court cognisant that it was dealing with a legality review and therefore vested with broader discretion than that traditionally applied to reviews under PAJA.

[108] As it turns out, the interests of justice and the unexplained egregious material deviations from the tender requirements coupled with the onerous financial burden that the revision of the tender requirements post its award to Simeka Group are all relevant factors that, amongst others, were not sufficiently accorded due weight by the high court in determining whether the unreasonable delay should be overlooked.

[109] As to the interests of justice, the remarks of the Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*⁹⁹ are instructive. The Constitutional Court there said that:

'The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay ...'.¹⁰⁰

[110] In similar vein, this Court emphasised in *Aurecon South Africa (Pty) Ltd v City of Cape Town*,¹⁰¹ with reference to judicial authority, that '[w]hether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case. The relevant factors in that enquiry generally include

⁹⁹ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (5) BCLR 465; 2000 (2) SA 837 (CC).

¹⁰⁰ *Ibid* para 3.

¹⁰¹ *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; [2016] 1 All SA 313 (SCA); 2016 (2) SA 199 (SCA) para 17.

the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, ... the importance of the issue to be raised, and the prospects of success'.

[111] Notwithstanding the fact that the explanation for the delay is not entirely satisfactory in certain respects, this shortcoming is compensated by the strong prospects in favour of the Department. In particular, the enormous financial burden that would be assumed by the Department following the material deviations from the tender requirements as against the huge financial rewards that the Simeka Group stands to reap if the tender remains intact in its revised form. As already indicated above, the tender envisaged that Simeka Group – and not the Department – must alone provide the funding for the project and bear sole responsibility for the operational costs of the project. The cumulative effect of these factors and the high stakes, especially for the Department, impels the conclusion that the delay ought to be overlooked and the substantive merits of the review be considered. In these circumstances, the present is an appropriate case where the high court should have exercised its 'broader discretion in the context of a legality review' by overlooking the unreasonable delay encountered in this case.

[112] To sum up: approaching the matter holistically, one cannot say with conviction that the government parties were not in certain respects tardy in bringing the review application. Thus, to a limited extent, one is constrained to share the reserve expressed by the respondents that the review application could and should have been instituted much earlier than what happened in this case. Nevertheless, that the delay in this case, although inordinate, did not manifest indifference to what was at stake is a weighty consideration that must tip the scales in favour of overlooking

the delay. This is particularly so, if the interests of justice, the substantive merits of the review itself, and the extent of the material deviations from the requirements of the RFPs coupled with the whopping amount that would be foisted on the Department and indeed the fiscus if the review is dismissed solely on the basis of delay without regard to the substantive merits of the review. Accordingly, given the egregious nature of the infractions that occurred during the procurement process in this case, the interests of justice dictate that procedural obstacles ought not to be allowed to stand in the way of inquiring into the lawfulness or otherwise of the exercise of public power.

[113] It is therefore my judgment that the high court failed to properly exercise a judicial discretion as enjoined by judicial authority. The inevitable consequence of this conclusion is that this Court is at large to itself exercise the discretion and, for the reasons already stated, to overlook the delay in instituting the review proceedings.

Relief

[114] In paragraph 4 of their notice of motion, the government parties sought an order directing the respondents to repay the Rand equivalent of the deposit that the Department paid towards the acquisition of the land in the USA. The Department paid a deposit of US \$9 million. It also claimed interest on this amount at the prescribed rate from the date on which the high court order repayment of the deposit. The conclusion reached in this judgment as to the merits of the review is that the award of the tender to the Joint Venture was not in accordance with constitutional prescripts. In terms of s 172(1)(a)¹⁰² of the Constitution our courts are obliged to

¹⁰² Section 172(1)(a) provides:

declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. However, in order to ameliorate the harsh consequences flowing from a declaration of invalidity, our courts are empowered under s 172(1)(b) of the Constitution to make 'any order that is just and equitable'.

[115] Although the power of the court under s 172(1)(b) has been described as wide, it is, however, 'bounded ... by considerations of justice and equity'.¹⁰³ In this case, the parties agreed in the high court to separate and postpone the relief sought in terms of prayer 4 of the notice of motion for later determination. Thus, the parties' agreement in regard to this aspect of the case need not detain us for present purposes and nothing more needs to be said on this aspect.

Costs

[116] There remains the question of costs to address. The government parties were represented by four counsel in this Court. Whilst content with costs of two counsel in the high court, lead counsel for the government parties asked for costs of four counsel in this Court in the event of the appeal being successful.

[117] It is trite that a court enjoys a wide discretion in considering the question whether costs of more than one counsel in any particular matter should be allowed. Such discretion must be exercised judicially on a consideration of all the relevant factors. The question always is, as Colman J posited in *Koekemoer v Parity Insurance Co Ltd and Another*:¹⁰⁴

¹⁰³ 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.'

¹⁰³ *Sita* para 5.

¹⁰⁴ *Koekemoer v Parity Insurance Co Ltd and Another* (Koekemoer) 1964 (4) SA 138 (T).

'... whether, in all the circumstances, the expenses incurred in the employment of more than one counsel were "necessary or proper for the attainment of justice or for defending the rights of the parties", and were not incurred through "over-caution, negligence or mistake".'¹⁰⁵

The learned Judge went on to mention, amongst others, the following as being some of the relevant considerations: (a) the volume of evidence (oral or written) dealt with by counsel or which she or he or they could reasonably have expected to be called upon to deal with; (b) the complexity of the facts or the law relevant to the case; (c) any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case; (d) the importance of the matter in issue, in so far as that importance may have added to the burden of responsibility undertaken by counsel.¹⁰⁶ This is by no means an exhaustive list. Ultimately, how a court should exercise its discretion is essentially a matter of fairness to both sides.

[118] The general rule is that costs of four counsel will be allowed only if it is clearly shown that the employment of more than two counsel was justified for purposes of doing justice between the parties.¹⁰⁷ The proper approach has been formulated in various forms. In *Stent v Roos*,¹⁰⁸ where costs of three counsel were sought, Innes CJ stated that before costs of three counsel could be allowed, it must be shown that a reasonable litigant would not have gone to court without the assistance of the third counsel. In *Umhlutuzi Valley Co., Ltd. v Hulett & Sons, Ltd.*,¹⁰⁹ albeit in a different context, Dove-Wilson JP stated that he was unable to say that the case before him

¹⁰⁵ Id at 144F-145A. See also: *Reilly v Seligson and Clare Ltd* 1977 (1) SA 626 (A) at 641E-H.

¹⁰⁶ *Koekemoer* at 144H.

¹⁰⁷ Compare: *South African Railways and Harbours v Illovo Sugar Estates Ltd and Another* 1954 (4) SA 425 (N) and the cases therein cited where three counsel were engaged.

¹⁰⁸ *Stent v Roos* 1909 TS 1057 at 1064.

¹⁰⁹ *Umhlutuzi Valley Co., Ltd v Hulett & Sons, Ltd.* 1914 35 NPD 224 at 226.

was one of such extraordinary difficulty or complexity as to warrant overriding the Taxing Master's disallowance of the fees of third counsel.¹¹⁰

[119] What Jansen JA said in *Scott and Another v Roupard and Another*,¹¹¹ with reference to the remarks of Hiemstra J in the court of first instance, bears mentioning. The learned Judge of Appeal stated the following:

'[I]t must be a very complicated case either as to the facts, which should require considerable research and investigation, or because it involves very difficult and novel points of law before costs of more than two counsel may be allowed.'¹¹²

[120] In *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others*,¹¹³ this Court overturned the judgment of the court of first instance where the latter court had awarded the costs of four counsel. Writing for a unanimous court, Cameron JA, although he did not pertinently say anything about the fact that costs of four counsel had been allowed in the high court because its judgment was ultimately overturned, he nevertheless alluded to the fact that the judgment was incorrect and the punitive scale¹¹⁴ of costs on the 'attorney and own scale' were all predicated on the harsh criticism against SARS's office which this Court found unjustified.

¹¹⁰ See also: *Grobelaar v Havenga* 1964 (3) SA 522 (N) at 530C where Harcourt J said that when more than two counsel are involved it must be an exceptional case to warrant allowance of their fees.

¹¹¹ *Scott and Another v Roupard and Another* 1972 (1) SA 686 (A).

¹¹² *Ibid* at 690F.

¹¹³ *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* [2006] ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA).

¹¹⁴ *Ibid* para 2-3.

[121] Whilst there can be no doubt that in preparing for the institution of the review proceedings counsel would have waded through voluminous documentation in order to distil the crux of the case of the government parties, I remain unpersuaded that costs of four counsel on appeal will be justified. I have earlier alluded to the fact that lead counsel was content with the costs of two counsel in the high court where considerable work would have been undertaken in collating various documents, and yet, counsel was happy to live with costs of two counsel without demur. We also had the advantage of perusing the record and hearing argument on issues that were germane for purposes of the appeal. In these circumstances, and taking a broad view of the matter, I do not consider that it would be fair for purposes of doing justice between the parties to allow the costs of four counsel on appeal. In this regard, it is not without significance that although the respondents were represented by three counsel on appeal, they asked for costs of two counsel only.

[122] Before making the order, I am constrained to mention that the finalisation of this judgment was inordinately delayed due to a concatenation of various factors that are unnecessary to traverse in this judgment. The cumulative effect of these factors rendered it impossible for this judgment to be finalised expeditiously in keeping with the abiding traditions of this Court. Nevertheless, I take full responsibility for this delay which is deeply regretted.

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

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the high court is set aside and in its place is substituted the following order:

'1 The late institution of the application for a legality review is condoned.

2 The award of the tender for the appointment of a development partner for the design, construction, operation, maintenance and financing of a suitable and sustainable office and residential accommodation for South African diplomatic missions in Manhattan, New York City, New York pursuant to a request for proposal (DIRCO 10/2015/16) to the joint venture comprising Simeka Group (Pty) Ltd and Regiments Capital (Pty) Ltd is declared constitutionally invalid and therefore unlawful.

3 The award of the tender referred to in paragraph 2 of this order is reviewed and set aside.

4 The Project Management Agreement concluded between the Department of International Relations and Cooperation and Lemascene (Pty) Ltd pursuant to the award of the tender is declared to be of no legal force and effect, reviewed and set aside.

5 The respondents, jointly and severally, are ordered to pay the costs of this application, including the costs of two counsel where so employed.'

X M PETSE
DEPUTY PRESIDENT
SUPREME COURT OF APPEAL

Appearances:

For appellants: G I Hulley SC (with S A Wentzel,
L Segeels-Nchube and V J Heideman)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein

For respondents: A E Bham SC (with L Sisilana and L S Crow)

Instructed by: Mkabela Huntley Attorneys Inc., Sandton
McIntyre Van der Post, Bloemfontein