REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NOS: 38124/2010

38127/2010

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

27/10/17
DATE SIGNATURE

In the matter between

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF PUBLIC TRANSPORT,

ROAD AND WORKS Applicant

and

L M T PROGRESSIVE DEVELOPMENT CC First Respondent

DUMABEZWE CONSULTING CC Second Respondent

J U D G M E N T

WEINER, J:

INTRODUCTION

1. This application concerns the validity of two contracts concluded between the applicant (the Department) on the one hand, and the respondents (LMT Progressive Developments CC (LMT), and Dumabezwe Consulting CC (Dumabezwe), on the other hand.

2. The Applicant contends that:

   2.1 the decision to conclude the contracts with the respondents is unlawful in that it was taken in breach of section 217(1) of the Constitution[1] (the Constitution) and section 38(1)(a)(iii) of the PFMA[2].

   2.2 the decision to appoint the respondents to render to the Department the services set out in the contracts is irrational and unreasonable.

   2.3 the decision to appoint the respondents to render to the Department the services set out in the service contracts was taken following a procedure that was unlawful, irrational and unfair. In particular, the former HoD of the Department failed to invite competitive bids from potential service providers, or to afford them an opportunity to tender for the services.

THE SERVICE CONTRACTS

[1] Act No. 108 of 1996
[2] Act No. 1 of 1999

3. Previous contracts (the previous contracts) existed between the Department and the present respondents. They were concluded in February and August 2007. Whilst these were in operation, the contracts which are the subject matter of the present review were negotiated. On or about 2 June 2008, the Department represented by its former HoD, Sibusiso Buthelezi (Buthelezi) and the respondents, concluded the service contracts for the provision of consultancy services to the Department (the service contracts). The material terms of the service contracts were that:

3.1 The contracts were for a period of 36 months, commencing on 1 September 2007, and terminating on 31 August 2010;

3.2 The respondents were each to render identical services to the Department, which, in summary, included:

3.2.1 Providing project management support, financial control, business strategy, project facilitation and monitoring and evaluation on special projects within the Department, which included among others:

3.2.1.1 performance audit on Public Works Maintenance

3.2.1.2 Due Diligence on the Operating Lease

3.2.1.3 Corporate Governance structures

3.2.1.4 Business Case for SATS; and

3.2.2 Review of Gautrain Inspectorate Reports.

3.3 The Department was to pay to each of the respondents, an hourly rate of R812 for a maximum of 250 hours per month,

3.4 Each of the respondents was to devote a maximum of 250 hours per month, to the performance of its duties and services;

3.5 LMT was to ensure that its employee, Ms. Lauretta Teffo ("Teffo')' or a suitable substitute performed the work for at least a period of 250 hours per month.

3.6 Dumabeswe was to ensure that its employee, Ms.Nobuhle Khekhe Shezi ("Shezi") or a suitable substitute performed the work for at least a period of 250 hours per month

4. Accordingly, each of the respondents was entitled to a maximum payment of R203 000.00 per month, exclusive of VAT. Over the duration of each contract, each contract was worth more than R7,3 million, exclusive of VAT.

APPLICABLE LEGISLATION

5. Section 217 of the Constitution, which was designed to ensure transparency and accountability on the part of organs of state, provides in relevant part:

(1) When an organ of state in the national, provincial or local sphere of government, or in 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) ---

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

5.1 These constitutional values on procurement are repeated in section 38(1)(a)(iii) of the PFMA, which provides in relevant parts:

"(1) The accounting officer for a department, trading entity or constitutional institution –

(a) Must ensure that the department, trading entity or constitutional institution has and maintains –

(iii) An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective."

5.2 Section 76(4)(c) of the PFMA, in turn provides: -

"76(4) The National Treasury may make regulations or issue instruction applicable to all institutions to which this Act applies concerning:

(c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective."

5.3 The procurement and provisioning system envisaged in section 76(4)(c) of the PFMA, is to be found in the National Treasury Practice Note No. 8 of 2007/2008 (the Practice Note), which places an obligation on an organ of state, when contracting for goods or services with a transaction value of more than R500 000 (Vat inclusive), to do so through a competitive bidding process.

5.4 Regulation 16A6.4 of the Treasury Regulations provides that, if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority." (the Regulation)

5.5 In addition to the Regulation, National Treasury issued an instruction Note. No.8 of 2007/2008 (the instruction note), which provides that, in urgent or emergency cases, or in case of a sole supplier, other means such as the Regulation may be followed, provided that the reasons for deviation are recoded and approved by the accounting officer.

6. This matter will turn on the interpretation of Section 217 of the Constitution read together with the above provisions, which provide for a deviation in certain circumstances.

7. The Constitutional Court in *Allpay Consolidated Investment Holdings (PTY) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others,*[3] set out the framework under section 217 of the Constitution as follows:

> *"[43] The legislative framework for procurement policy under section 217 of the Constitution does not seek to give exclusive content to that section, nor does it grant jurisdictional competence to decide matters under it to a specialist institution. The framework thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in*

[3] [2013] ZACC 42

the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

[44] Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

[45] Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. This also includes other relevant legislation referred to in these Acts. If a

court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established." [Footnotes omitted]

DEVIATION

8. It appears to be common cause, that the service contracts were concluded in breach of section 217(1) of the Constitution The Applicant contends that, since the value of each of the contracts was in excess of the R500 0000 threshold determined in terms of paragraph 3.4 of the Practice Note, the Department was obliged to procure the services through a competitive bidding process (tender), unless a valid and proper deviation was necessary.

9. The Respondents' contention is that they were appointed in terms of a process provided for in the Regulation, which empowers the accounting officer / accounting authority to deviate from a competitive bidding process where it is impractical to follow that process.

10. As set out above, the Regulation provides an exception to the procurement process envisaged in the Constitution.

11. The Regulation and Practice Note provides for what the respondents state may be termed "an alternative system of procurement". In terms of

this system, procurement may take place through any convenient process, which may include negotiations or price quotations, provided that a record is kept of the reasons for deviating from a competitive bidding process and such reasons are approved by the relevant authority.

12. Respondent contends and it appears to be common cause that the recording and approval are formal requirements and that failure to comply therewith would not render a contract invalid.

13. Applicant contends that this alternative system may only be used in circumstances which are circumscribed in the Regulation and Practice Note– i.e. in the case of 'emergency'; if the goods or services are only available from a 'single source' or in 'any other exceptional case' where it is 'impractical or impossible' to follow competitive bidding procedures.

14. Whilst the Regulation provides for procurement 'by other means' when it is 'impractical' to invite competitive bids, Applicant submitted that there is no guidance in the Treasury Regulations as to when, and in what circumstances, inviting competitive bids would be 'impractical'. There is also no guidance in the Treasury Regulations on what is meant by 'other means' of procurement.

15. Applicant contends however, that paragraph 3.4.3 of the Practice Note No. 8 sheds some light on when the calling for tenders may be 'impractical' and when 'other means' of procurement may be used. The Practice Note makes specific reference to 'urgent or emergency cases or in case of a sole supplier;' and procurement by other means, 'such as

price quotations or negotiations', as instances in which deviation from competitive bidding may be justified.

16. There are various instances when tendering may be 'impractical'. For example, where repairs need to be done and it is not possible to ascertain the nature or extent of the work required; where there has been a call for tenders and no tenders were received or 'inappropriate' or 'unacceptable' bids were received; or for reasons of national security.

17. The Practice Note regulates the threshold values within which accounting officers / accounting authorities may procure goods or services including, hiring or letting, acquiring or granting any right or disposing of movable state property.

    17.1 Paragraph 3.4 of the Practice Note requires accounting officers/ accounting authorities to invite competitive bids for all procurement above R500 000.

    17.2 If the procurement involved an amount in excess of R1 million, the reporting requirements come into operation.

    17.3 The Respondents contend that the monthly payments or instalments payable in terms of the contract should be used to determine the transaction value of the contract.

    17.4 Applicant submits that the total value of the contract calculated over the life of the contract should be used to determine the transactional value of the contract. Reference is made to paragraph 3.5 of the Practice Note which provides:

"Goods, works or services may not deliberately be split into parts or items of lesser value merely for the sake of procuring the goods, works or services otherwise than through the prescribed procurement process. When determining transaction values, a requirement for goods, works or services consisting of different parts or items must as far as possible be treated and dealt with as a single transaction." [emphasis added].

18. In my view, this makes it clear that the total value of the contracts is the relevant threshold and therefore the requirements of the Practice note and the reporting requirements come into play.

BACKGROUND TO THE CONCLUSION OF THE SERVICE CONTRACTS

19. During the 2006-2007 financial year, the Auditor General (the AG) raised certain concerns relating to the Department's internal systems of control. This complaint, by the AG, followed a qualified audit report which he had issued the previous year (2005-2006) against the same Department.

20. In order to address these issues the previous MEC and the AG had introduced a concept titled a Turn Around Strategy (TAS). PriceWaterhouse Coopers (PWC) were to be appointed as consultants in this regard. Buthelezi states that he was pressurized to appoint PWC, despite his objections. PWC were appointed for a period of 25 months.

21. After the lapse of eighteen (18) months, Buthelezi was not happy with PWC's performance and attributed its failure to deliver to its lack of knowledge of the operations/dynamics of the Department and the various projects that were already running therein. Accordingly, Buthelezi sought to appoint a task team of proven people in the Department to attend to the resolution of these problems.

22. Buthelezi contends that he exercised his powers as an accounting officer, in terms of section 38 of the PFMA, to address the issues raised by the AG as PWC's failure to perform in terms of the Terms of Reference had aggravated the very same urgent situation that warranted its appointment in the first place.

23. Buthelezi submits that the Respondents had been rendering consultancy services in different business units of the Department under agreements concluded in February and August 2007 respectively. LMT had consulted for the Department in the Project Management Unit, a unit in the Public Work under Sibusiso Mpanza, projects and DUMABEZWE was to render services in the Task Team of Four (TT4) in November 2007. The previous contract with LMT, concluded in February 2007, commenced on 1 April 2007 and was to terminate on 31 March 2009. It is not entirely clear, but it appears that when Buthelezi took this decisio996n, LMT had only been delivering certain services since April 2007. DUMABESWE was only to commence with services in November.

24. During about August 2007, LMT was approached by Buthelezi who sought its assistance to deal with the AG's queries. This led to the appointment of LMT, which was to commence work in September 2007, just five months after the conclusion of the previous contract.

25. Applicant contends that there is duplication in the two contracts and that it would have been impossible for LMT to perform in terms of both contracts. Accordingly, applicant contends that the decision to conclude the service contracts was irrational. Respondent argued that the service contracts replaced the previous contracts so that there was no duplication. It is not necessary to decide this issue of the for the reasons which will be elaborated upon below.

26. In dealing with the rationale behind his decision, Buthelezi contends that:

> *"Accordingly, when PWC floundered in its TAS terms of reference, it was urgent that the Department seek people with extensive knowledge of the operations of various business units in the Department. LMT was among the first names that I considered, given the specialised and vast experience Ms Teffo had. I approached her (of LMT) to urgent (sic) assistance in resolving the AG's queries.*
>
> *The HOD required a Task Team of Four from various business units/projects in the Department to coordinate their knowledge of the Department's operations, their professional background skills to help the Department to resolve the said TAS.*
>
> *The members of the said TT4 were the LMT, Acresa Consulting CC, Ekuthuleni Consulting CC, and after some replacements, Dumabeswe.*
>
> *The TT4's broad mandate was to assist the Department to review the TAS and later on prepare a project charter on departmental change management project the TAS. The above project charter was designed to facilitate the successful implementation of the then Premier's executive decision, namely the disestablishment of the Department of Public Transport Roads and Works and the establishment of two new departments, being the Department of Infrastructure Development and the Department of Roads and Transport".*(the project charter)

27. Buthelezi contends that, in the process leading up to June 2008:

27.1 the Respondents met on numerous occasions with, inter alia, the Department's Legal Advisors, including the deponent to applicants' affidavits, Mohlomphegi Thulare (Thulare) in order to formalise the agreements.

27.2 Buthelezi drafted and furnished the Department Acquisition Committee (DAC and a.k.a Tender Committee) with his reasons for seeking to procure the TT4.

27.3 He gave same to Thulare to ensure compliance with the law (including if needs be, filing those reasons with AG);

27.4 On 2 June 2008 and after about nine (9) months after the Respondents had commenced rendering services to the Applicant and at Johannesburg, the Respondents and the Department, then represented by Buthelezi, concluded the Contracts

28. Respondents contend that the fact that Thulare's legal department approved these contracts supports their submission that the contracts are valid and enforceable. Thulare never stated to Buthelezi that the procurement method was unlawful or that the contracts were unenforceable, and invalid. Thulare's opinion at the time remains just that: an opinion. Whether the contracts were valid is a matter for the court to decide.

29. The Respondents state that they performed in accordance with their contracts.

30. Buthelezi accordingly contends that the situation was one of an emergency that required him to deal with it by deviation.

31. In summary, the Respondents' contention is that the audit queries created an emergency situation that justified their appointment without following a competitive bidding process. They further contend that once the accounting officer forms the view that an emergency exists, he is empowered without further ado, to deviate from tender procedures, provided the reasons for the deviation are recorded and approved by him.

32. Applicant contends that this is an incorrect view of the law, and a superficial reading of the Regulation. Applicant submits that a proper deviation in terms of the Regulation is not dependent only on the subjective view of the accounting officer together with a recordal of the reasons for the deviation. The giving of the reasons for the deviation is to assist the National Treasury to determine whether financial misconduct has been committed, and if so, whether the take appropriate steps in terms of Regulation 33 of the Treasury Regulations.

33. Applicant's submission is that, in addition to the formal requirements of furnishing the reasons and the approval thereof, a proper deviation in terms of the Regulation requires, for its validity, the existence of facts which objectively viewed, gives rise to an emergency. This is a material requirement for the proper exercise of the power to deviate from a competitive bidding procedure. Unlike with the formal requirements, non-

compliance with the material requirement of the Regulation invalidates the contract. The formal requirement is that the reasons for the deviation must be recorded.

EMERGENCY

34. It is necessary to consider first, what constitutes an '*emergency*' for the purpose of the Regulation and paragraph 3.4.3 of the Practice Note. In this regard, Applicant has referred to clause 4.15 of the Green Paper on Public Sector Procurement Reform, which it contends, serves as a useful guide when interpreting the Regulation and Practice Note. It provides, that '*emergency situations*' may include:

34.1 the possibility of human injury or death;

34.2 the prevalence of human suffering or deprivation of human rights;

34.3 the possibility of damage to property, or suffering and death of livestock and animals;

34.4 the interruption of essential services, including transportation and communication facilities;

34.5 the possibility that the security of the State could be compromised;

34.6 the possibility of serious damage occurring to the natural environment; and/or

34.7 the possibility that failure to take necessary action may result in the State not being able to render an essential community service.

35. Applicant submits that resolving audit queries, which have existed over a number of years do not amount to an emergency situation. Buthelezi waited 18 months to determine that PWC's work was not producing the required results and he negotiated the contracts with the respondents for a period of nine months. During this extensive period, he could have utilized the proper procurement procedures to invite competitive bidding. The Department could also, if the situation was so urgent, have appointed the respondents for a short period, until the audit queries were addressed. Thereafter, it could have invited competitive bids in respect of the future services i.e. until 2010, and to deal with the long-term project charter, which was, in no way, considered as an emergency.

36. Applicant submits that, in order to ensure compliance with the principles of *competitiveness* and *cost-effectiveness*, State entities are still required to procure the goods or services on the best possible terms. Even with emergency procurement procedures, the HOD has to carefully consider limiting the value and length of contracts, so that the contract deals only with the immediate emergency. Emergency procurement procedures must be rationally related to the purpose for which the power exists – to deviate from normal procurement procedures only in emergency

situations. Public tender procedures must be used for long term and /or non-urgent requirements, where appropriate.

37. Applicant submits that it is not sufficient for Buthelezi to simply claim that there was an emergency situation which justified deviation from the normal procurement procedures. The court must be satisfied that objectively, the facts reveal the existence of an emergency situation. Applicant contends that Buthelezi's reasoning cannot meet the test of rationality.

RATIONALITY TEST

38. To consider whether the deviation can be justified on the ground of an emergency/urgency, the court needs to consider the reasons given by Buthelezi for the deviation. Applicant contends that these reasons must bear a rational connection to the purpose of the Regulation.

39. The applicants submit that the rationality test envisaged by section 6(2)(f)(ii) of PAJA has been described as requiring an administrative decision to be *"objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken."*

40. In *SA Predators Association v Minister of Environmental Affairs*,[4] the SCA identified the purposes served by a rationality review:

> "Rationality as a necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between

[4] [2010] ZASCA 151 at para 28

the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given, and to ensure the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such decision."

41. In *Minister of Defence and Military Veterans v Motau and Others,*[5] the court reaffirmed that the principle of legality requires that every exercise of public power including every executive action, be rational.

42. Applicant also refers to *S A Credit Association v Minister of Environmental Affairs*[6] in which it was held:

> "*Rationality is a necessary element of lawful conduct by a functionary serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given, and to ensure the action of the functionary there is a rational connection to the facts and the information available to him and on which he purports to base such action.*"

See also *Medirite (Pty) Ltd v South African Pharmacy Council and Another*[7] where the SCA held:

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[5] 2014 (5) SA 69 (CC) at para [98]
[6] [2010] ZASCA 151 at para [28]

> *"Whether an action may be impugned on grounds of rationality ...involves a fact driven inquiry having regard, inter alia, to the information available to the administrator, the considerations relied on, the ends that were sought to be achieved and the effects the proposed action would have upon interested parties. But in considering the lawfulness of the action sought to be impugned, it is important for a court to remember that it is engaged in a review and not an appeal, and that it is not for it to usurp the administrator's function. Accordingly, as long as the administrative action is rational or reasonable it cannot be impugned even if it is not an action the court would have taken. But of course questions such as ... rationality involve the making of a value judgment that cannot be tested in isolation, so to speak, without considering the so-called 'merits' of the action and why it was taken."*

43. Applicant submits that Buthelezi's decision to appoint the respondents does not meet the rationality test. The applicant states that the decision bears no relationship to the purpose for which the power to deviate in terms of the Regulation was given.

44. Buthelezi's reasons for the deviation are set out in his confirmatory affidavit. However, the court must have regard to the time when the decision was actually taken, and what grounds Buthelezi put forward

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[7] [2015] ZASCA 27 at para [10]

then. His reasons, at the time, are set out in two memoranda (the second of which does not relate to this matter). In the first, Buthelezi seeks to justify the appointment of Shezi as a skills developer and additional resource to the TT4. Applicant contends that this deals with Shezi in her personal capacity and not with DUMABEZWE. There is no memorandum relating to the LMT or Teffo. Buthelezi appears therefore to rely on the memorandum relating to Shezi to justify the decision relating to Teffo. Although this recordal and report is only a formal requirement, the existence of the relevant memoranda assist the Court in ascertaining the reasons advanced by Buthelezi, at the material time, for his decision. The reasons advanced by Buthelezi at the material time for the appointment of the LMT remains unexplained.

45. Applicant submits that, even if the memorandum relating to Shezi relates to the appointment of DUMABEZWE (which will be accepted for the purposes of this judgment), it is clear from the memorandum that the responsibilities of the TT4 are not related to urgent or emergency situations. The responsibilities of the TT4 set out in the memorandum included:

45.1 The committee of Enquiry Report;

45.2 The Department Quarterly Performance Reports;

45.3 The Departmental State of Readiness for 2010;

45.4 A performance Audit on Public Works Maintenance (1 April 2007 to 30 September 2007);

45.5 A performance Audit on the Impophoma Maintenance Call Centre (1 June 2007 to 30 September 2007);

45.6 Soccerex – General Taxi Industry Capacitation;

45.7 A performance Audit on Programme 5's Budget Statement 3 Projects (1 April 2007 to 30 September 2007);

45.8 A Performance Audit on the 30 Municipal Drivers Learners Testing Centres (1 July 2006 to 30 June 2007).

46. Applicant contends that none of these services were so urgent as to warrant deviation from the normal procurement procedures, more particularly when the problems had existed for some years, and when there was sufficient time to request competitive bidding. It must be noted that when LMT was appointed to begin work in September 2007, Teffo/LMT had only worked for the Department for approximately 5 months and Shezi/DUMABESWE had concluded the previous contract only in August 2007 to begin work in November 2007. Their prior experience was therefore, at best, minimal and not such that the HOD could have concluded that only they could have sorted out the emergency situation.

47. Applicant accordingly submits that this Court needs to be satisfied that, objectively speaking, there was an emergency situation that warranted procurement of the services by other means other than a competitive tender process.

SOLE SUPPLIER

48. The respondents rely on the two memoranda in regard to a single source selection. As set out above, no memorandum was referred to by Respondents which justified the appointment of LMT or Teffo. However, assuming that Buthelezi's reasons as set out in his affidavit were those he relied on at the time, Applicant contends that the respondents could not have been appointed as a single source supplier as there were many other consultants who could have performed the work., which was standard consultancy work in the public sector. As set out above, LMT had not been doing this specific work for the Department for a lengthy period, enabling it, as opposed to any other suppliers, to quickly master the array of services required from them. Shezi/DUMABESWE was to commence work in November 2007.

REPORTING REQUIREMENTS

49. It is common cause that in terms of the Practice Note, the requirement to report the deviation to the relevant Treasury only arises where goods and services above the value of R1 million (VAT inclusive) are procured in terms of the Regulation.

50. In this case, since the value of the contracts are above R1 million, Buthelezi was obliged to report the deviation to the Provincial Treasury and the AG. Applicant contends this was not done.

51. However, the requirement to report the deviation to the relevant treasury and the AG is not a 'mandatory and material procedure or condition' in

the words of section 6(2)(b) of PAJA. It is merely a formal requirement, whose non-compliance does not of itself, invalidate the procurement process. Non-compliance therewith falls to be dealt with in terms of Regulations 33.1.3 and 33.1.4 of the Treasury Regulations.[8]

DECLARATION OF INVALIDITY

52. The applicant contends that the appointment of the respondents is accordingly unlawful for non-compliance with section 217(1) of the Constitution. They submit that the HOD acted improperly in that his decision and the reasons therefor do not meet the rationality test required for a proper deviation for two main reasons:

52.1 Objectively speaking, there was no emergency situation;

52.2 No case is made out by the respondents that they were considered a single source supplier for the required services.

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[8] Regulation 33.1.3 of the Treasury Regulations provides:
"If an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately."
Regulation 33.1.4 in turn, provides:
"The relevant treasury may, after consultation with the executive authority, -

(a) direct that a person other than an employee of the public entity conducts the investigation;

(b) issue any reasonable requirement regarding the way in which the investigation should be performed."

53. In such a case Applicant submits that the court is obliged to declare the contracts to be invalid and of no force and effect. See *Department of Transport and Others v Tasima (Pty) Limited*[9], where Jafta J held:

> "*The declaration of invalidity is a mandatory consequence of inconsistency with the Constitution. Section 2 of the Constitution proclaims that the Constitution is supreme and that law or conduct that is inconsistent with it is invalid.*" [at 77]

54. Applicant also refers to section 172(1) of the Constitution which provides:

> "*When deciding a constitutional matter within its power, a court –*
>
> (a) *must declare that ... any conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.*"

UNDUE DELAY

55. The respondents raised the applicant's delay in instituting the review application. On this basis they contend that the court should not entertain the merits of the application.

56. The following dates are relevant in dealing with the delay:

56.1 The initial contracts with the respondents were concluded between 22 February and 23 August 2007 respectively

56.2 On 14 December 2007, the HOD applied to the DACX for the deviation.

[9] [2016] ZACC 39

56.3 The contracts in dispute were concluded on 2 June 2008.

56.4 On 20 August 2009 the HOD suspended LMT services and Dumabezwe services.

56.5 On 17 May 2010 LMT's attorneys responded to the suspension letter of August 2009 on behalf of LMT and Dumabezwe.

56.6 On 10 June 2010 the respondents filed a notice in terms of section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

56.7 On 23 September 2010 the respondents issued summons against the Department.

56.8 The Department filed its notice of intention to defend on 22 December 2010 and its plea on 5 January 2011.

56.9 On 11 February 2011 the respondents filed a replication.

56.10 On 9 November 2011 the parties held their first pre-trial conference.

56.11 On 7 February 2012 a second pre-trial conference was held.

56.12 On 8 February 2012 the matter was removed from the trial roll.

56.13 In 2014 the decision in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd,*[10] ("Kirland"), was handed down. That decision for the first time held that an

[10] 2014 (3) SA 481 (CC)

applicant must seek a declarator of invalidity. (This will be elaborated upon below)

56.14 On 20 August 2015 a notice of appointment of new attorneys of record for the respondents was filed.

56.15 On 12 November 2015 the applicant enquired from the respondents' attorneys what their intention was in regard to the trial. No response was received to such letter;

56.16 On 5 July 2016 a notice of set down was served on the state attorney.

56.17 On 23 November 2016, the respondent's attorneys confirmed that the matter was set down for 17 February. They suggested settlement discussions;

56.18 On 1 February 2017 a further pre-trial conference was held

56.19 On 14 February 2017 the present application was launched.

56.20 The matter was postponed on 17 February 2017.

57. It is correct that there is a substantive delay in the launch of these proceedings. However, the following factors are important in assessing whether or not condonation should be granted in regard to the applicant's explanation for the delay:

57.1 Firstly, in their plea filed on 5 January 2011 the applicant pleaded that the contracts were invalid and of no force and effect.

57.2 At this point in time, the applicants contend that the law did not require that a declaration of invalidity was necessary. The respondents dispute this.

57.3 It was only in 2014 pursuant to the *Kirland* decision that this view was taken.

57.4 At that time the respondents had done nothing to expedite the matter since February 2012 when the matter was removed from the roll.

57.5 The respondents failed to respond to a letter dated 4 November 2015 in which they were asked what their intentions were.

57.6 It was only when the notice of set down was served on the applicant's attorneys on July 2016 that the matter again raised its head.

58. Applicant contends that prior to Kirland, the approach adopted by the SCA in *Municipal Manager, Qaukeni Local Municipality v F V Trading CC*[11] and the cases cited therein was different. Jafta J (writing for the minority in *Kirland*) agreed with the approach adopted by the SCA in the *Qaukeni Local Municipality* cases. He found that a procurement contract concluded in breach of section 217 of the Constitution must be declared invalid and

[11] [2009] ZASCA 66

unenforceable by the Court, even if no application for a declaratory of invalidity had been sought by the applicant:

> *"[46] Corrupt practices should not escape the reach of our courts solely on the basis that no application to have them set aside was made. If the validity of a corrupt decision was raised in the pleadings a court is duty-bound to declare it invalid if that is established by evidence. Section 172(1)(a) of the Constitution obliges every court, when deciding a constitutional matter within its powers to declare invalid any contract that is inconsistent with the Constitution. The section admits of no discretion."*

The majority of the court in *Kirland* took a different view. Cameron J held:

> *"[22] Even where the decision is deffective - as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision so that the court can properly consider its effects on those subject to it."*

59. Applicant contends that the *Kirland* judgment was only delivered in 2014 some two years after the action which was instituted by the respondents was removed from the roll. They contend that at the time of the *Kirland* judgment, there was no indication whatsoever from the respondents that they intended once again to apply for a trial date of the matter. The Department considered the action instituted by the respondents to have been withdrawn and therefore they did not consider it necessary to apply to the court for a declaratory order or a review.

60. Respondents however submit that, the Applicant has always from 2010 to 2017 (eight (8) full years ago), been able to assert his defence by way of counter-claim for declaratory relief and assert that the impugned contracts

were invalid and unenforceable. It is common cause that the Applicant only sought declaratory relief by way of the amendment. It is also common cause that the invalidity was pleaded in 2011.

61. The real delay, if one takes into account the above factors, which can be placed equally at the foot of the respondents, is from July 2016 to February 2017 when the application was launched.

62. Although the applicant did not, in its plea, counter-apply for a declaration of invalidity, it was an issue raised pertinently in the pleadings and could, with a minor amendment, have included such declaration.

63. In *Tasima supra* the Constitutional Court noted that a plea of undue delay in bringing a review application by a state organ must be assessed by examining whether, on the facts, the delay is unreasonable, and, if so, whether the court should exercise its discretion to overlook the delay and nevertheless entertain the application.

64. The applicant contends that even if the explanation for the delay is not sufficient an important consideration in assessing whether the delay should be overlooked is the nature of the decision. This was stated in *Khumalo v MEC.*[12] This, applicant contends requires an analysis of the impugned decision within the legal challenge made against it and the merits of the challenge. In *Tasima* it was held:

> *"[166] The merits of the challenge are nonetheless compelling and whether maladministration surrounds the granting of the extension*

[12] Khumalo v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49

while entrenchment may be too strong a description for a five year period Tasima has been significantly enriched on the basis of an unlawfully extension. It would be naïve for this court to ignore that state of affairs. The effect on state resources should also not be overlooked. Substantial unplanned expenditure has occurred. Both by the Department and the corporation – as a consequence of the extension."

"[170] But what is the prejudice suffered by Tasima in overlooking the delay. Condoning the delay does not prevent them from enforcing the court orders that had been granted in their favour. In addition, the contract extension itself has already expired. Setting aside the extension at this point should not therefore impact negatively on Tasima going forward. It is also a factor that this court may rely on its section 172(1)(b) powers to ameliorate the prejudice suffered."

65. The court went on to hold that *Tasima* had benefitted greatly from the extension and the prejudice that it would suffer would be minimal compared to the prejudice to be suffered by the Department if the counter-application (for a declaration of invalidity) was not condoned. As stated in *Khumalo*:[13]

"*Consequences and potential prejudice ... ought not in general to favour the court non-suiting an applicant in the face of the delay.*"

66. Applicant submits that the merits of its challenge are compelling. The procurement and tender processes were blatantly flouted. The contracts

[13] *Supra* at [56]

have expired and there is accordingly no real prejudice to the respondents, if condonation is granted. However, if condonation is refused, the court would be prevented from considering the lawfulness of the exercise of public power. In *Tasima,* Khampepe J held that such a state of affairs would "*allow an unlawful administrative decision to morph into a valid act*"[14].

67. In *Grootboom v National Prosecuting Authority and Another,*[15] the Constitutional Court held that the test for determining whether condonation should be granted or refused is the interests of justice. These it held must be determined with reference to all relevant facts. It referred to cases where the delay was unacceptably excessive and there was no explanation for the delay. In such a case, it held that there may be no need to consider the prospects of success. It went on to hold that despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive and the explanation is non-existent and granting condonation would prejudice the other party. Applicant contends that it's case does not fall into this category.

68. The extent of the delay is also relevant as the applicant rests its application both on the principle of legality and on PAJA. The latter subscribes that a review must be launched within 180 days, whereas the legality review has no prescribed time period.

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[14] Para [147]
[15] [2013] ZACC 37

69. *SITA v Gijima,*[16] dealt with the delay by government in bringing a review application against its decision. The applicant therein was also of the view that he could the choose between PAJA and legality ground and that, if he elected to go with legality grounds, there is no need to comply with the time frames set out in PAJA. Therefore, condonation is only sought in the event that the Court finds that the applicant ought to have followed PAJA. In *Gijima*, the Court held:

> *"[16] It is well established that a decision by a state entity to award a contract for services constitutes administrative action in terms of s 1 of PAJA Once this is accepted, there is no good reason for immunising administrative decisions taken by the state from review under PAJA..... Furthermore, there does not appear to be any justification for permitting the state, with all the resources at its disposal, not to be subjected to the exacting requirements of PAJA in the way that all other litigants are.*

The SCA further rejected the so-called choice and/or preference of the legality grounds over PAJA:

> *"[35] Because of the ubiquitous reach of the principle of legality, and the fact that administrative actions also fall within its remit, it is unsurprising that litigants and the courts have sometimes deliberately sidestepped PAJA. The reason is obvious; it is at times difficult to work out whether the unlawful action complained of qualifies as administrative action. ....*

[16] [2016] ZASCA 143

[36] But it is not a problem that can legitimately be avoided. For if a litigant or a court could simply avoid having to conduct the sometimes testing analytical enquiry into whether the action complained of amounts to administrative action, PAJA, in Professor Hoexter's words: '. . . would soon become redundant, for no sane applicant would submit to its definition of administrative action (or to the strict procedural requirements of section 7) if he or she actually had a choice.'

[37] Put differently, the consequence of this would be that the principle of legality, unencumbered by PAJA's definitional and procedural complexities, would become the preferred choice of litigants and the courts – which is happening increasingly – and PAJA would fall into desuetude. This would be a perverse development of the law, one that the framers of the Constitution would not have contemplated when they drafted s 33(3) of the Constitution. Neither would the lawmaker have imagined this when enacting PAJA."

70. In my view, the provisions of PAJA are applicable and the application for condonation must be adjudicated within those parameters and time frames. The explanation for the delay is one which can be accepted by the court as reasonable. The applicant had not used "*procedural tricks*" to circumvent time periods as referred to in *Kirland*[17]. I do not believe that the actions of the applicant in this case fall within the criticisms levelled at the applicants in the *Kirland* case.

71. In summary, Applicant contends that the HOD appointed the respondents:

[17] Para [83]

72.1 without following a competitive bidding process required by section 217(1) of the Constitution and section 38(1)(iii) of the PFMA;

72.2 without properly following an alternative procurement process envisaged in the Regulation by rationally exercising his powers to circumvent the legislative requirements; and

72.3 in a manner which directly prevented other potential service providers for competing with the respondents to render the required services to the Department.

CONCLUSION

72. The court is of the view that the applicants have provided a reasonable explanation for the delay in launching these proceedings. The merits of the review in seeking to declare the contracts invalid have also been taken into account in arriving at the court's decision to grant condonation.

73. The applicants have demonstrated that the reasoning utilised and the decision taken by Buthelezi to deviate from Section 217 of the Constitution read with the relevant regulations and practice notes did not:

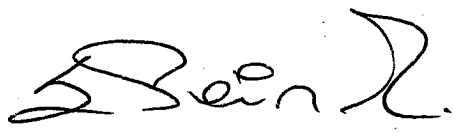
73.1 Fall within the purview of either an emergency or single source situation;

73.2 Comply with the requisites of the rationality test;

73.3 Are accordingly invalid and therefore the contracts concluded with the respondents are to be declared invalid and of no force and effect.

Accordingly, the following order is made:

1. Draft order marked "X" is made an order of court.



S.E. WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Attorney for applicants:	Office of the State Attorney, Johannesburg
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Attorney for respondents:	M.T. Raselo Attorneys
Counsel for respondents:	Adv T Machaba
Date matter heard:	14 June 2017 (Further heads of argument submitted on 15 September 2017)
Judgment date:	27 October 2017

27/10/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38124/2010

BEFORE THE HONOURABLE:

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL: DEPARTMENT OF ROADS AND TRANSPORT:	Applicant
and	
LMT PROGRESSIVE DEVELOPMENTS CC:	First Respondent
DUMABEZWE CONSULTING CC:	Second Respondent

DRAFT ORDER

Having heard counsel and having considered the documents filed of record, it is ordered that:

1. The Applicant's late filing of the review application is condoned.

2. The decisions by the former HoD of the Department taken during or about 2 June 2008 to appoint and to conclude the Independent Contractor Contracts with the First and the Second Respondents

(annexures "MT2" and "MT3" to Applicant's founding affidavit), are here by reviewed and set aside.

3. The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, including costs consequent upon the employment of two counsel.

BY THE COURT

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REGISTRAR