



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG, PRETORIA**

Case No: 73526/2018

In the matter between:

**MINISTER OF INTERNATIONAL RELATIONS &
COOPERATION**

FIRST APPLICANT

**DIRECTOR GENERAL: DEPARTMENT OF
INTERNATIONAL RELATIONS AND COOPERATION**

SECOND RESPONDENT

**DEPARTMENT OF INTERNATIONAL
RELATIONS AND COOPERATIONS**

THIRD RESPONDENT

And

SIMEKA GROUP (PTY) LTD

FIRST RESPONDENT

**REGIMENTS CAPITAL (PTY) LTD
[REGISTRATION NUMBER 004/023761/07]**

SECOND RESPONDENT

**LEMASCENE (PTY) LTD
[REGISTRATION NUMBER 2016/390768/07]**

THIRD RESPONDENT

SERENDIPITY INVESTMENTS SA LLC
[REGISTRATION NUMBER 5944694]

FOURTH RESPONDENT

SIMEKA INVESTMENT GROUP (PTY) LTD
[REGISTRATION NUMBER 2006/013111/07]

FIFTH RESPONDENT

JUDGMENT

HUGHES, J

Introduction

[1] This case concerns an organ of State seeking to review its own decision. The applicants are the Minister of International Relations and Cooperation, the Director-General, of the Department of International Relations and Cooperation and the Department itself. Hereafter, collectively referred to as 'the Department'. The first respondent, Simeka Group (Pty) Ltd (Simeka) and Regiments Capital (Pty) Ltd (Regiments), the second respondent, were in a Joint Venture, which was awarded a tender by the Department. The Department appointed the Simeka-Regiments JV as development partners to design, construct, operate, maintain and finance suitable office and accommodation for a diplomatic mission of South Africans, in Manhattan, New York City, New York. In this judgment the respondents are at times collectively referred to as 'Simeka'.

[2] In this self-review the order sought by the Department reads as follows:

- '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 (DIRCQ 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.'

[3] At the commencement of the proceedings the Department submitted that prayer 4 of the order above was not being pursued at this stage and sought that it be adjourned *sine die*. There was no opposition to the granting of the order.

[4] The Constitutional Court has made it clear in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty)Limited*, that a review of a State organ's own decision falls to be determined under the principle of legality and not PAJA. The Constitutional Court was emphatic that there is 'no choice [is] available to an organ of state wanting to have its own decision reviewed: PAJA is simply not available.'¹

Background

[5] On 4 March 2016 the Department issued a Request for Proposals by way of a Government Tender Bulletin, in the following terms:

'DIRCO 30/203 5'16:

Request for Proposals: Appointment of a Development Partner for the Design, Construction, Operation, Maintenance and Finance of suitable and sustainable office and residential accommodation for the South African diplomatic missions in Manhattan, New York City'

[6] Essentially, the Department required of the successful bidder to identify and procure land in New York for accommodation and offices for South African diplomats. The bidder would also have to design and develop the facilities as per the specifications of the Department, maintain the property and act as the landlord. Performance in terms of the aforesaid mandate was necessary for the successful bidder to raise the required funds.

¹ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty)Limited* 2018 (2) SA 23 (CC) at para [37].

[7] Only two bidders, namely Lephuting (Pty) Ltd (Lephuting) and Simeka-Regiments JV (the Joint Venture) responded to the Request for Proposals. On 17 May 2016 the Joint Venture was appointed as Lephuting was disqualified.

[8] The business model proposed by the Joint Venture was the incorporation and use of Lemascene (Pty) Ltd (Lemascene) as a corporate vehicle on the South African(SA) end to execute the project on behalf of the Department. On the other end, in the United States of America(USA), and under the laws of Delaware, the Joint Venture incorporated Serendipity SA Investments LLC (Serendipity) as the special purpose vehicle, that would execute the project in the USA. The Joint Venture contends that both Lemascene and Serendipity were appointed with the approval of the Department.

[9] The business model set out above as adopted by the Joint Venture, was contemplated in the Department's Request for Proposals, as is evident from the extract set out below:

'At paragraph 1 under the heading "INTRODUCTION", the following is stated:

"DIRCO will appoint a South African registered company that has presence or collaboration in the State of New York, USA to provide and maintain such serviced accommodation to enable DIRCO to execute its mandate in an effective, efficient and cost-effective manner".'

[10] After the tender was awarded to the Joint Venture a steering committee was formed to carry out and monitor the proposed lease implementation of the property to be attained. This committee comprised of members of the Department, the National Treasury and the Joint Venture.

[11] On 21 June 2016 the steering committee made the following proposals:

- Government will make a 'potential capital contribution' to the project;
- The conclusion of a Public-Private Partnership(PPP) and project timelines were to be put in place.

According to the Department the proposals advanced by the steering committee deviated from that which was mandated in the Request for Proposals. Another, problem was that, before the adoption of these proposals the National Treasury's

approval was required in terms of Regulation 16 of the Treasury Regulation.² The Department contends that none of these approvals from the National Treasury were obtained, as National Treasury had not been involved from the inception.

[12] According to the Department, on 15 December 2016, the National Treasury granted exemptions in an effort to comply with Treasury Regulations. These exemptions were Treasury Approval I (TA I) and Treasury Approval IIA (TA IIA) and Treasury Approval IIB (TA IIB).

[13] However, in respect of the final approval, Treasury Approval III, the National Treasury sought of the Department to provide it with the following: the draft PPP agreement; the draft nominee agreement; the final financial model for the project; the PPP contract management plan; proof of Serendipity's capacity and track record in the financing, designing and construction of the buildings, and Lemascene's capacity and track record in facilities management.

[14] On 24 March 2017 the Department concluded a Project Preparation Agreement (PPA) with Lemascene. In terms of this agreement, Lemascene was to act on behalf of the Department to locate land in Manhattan that could be acquired. In addition, Lemascene had to negotiate the purchase price of the land with the owner.

[15] On 28 March 2017 the project site was identified by Serendipity and approved by the Department. In terms of the PPA, on 31 March 2017, the Department provided Lemascene with USD 9 000 000.00, of which an amount of USD 5 000 000.00 was to be paid for the deposit for the purchase of the land and the balance of USD 4 000 000.00 was to be used for preparatory work to be effected.

[16] On 29 June 2017, the purchase and sales agreement for the project site in the USA was concluded between Serendipity and Clark 38th Street LLC and Kent 38th Street LLC. This agreement records that Serendipity would purchase the land in New

² The *Treasury Regulations*, General Notice No. R225 in Government Gazette No. 27388 of 15 March 2005, as amended.

York in its own name for a total amount of USD 47 850 000.00. The deposit of USD 5 000 000.00 was paid over by Serendipity on 30 June 2017.

[17] On 11 October 2017 Simeka addressed correspondence to the Department in response to their concerns regarding the corruption allegations involving Regiments. Following up on the aforesaid further correspondence was sent on 8 November 2017 informing the Department, specifically Ms Bernice Africa, that Simeka was formally notifying the Department of Regiments exit from the project. The termination agreement was attached thereto.

[18] All the while, in correspondence dated 16 October 2017 the National Treasury advised the Department that the appointment of Simeka was an irregularity. In the same correspondence, the Department alleges that National Treasury posed various questions which were to be addressed in respect of the Simeka bid. Conspicuously, the correspondence of 16 October 2017 has not been annexed to the pleadings by the Department. Simeka drew this to the Department's attention, at paragraph 19 of their answering affidavit, which the Department has yet to advance a response to.

[19] Discussions were held on 19 January 2018 between the Department and the National Treasury to take action in respect of the Simeka bid. Following these discussions, on 26 January 2018, the Department was advised by the National Treasury that they were not going to issue the Treasury Approval III (TA III), as a result of the 'insurmountable' difficulties the Department was confronted with in respect of the Simeka bid and the various deviations from the Request for Proposals.

[20] Consequently, the National Treasury gave the Department the following ultimatum:

'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 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.'

[21] The Department then sought legal advice from senior counsel on 7 February 2018, and counsel was consulted on 12 February 2018. It was on 25 February 2018 that counsel informed the Department that the tender process was flawed and irregular.

[22] The Department states, that since the members of the Bid Evaluation Committee are stationed all over the world, they could only convene a meeting of the Bid Evaluation Committee. The National Treasury's concerns could only be attended to after the Bid Evaluation Committee convened on 19 April 2018. Hence, the delay in responding.

[23] The Department contends that on 26 April 2018 they responded to National Treasury's concerns in their correspondence of 16 October 2017. In doing so, the Department acknowledged that the concerns raised by National Treasury had been 'sufficiently addressed'. Hereafter find the relevant extract:

'On the perusal of the report [of the Bid Evaluation Committee] and my assessment, I am satisfied that matters raised are sufficiently addressed.'

Even so, on 18 May 2018, the National Treasury reaffirmed their decision not to grant the TA III approval.

[24] On 22 June 2018 the Department informed the Joint Venture that it would be proceeding to set aside the tender, as Simeka's bid was lacking and the Joint Venture had failed to reach a substantial portion of the bid requirements.

[25] On 19 July 2018, the sellers cancelled the agreement due to non-payment of the balance of the purchase price of USD 42 850 000.00, which was to be paid on 27 October 2017. Notably there were seven addendums to the purchase and sale agreement, which primarily extended the payment of the balance of the purchase price. The last of such extensions was for a payment in good faith to be made 30 days from 4 April 2018. Serendipity breached the agreement, in that it failed to pay the balance. In terms of the agreement, this resulted in the deposit being forfeited.

[26] On 22 June 2018 counsel on behalf of the Department conducted a meeting, with Simeka to communicate the Department's view that Simeka's bid was irrational. The review application was only issued on 10 October 2018. Patently, the explanation for the delay in filing this self-review was only submitted by the Department on 8 November 2019.

[27] The Department took issue with the bid submitted by Simeka saying that this bid did not comply with some of the terms of the Request for Proposals. Their main concerns being that this bid did not meet certain requirements and I set same out below:

- (a) The financial statements of Simeka were not audited, as opposed to the requirement that these be audited;
- (b) The bid documents were to be completed in the name of the Joint Venture but the documents submitted were only completed in the name of Simeka;
- (c) Confidentiality statements were to be submitted by each member of the Joint Venture, however Simeka's bid did not contain a confidentiality statement from Regiments who was part of the Simeka-Regiments JV;
- (d) With respect to the issue of the Joint Venture's ability to raise funds no letter from a financial institution was submitted. The only letter submitted was in respect of Simeka's ability to raise funds;
- (e) The bid did not demonstrate the bidder's ability to finance the model it proposed, in fact it demonstrated the Joint Venture's inability;
- (f) The bid did not show a clear indication of the relationship between Simeka and Regiments.

[28] Other concerns raised was that the bid submitted by Simeka was a finance lease proposal, whilst the Department sought an operational lease proposal. In addition, in terms of the Request for Proposals, Government was to be a contributor of the land. However, in terms of the proposal of the steering committee, the Government was sought to purchase the land. Clearly contrary to the prescripts of the Request for Proposals.

The Delay

[29] It is trite, that where there is an issue of delay and no condonation has been sought, this court is not entitled to entertain the merits of the review application.³

[30] It is common cause that this is a legality review and as such there is no fixed period within which it ought to be launched. I refer to the Constitutional Court judgment of *Khumalo and Another V MEC for Education, Kwazulu-Natal*.⁴

[31] The test regarding delay in bringing a legality review was pronounced in *Khumalo*. Essentially, it highlights that the first enquiry when dealing with a delay, is to determine whether the delay was unreasonable or undue. This enquiry was a factual one and entails a value judgment, having regard to the circumstances of each case. If there is an unreasonable delay the second leg of the enquiry comes to the fore. This requires a determination, whether in light of such unreasonable delay, a court ought to exercise its discretion to overlook such delay, and proceed to deal with the merits of the application.⁵

[32] In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* the Constitutional Court went further to explain that the approach to delay in the context of a legality challenge involves a broader discretion than that under PAJA. The exercising of this broad discretion involves a 'factual, multi-factor, context-sensitive framework' approach. Although there is no prescribed time period of 180 days as is with PAJA to launch proceedings, in a legality review, the time starts running from when an applicant would have become aware or reasonably ought to have been aware.⁶

[33] The prerequisite of a condonation application is absent in legality review proceedings. However, an explanation is necessary in line with the necessary considerations in respect of the delay as outline in *Khumalo* above. An explanation must be offered for the delay, covering the entire period pertaining to the delay, or the

³ *Sanral v Cape Town City* 2017(1) SA 468 (SCA) at para [79]- [81]; *Aurecon SA(Pty) Ltd V Cape Town City* 2016(2) SA 199 at para [16].

⁴ *Khumalo and Another V MEC for Education, Kwazulu-Natal* 2014 (5) SA 579 (CC).

⁵ *Ibid* at paras [48] and [49].

⁶ *Buffalo City Metropolitan Municipality V Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at paras [48]- [54].

delay will be considered to be unreasonable. If an explanation is advanced that justifies the delay, then the delay is deemed to be reasonable and the merits of the review may be entertained.⁷

The Department in addressing the issue of delay

[34] The issue of delay in bringing this review application was raised by Simeka in their answering affidavit. The Department then filed a replying affidavit without addressing the issue of delay at all.

[35] Simeka then filed a fourth affidavit, pointing out that though the issue of delay had been raised, the Department had failed to proffer an explanation. Ironically, the Department sought that Simeka seek condonation for the late filing of their answering affidavit. It was after receipt of this fourth affidavit that the Department filed a condonation application with an explanation for the delay in filing the review timeously.

Was the delay unreasonable?

[36] The factual background of a case is a decisive factor in determining the issue of delay. In assessing same and especially so in a legality review, the pertinent question is when the provable clock ought to start ticking. In this instance, the question would be, when would the clock start ticking for the Department, to institute these review proceedings.

[37] It is trite that courts should not tolerate undue delay as pointed out in *Department of Transport v Tasima (Pty) Limited*.⁸ This is especially so, as a court's ability to deal with the merits is much weaker once there is a delay. Further, it is sensible that clarity and finality is attainable if there are no delays.

[38] In a review of the State's own decision, the explanation advanced for the delay is very important, especially so, in assessing its reasonableness. Cameron J in the minority judgment of *Buffalo City* stated the following:

⁷ *Department of Transport v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) at para [153] (*Tasima I*).

⁸ *Ibid Tasima* at para [48].

‘It is an opportunity for the state to demonstrate that its self-review seeks to promote open, responsive and accountable government rather than the self-interest of state officials seeking to evade the consequences of their prior decisions.’⁹

[39] Significantly, at paragraph 124 Cameron J states:

‘In this, the first judgment reflects the ambivalence that emerges from this Court’s own previous decisions. These have insisted that where delay is unreasonable and unexplained, the nature of the application and its merits would not favour overlooking it (*Khumalo*), and indeed that undue delay should not be overlooked (*Tasima I*). These decisions have also asserted that a government actor must afford a court a basis for overlooking inordinate delay (*Gijima*), in the absence of which there can be no possible basis for exercising the court’s discretion to assist the actor by affording it the relief it seeks.’¹⁰

[40] Purely to summaries, the Department awarded the tender to Simeka-Regiments JV on 17 May 2016. On 16 October 2017 the National Treasury alerted the Department to the fact that the tender was irregular. The review application was launched on 10 October 2018 and an explanation for the delay in respect of filing this review was only forthcoming on 8 November 2019.

[41] The Department seeks this court to consider that the clock only started ticking on 18 May 2018 when the National Treasury ‘affirmed...its earlier decision’ that the tender was irregular. Why so? This being after the Bid Evaluation Committee met on 19 April 2018 to respond to the correspondence of 16 October 2017.

[42] Conspicuously, the Department approached senior counsel for advice as early as February 2018. This was way before the Bid Evaluation Committee provided the National Treasury with a response. Pertinently, the Department only saw fit to advise Simeka of National Treasury’s stance on 22 June 2018.

[43] The Department having quoted portions of the correspondence of 16 October 2017 in their affidavit for condonation prompted Simeka to file a rule 35(12), in an

⁹ *Buffalo City* at para [120].

¹⁰ *Ibid* at [124].

attempt to obtain the correspondence concerned. To date the Department has failed to comply with the rule 35(12) request. Evidently, this correspondence is available, but for whatever reason, the Department has opted not to make it available to Simeka or the court.

[44] The chronology set out above together with the Department authorising and consenting to the various addendum, seven to be exact, clearly indicating an unyielding continuation of the project. Particularly as, these addendums only came to ahead sometime in May 2018.

[45] 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, in my view, 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.

[46] Visible from the aforesaid conduct, is the fact that the Department has failed to be open, responsive, forthright and accountable, as a State organ ought to be, who seeks a self-review. I say so as, the Department has not taken this court into its confidence, and by not doing so, it has not submitted a full explanation for the unreasonable delay in launching this review application.

[47] The crucial correspondence of 16 October 2017 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.¹¹

¹¹ *Buffalo City* at [123].

[48] 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.¹²

In any event, should the delay be overlooked?

[49] It is judicious to bear in mind the *dicta* of *Khumalo* and *Tasima* when dealing with overlooking the delay, which I set out below for easy reference:

‘[47] *Khumalo* also says that courts have a ‘discretion to overlook a delay’. Here is what we 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.*’

[48] *Tasima* explained that this discretion should not be exercised lightly:

‘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, reactive or otherwise.’¹³

[50] The Department’s entire case depends on a finding that the delay is reasonable, and worst case scenario, if it is found not to be reasonable, then I should exercise my discretion to overlook such delay.

[51] The decision of National Treasury in refusing to issue the TA III for the project is monumental. It results in the lease of the land already secured in the United States of America not materialising and brings the entire project to an abrupt halt. Concerning, is the fact that the Department did not heed National Treasury’s conclusion of irregularity in respect of Simeka’s tender promptly. The Department stood by its

¹² *Gijima* at para [49].

¹³ *Gijima* at para [47] and [48].

decision to grant the tender to Simeka and sought to ignore National Treasury, until of course they were placed on terms.

[52] In reality, what the Department sought of this self-review, was redemption from the stance, that in awarding the tender to Simeka, resulted in fruitless and wasteful expenditure. Thus, in my view, the only avenue opened to the Department to avoid a fruitless and wasteful declaration, was to seek a do over in the form of a self-review. In my view, the allegations of corruption and the issue of deviating from the fundamental terms of the Request for Proposals, as grounds to justify the self-review, are unfounded and unsubstantiated.

[53] I turn to deal with the allegations of corruption. The Department's assertion that there were undertones of corruption on the part of Simeka are not substantiated. The corruption allegation emanates from National Treasury having received allegations that Regiments were linked to the Gupta family and are guilty of corruption. Ironically, in the Department's heads of argument, the submission is made that there is no direct evidence of corruption established.

[54] According to Simeka, the refusal of National Treasury to grant the TA III approval on 26 January 2018, came about after the Department had already expended the USD 9 million and Simeka did not gain anything from the project. There is no evidence advanced by the Department to substantiate these corruption allegations and therefore it must fail.

[55] The assertion that Simeka changed the fundamentals of the Request for Proposals, is also fatally flawed. The model adopted by Simeka was in terms of the prescripts of the PPA and the PPA was concluded with the blessing of the steering committee, whose composition was inclusive of members of the Department, National Treasury and Simeka. Bearing in mind that the PPP and the PPA were concluded with the input, consideration and consent of the Department.

[56] Significantly, there was no objection from the Department on the model proposed and adopted by Simeka, until the TA III approval was sought by National Treasury. It was on the basis of the very same model, that National Treasury granted the TA I, TA

IIA and TA IIB approvals. The Department actively took part in the procurement process and cannot now turn around and seek this court to nullify same on the basis of alleged corruption that has not been proven and implementation of a model approved.

[57] Of concern, is the fact that there are no facts before this court to establish what the deciding factor or factors were that influenced National Treasury to take the stance that it did. I am certain, this would have been set out in the correspondence of 16 October 2017, which the Department sought to withhold. Unfortunately, the result is that the Department failed to make out a case for its self-review.

[58] The Department contends that the Joint Venture could not be trusted or believed to have complied with the requirements for their appointment. This contention is absurd and is contrary to the facts before me. 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 Request for Proposals, the PPA and with the cooperation and consent of the Department.

[59] I reiterate that the Department found nothing untoward with the tender submitted by Simeka, even in the face of the irrationality pronouncement, they did not agree with National Treasury's findings. The Department went so far as to seek legal advice, indicative of the fact that they were adamant, that the tender was correctly pronounced and complied with the requirements of section 217 of the Constitution, that it was transparent, cost effective and competitive.

[60] The Department has clearly failed to demonstrate that it has reasonable prospects of success, in confirming that the awarding of the tender to Simeka was irrational and invalid. The Department's failure to be open, frank and transparent in producing the correspondence of National Treasury of 16 October 2017 cannot be overlooked. It is only when the Department is put on terms and is faced with a declaration from National Treasury that it instigated fruitless and wasteful expenditure, that the Department look to self-review.

[61] Thus, I am fortified that there is no evidence, no reasons advanced and no case made out for me to exercise my discretion to overlook the inordinate delay. For the reasons set out above the condonation application must be dismissed.

Conclusion

[62] In this case, the delay outweighs the possible breach of legality, primarily so for lack of evidence and absent a full explanation. Therefore, no basis exists to invoke one's remedial powers in terms of section 172 of the Constitution. The lack of a full explanation and evidence, notwithstanding the delay precludes the exercise of my discretion, to provide equitable refuge, for the Department in terms of section 172.

[63] Looking at the position that the parties find themselves currently. First, it is the Department which awarded the tender to Simeka-Regiments JV, and it was the Joint Venture who performed in respect of the project, with the knowledge and consent of the Department. Secondly, it is the Department that asserts that the corruption allegations in respect of Regiments were not substantiated. It is also the Department which accepted Simeka's termination of Regiments involvement in the Joint Venture. Thirdly, it is the Department which failed to be open, frank and transparent. Fourthly, it is Department that advanced an unconvincing, insincere explanation. Lastly, it is evident that Simeka is the innocent party, having complied with its obligations in good faith. Simeka is 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.

[64] The interest of justice would not be served when the Department, in fact, endorsed the proposed model and the steps taken by Simeka, from the inception of the project. It is now, Simeka who is prejudiced by the Department's about turn, in respect of the tender. Simeka surely expected the Department to adhere to its procedures and protocols in accessing and awarding the tender. Simeka would not have anticipated that the Department would turn on it and 'nit-pick' on aspects relating to its proposal submitted, having accepted and awarded the tender. Especially so with regards to implementing the model proposed by the steering committee, of which, the

Department and National Treasury were members. This is clearly a case where the Department seeks to evade its constitutional obligation by way of a self-review.¹⁴

[65] In the particular circumstances of this matter and the fact that the enrichment claim, in prayer 4, is still to be determined, it would be unfair to intervene, when there are absolutely no proper grounds, to vindicate any principles of contract or that of section 217 of transparency and fairness.

[66] I align myself with the sentiments expressed by Cameron J in the passage below: 'In the absence of explanation, it is opportunistic and arbitrary for the very person who made the decision to shrink back when the review of the decision pans out. And in these proceedings, all this falls right into the Municipality's lap. The Municipality claims to assert legality yet its actions are antithetical to it. To overlook the unreasonable delay in this context is to give the Municipality a free pass. To do so would be counter to the purpose of legality review. Thus we do not consider a definitive pronouncement on the lawfulness of the action under review essential to the determination of the matter.'¹⁵

[67] In conclusion, the possible breach of legality does not outweigh the undue delay absent an explanation.

Order

[68] Consequently, the application for condonation is dismissed with costs. Such, costs are to include the costs of two counsel where so employed.



W. Hughes

Judge of the High Court

¹⁴ *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* (1104/2019) [2020] ZASCA 122 (5 October 2020) at [69]- [70].

¹⁵ *Buffalo City* at para [146].

Virtually Heard: 12 October 2020

Electronically Delivered: 10 April 2021

Appearances:

For the Applicants: Adv. Hulley SC

Adv. Marker

Instructed by: State Attorney

For the 1st and 2nd Respondent: Adv. Bham SC

Adv. Sisalana

Instructed by: Mkhabela Huntley Attorneys