REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

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

30 SEPTEMBER 2022 .....

DATE SIGNATURE

CASE NO: 54068/2020

In the matter between:

EVERGRAND TRADING (PTY) LTD	**APPLICANT**
AND	
SOUTH AFRICA RESERVE BANK	**FIRST RESPONDENT**
MINISTER OF FINANCE	**SECOND RESPONDENT**

JUDGMENT

CEYLON , AJ

A. INTRODUCTION:

[1] This is an opposed application for an Order in the following terms:

> 1. Declaring the decision of the 1st Respondent ("Reserve Bank") to make an order of forfeiture against the Applicant on 08 November 2019 unlawful, unconstitutional and invalid.
>
> 2. Reviewing and setting aside the decision of the 1st Respondent as set out in paragraph 1 above.
>
> 3. Directing the 1st Respondent, alternatively the 2nd Respondent ("Minister of Finance"), to return to the Applicant the sum of $237 527-48 United States dollars ("USD"), which were unlawfully confiscated and declared forfeit by the 1st Respondent.
>
> 4. Directing the 1st Respondent to pay the costs of this application.

[2] The following applications were also brought before this Court:

(a) an application for condonation for the late filing of the Heads of Argument by the Minister of Finance; and

(b) a application for the condonation of the late filing of the review application by the Applicant ("Evergrand").

B. BACKGROUND:

[3] The broad background of this matter is as follows:

(a) Evergrand, an importer and exporter of various goods, have been trading since 2016. Around January 2018, Evergrand entered into an agreement with HBKCS International Co Ltd, a Hong Kong registered company, in terms whereof it would purchase 600 metric tons of copper cathodes sourced from either Zambia or the Democratic Republic of Congo (DRC), which would be delivered and transferred to HBKCS at Tanzania, for the total amount of USD 2 697 500-00.

(b) According to Evergrand, it was never the intention of any of the parties that it would import the copper cathodes or any other minerals or commodities to South Africa for its own account under the said agreement.

(c) HBKCS, in accordance with the agreement, paid the required ten percent (10%) deposit of USD 362 865-00 to Evergrand, which amount was kept in its bank account held at Bidvest Bank ("Bidvest"). In terms of article 7 of the agreement, the deposit was to be utilised for, among others, to cover all of the expenses incurred by Evergrand, including the costs of transportation, and logistics in respect of the goods.

(d) Evergrand sourced the copper cathodes from IGM Group, a Tanzanian company. Following the conclusion of the agreement, IGM introduced Evergrand to its shipping partner Minerals Handling Shipping Co Ltd ("MHS") and was advised that said MHS would be responsible for the sourcing and transporting of the cathodes from the DRC to Tanzania.

(e) MHS issued several invoices during the course of January 2018 to Evergrand for various costs, including transportation, insurance, wharfage, permits, handling and others, and informed Evergrand that, if the invoices were not paid, the cathodes would not pass customs clearance and be confiscated by the Tanzanian authorities. Evergrand then paid the invoices without question in an attempt to avoid delays in the delivery of the goods.

(f) The payments of these invoices caused the Reserve Bank to investigate the matter.

(g) Around 22 January 2018, Evergrand's account held at Bidvest Bank had been frozen by the Reserve Bank following the investigation and discussions between Evergrand, Bidvest Bank and the Reserve Bank. Further, the Reserve Bank confiscated the amount of USD 237 527-48 from Evergrand's said bank account at Bidvest Bank. As a result of the above, HBKCS cancelled the agreement with Evergrand and claimed the refund of the deposit it paid to Evergrand.

(h) It is against the background of the above that Evergrand launched the current application.

C. ISSUES TO BE DETERMINED:

[4] The following issues are before this Court for determination:

(a) whether the time period applicable for purposes of condonation is regulated by the Currency and Exchanges Act 9 of 1933 ("the Act") and the Exchange Control Regulations 1961 ("the ECR"), as contended for by the Reserve Bank, or whether it is regulated by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), as contended for by Evergrand.

(b) if the Act and ECR are applicable, whether Evergrand's delay is unreasonable or unreasonable *per se*. If it is unreasonable or unreasonable *per se*, whether Evergrand's delay should be condoned.

(c) if PAJA is instead applicable, whether Evergrand's delay is unreasonable or unreasonable *per se*. If it is unreasonable or unreasonable *per se*, whether Evergrand's delay should be condoned.

(d) the Reserve Bank seeks to argue that because Evergrand, on its own version, admitted that there were contraventions of the ECR, the application is stillborn. Evergrand disputes this argument and submitted that, on the Reserve Bank's own version, an infringement or contravention of the ECR was not sufficient to sustain a forfeiture order.

(e) the Reserve Bank alleges that Evergrand has advanced new grounds of review in its Heads of Argument ("HOA"). Evergrand disputes this contention and argues that the arguments raised in its HOA clearly arise from the affidavits filed before this Court, and the Reserve Bank was in no way prejudiced. Alternatively, Evergrand will contend that the arguments raised are obvious points of law that this Court may consider even if the parties failed to do so.

(f) whether, if Evergrand is able to satisfy this Court on the points raised by the Reserve Bank above, its grounds of review has merit.

(g) whether the Minister of Finance can be ordered to return the funds to Evergrand on the basis that they were allegedly unlawfully confiscated and declared forfeit by the Reserve Bank.

(h) if Evergrand succeeds on any of its grounds of review, what would be the appropriate remedy in the circumstances of the case.

(i) whether costs should be awarded and against whom.

D. CONDONATION:

[I]. Condonation for the late filing of the Minister's Heads of Argument:

[5] In its HOA the Minister applied for condonation for the late filing thereof. The reasons for same are explained as follows:

(i) after the filing of Evergrand's HOA dated 18 October 2021, the Minister's attorneys discovered that the Reserve Bank's HOA, dated 23 November 2021, was filed on Caselines but not served on the Minister. This caused the Minister to undertake to speedily file their own HOA.

(ii) counsel for the Minister, when informed about the aforementioned around 27 November 2021, was at the time acting as a Judge at the South Gauteng High Court,

having been appointed as such for the period between 16 November and 03 December 2021. He could therefore not attend to finalising the HOA of the Minister during said acting stint and undertook to do so once the period of acting finished. Said counsel considered the papers filed in this application, including the HOA of Evergrand and the Reserve Bank by 06 December 2021. He managed to finalise the drafting of the Minister's HOA by 08 December 2021, which was served on 09 December 2021.

(iii) according to said counsel, he was not in a position to conclude the HOA sooner and that none of the other parties was prejudiced as a result of the late filing of said HOA.

[6] From the papers and argument at Court, it appears that this application was not opposed.

[7] In the view of this Court, the time period in respect of the delay was not excessive. The Court is further of the view that the explanations provided by the Minister and particularly its counsel are reasonable. In addition, it is the Court's opinion that there would not be any prejudice to any of the parties involved in this matter. The fact that the application is unopposed substantiates the Court's view that none of the other parties appears to be prejudiced by the late filing of said HOA. Accordingly, this Court finds that a proper case has been made out for the condonation for the late filing of the Minister's HOA in the circumstances. Therefore, the application for condonation will be granted.

[II] Condonation for the late filing of Evergrand's review application:

[8] The following are the main contentions raised by the parties regarding the condonation requested for the late filing of this review application.

- Evergrand's contentions:

[9] In its founding affidavit ("FA") Evergrand refers us to section 7 (1) (b) of the Promotion to Access to Justice Act 2003 ("PAJA") and states that this section requires a review application to be brought without unreasonable delay and not later than 180 days after the date "*on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons*". Evergrand relies on the latter section to argue that the Reserve Bank never provided reasons for the decision it made mentioned above. Therefore, Evergrand submitted, it was never in a formal position to bring review application and accordingly the application is not brought out of time.

[10] Evergrand further contended that if this Court finds that this application is brought out of time [outside the time period set out in section 7 (2) of PAJA], then Evergrand submits that its failure to comply should be condoned in terms of section 9 of PAJA.

[11] According to Evergrand, the decision of the Reserve Bank was formally taken on 08 November 2019, when it was formally gazetted and communicated to Evergrand. Evergrand contended that, had it been provided with sufficient reasons for the decision by the Reserve Bank, the 180-day period in terms of said section of PAJA would have expired on 06 May 2020.

[12] Evergrand then went on to explain the reasons or grounds for the delay in filing the application late. Evergrand submitted that the Reserve Bank deprived it from all its funds and rendered it unable to trade. As a result of this, Evergrand was not able to secure the services of a legal representative conversed in foreign exchange law. Evergrand's attorney, Mr Teng, did not have sufficient expertise in the said field of law in order to assist Evergrand and an expert practitioner was required to bring the review application.

[13] Evergrand contended that its search for a specialised legal practitioner was further complicated by the unavailability of counsel during the festive season over the December 2019 and January 2020 period as well as the national lockdown that was imposed in the country in March 2020 in terms of the Disaster Management Act.

[14] Evergrand submitted that it acquired legal assistance in May 2020. It was then advised by its legal representatives to first obtain better reasons from the Reserve Bank for the decision it took, and following a written request by Evergrand's attorneys to the Reserve Bank for such better reasons, correspondence was exchanged between the parties' attorneys. According to Evergrand, the Reserve Bank only advised it on 24 August 2020 that it (Reserve Bank) was not prepared to provide better or sufficient reasons for its decision, whereafter Evergrand's legal team immediately prepared this application.

[15] Evergrand submitted that the application was brought without unreasonable delay, as it was financially unable to do so, could not do so without the expert legal assistance required and had to engage the Reserve Bank for the reasons for its decision.

[16] Further, Evergrand contended that it was in the interest of justice that the late filing of this application be condoned, because the delay does not cause any serious prejudice to the Reserve Bank or the Treasury as it only pertains to funds belonging to Evergrand and has no impact on the Reserve Bank or Treasury. On the other hand, so Evergrand submitted, the prejudice to Evergrand is severe as it had been rendered unable to trade as a result of the decision of the Reserve Bank. If it is not afforded the opportunity to bring this application, it would have been deprived of all its assets.

[17] Accordingly, Evergrand argued that a proper case has been made out for relief in terms of section 9 of PAJA.

[18] In its Heads of Argument ("HOA") Evergrand submitted that the Act and ECR affords a person affected by a forfeiture order a 90-day period in which to launch a review application [relying on section 9(2) (d) (ii) of the Act and Regulation 22 D (b) of the ECR]. Evergrand then again refer us to the 180-day period contained in section 7 (1) of PAJA and submitted that the 180-day period has been adopted by the Reserve Bank as the time within which the review may be brought [relying on Annexure "FA14" at pg 002-95 in this matter].

[19] Evergrand went further to state that Reserve Bank's decision was made on 23 October 2019, this application was filed on 15 October 2020, that service was effected on the Reserve Bank on 03 December 2020 and on the Minister on 16 November 2020. Therefore, Evergrand submitted, this application was brought approximately a year after the decision of the Reserve Bank was made. Evergrand then conceded that the application was made out of time and accordingly requested this Court to condone the late filing thereof.

[20] Evergrand submitted further that an application for an extension under section 9 of PAJA may be granted if the interest of justice so require [relying on the South African National Roads Agency Ltd v Cape Town City 2007 (1) SA 468 (SCA) at para 80 ("Sanral") decision].

[21] Evergrand indicated that a Court, in determining whether such an extension under section 9 of PAJA should be granted, it may take into account, *inter alia*, the length of the delay, the explanation for the delay, the prejudice flowing from the delay, the prospects of success on review and public interest considerations following from the review [relying on Altech Radio Holdings (Pty) Ltd v City of Tshwane Metropolitan Municipality 2021 (3) SA 25 (SCA) at para 20; Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG) at para 52 and Sanral, *supra*, at para 105].

[22] Evergrand then further went on to repeat that the delay in bringing this review application is directly attributable to the fact that Evergrand was rendered impecunious by the Reserve Bank's decision and that it had no funds to acquire expert legal representation to assist it in this matter. Evergrand further submitted that, although it was assisted throughout this matter by an attorney, that attorney was not sufficiently versed in administrative law or the law pertaining to currency exchange to be able to assist Evergrand without the advise of counsel. As a result of Evergrand's lack of funds, it was only able to secure legal assistance around June 2020. Evergrand then again mentioned that the general unavailability of counsel during the festive season of December 2019/January 2020 and the national lockdown imposed in the country in March 2020 further complicated its ability to launch this application timeously.

[23] Evergrand contended that once it managed to secure the legal assistance it required, and following consultation with counsel, it became evident that the reasons given by the Reserve Bank for its decision was insufficient as it did not provide reasons why it chose to exercise its discretion against Evergrand other than to identify the provisions of the ECR that were allegedly contravened, even though it (Reserve Bank) was obliged to do so [relying on Armbruster and Another v Minister of Finance and Others 2007 (12) BCLR 1283 (CC)].

[24] Evergrand, as mentioned above, submitted that, following an exchange of correspondence, the Reserve Bank advised it on 24 August 2020 that no further reasons for its decision will be provided, whereafter Evergrand proceeded to bring this application as soon as it was reasonably possible to do so.

[25] Evergrand contended further that, in the broader context of this matter, the delay in bringing this application does not seem excessive. Evergrand substantiates the latter argument by stating that the Reserve Bank froze its funds in February 2018 and seemingly conducted its investigations until June 2019 when it finally warned Evergrand of its intention to declare the funds forfeit. Evergrand went on to advise that even though the Reserve Bank is afforded a period 36 months to finalise its investigations, there is no evidence in the Rule 53 record or in the reasons provided why it required a period of a year and a half to conduct said investigation.

[26] Evergrand then addressed the issue of prejudice and submitted that there is no significant prejudice to any party except to itself. The only prejudice the Reserve Bank complains about, so argues Evergrand, is to the national fiscus. Evergrand submitted that, at worst for the Respondents, they will be obliged to return the forfeited funds to Evergrand. On the other hand, Evergrand has suffered and continues to suffer, extreme prejudice: it has been deprived of its funds, forced to shut down its business operations and is unable to trade. Its prejudice therefore outweighs the prejudice the Respondents will suffer if the review is not considered on the merits.

[27] It was further contended by Evergrand that this matter is of national importance and must be ventilated by this Court - at the core of this matter is the question of what the Reserve Bank must substantively decide and how it should exercise its discretion before making forfeiture orders against individual persons or entities in South Africa that may have severe financial implications and such decisions (forfeiture) has clear implications for the constitutional right to property and even the right to access to courts. The powers of the Reserve Bank are not limited under the Act or the ECR and may well be imposed against a natural person with consequences that may be far more severe than against a legal entity, and therefore the powers of the Reserve Bank must be properly examined and delineated with judicial oversight. Evergrand argued that the public interest in this matter is therefore compelling and the matter should be heard.

[28] Evergrand then submitted that there are significant prospects of success for the reasons raised herein-above.

[29] During argument, Evergrand emphasised the contentions raised in its FA and HOA regarding the delay in bringing these proceedings, the section 7 and 9 provisions of PAJA, the issue of the interest of justice, its significant prospects of success on review, and the possible violation of the constitutional rights of individuals and legal entities.

[30] With regards to prejudice, Evergrand, at the hearing, emphasised its view that its prejudice will be more severe than that of the Reserve Bank or the Minister. It was at great pains to point out that all its funds were taken away and the consequences it suffered as a result thereof. Evergrand required the funds to be returned and it indicated that it does not even claim interest on such forfeited funds. Evergrand referred this Court to section 3 of the State Liability Act and its application.

[31] Evergrand also argued that the funds is money and could easily be refunded as it is not a corporeal asset that needs to be sold first before it can be refunded [referring to the Gqwetha v Transkei Development Corporation (2006) 2 SA 603 (SCA) decision.

[32] Evegrand indicated that it viewed the conduct (decision) of the Reserve Bank as draconian and unlawful. It is therefore in the interest of justice that condonation be granted.

- the Reserve Bank's contentions:

[33] In its Answering papers, the Reserve Bank contended that, in terms of section 7 (1) (b) of PAJA, read with Regulation 22D of the ECR, any proceedings for judicial review against a forfeiture decision must be instituted without unreasonable delay and not later than 180 days from the date of publication of the notice and order of forfeiture.

[34] The Reserve Bank further submitted that section 9(2) (d) (iii) of the Act requires an aggrieved party to institute legal proceedings for the setting aside of a forfeiture decision within 90 days after the date of the publication of the forfeiture notice in the Gazette.

[35] According to the Reserve Bank, the forfeiture decision was gazetted on 08 November 2019, while Evergrand served this application on the Reserve Bank on 03 December 2020 and on the Minister on 16 November 2020, which was more than a year late, and which the Reserve Bank contended was significantly out of the 180-day period under PAJA and the 90- day period in terms of the Act. Accordingly, this delay is, so the Reserve Bank argues, unreasonable *per se*, and this Court cannot entertain this application without more.

[36] With regards to the contentions made by Evergrand in favour of condonation, the Reserve Bank responded that the interest of justice do not support the granting of condonation for the following reasons:

(i) the explanation that it could not afford legal representation to bring this application is without merit. Firstly, Evergrand was duly represented throughout its dealings with the Reserve Bank, even if it (Evergrand) now decries the legal expertise of its attorneys, it was still represented in these proceedings.

(ii) Evergrand failed to account for the complete period of the delay. It seeks to claim that it was due to Reserve Bank not furnishing it with sufficient reasons for the forfeiture decision, but this is not correct as the Reserve Bank did provide adequate reasons for its decision. Even so, that explanation does not account for the length of the delay in bringing this application.

(iii) therefore, the Reserve Bank submits, it is not necessary for this Court to detain itself with the merits of this application and that this application should fail on the grounds of Evergrand's unreasonable delay alone.

[37] In its HOA, the Reserve Bank deals extensively with the issue of the delay in bringing this application. It relies on, *inter alia*, the Transkei Development Corporation Ltd 2006 (2) SA 603 (SCA) at para 24, *supra*, Radebe v Govt of the RSA and Others 1995 (3) SA 787 (N) at 798J-799A and Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 42C-D decisions to emphasise the importance of the rule against unreasonable delay in judicial review proceedings in our legal history and that the rationale behind the said rule is an acknowledgement of the prejudice to interested parties that might occur from such unreasonable delay as well as the public interest in the finality of administrative acts and decisions [relying on Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at para 46].

[38] With regards to PAJA, the Reserve Bank submitted that it is trite that the review of any exercise of public power must be effected within a reasonable time, as was the case under common law. Section 7 (1) of PAJA requires judicial review to be instituted without reasonable delay, and what constitutes a reasonable time will depend on the facts of each matter. The Reserve Bank contended that when a review is launched in terms of PAJA, an additional requirement is applicable, in that section 7 (1) lays down a long-stop date after which the review proceedings will be regarded as being unreasonable *per se*. That long-step date the Reserve Bank submits, is 180 days after:

(i) the person seeking to challenge the administrative action ought reasonably to have become aware of the existence of the administrative action; or

(ii) any existing and effective internal remedies have been exhausted. The Reserve Bank then explained that this means, under PAJA, where "ordinary" administrative action is concerned, the position is as follows: before such time as the 180 days expires, the review may be fatally unreasonable depending on the circumstances, but after the lapse of the time period, the delay will necessarily become unreasonable *per se*. The Reserve Bank explained further that it use the term "ordinary" administrative action to distinguish it from the case where a forfeiture decision/order is applicable, which is an administrative action of a *sui generis* nature, in that PAJA allows a different system to be applied and a different procedure to be followed [relying on section 3 (5) of PAJA]. This latter argument the Reserve Bank says is not only through the said legislation, but was so confirmed by the SCA in the Rustenburg Platinum Mines Ltd v CCMA 2007 (1) SA 576 (SCA) decision, at para 27, wherein which it was recognised that the legislature may need to regulate time periods for review differently in relation to different fields because the type of the prejudice that may arise is varied [Rustenburg Platinum Mines, *supra*, para 27].

[39] With regards to forfeiture orders, the Reserve Bank submitted that the system applicable is set out in the Act and the ECR. In terms of Regulation 22D of the ECR [which the Reserve Bank argued is not challenged in this matter], a review must be instituted at any time but not later than 90 days [section 9 (2) (d) (iii) of the Act and Regulation 22D (b) of the ECR]. The Reserve Bank then submitted that, because the legislature chose to impose a 90-day time limitation, this chosen time period will prevail over the longer time period stipulated in PAJA.

[40] According to the Reserve Bank, Evergrand would be in egregious delay even if the standard for "ordinary" administrative action is applicable and even more so if the standard in terms of the Act and the ECR is applicable. The Reserve Bank contended that, even on the best version for Evergrand:

(i) this application was issued on 15 October 2020 and the clock on the 90 days would not stop until the application was served, and, even if this was not the case, and the time limit would be calculated from date of service, Evergrand would have taken 351 days to bring this application and exceeded the long-stop date by 261 days.

(ii) the application was served on the Reserve Bank on 03 December 2020, a period of 390 days after the date of notice of forfeiture, which is a delay of 300 days and more than quadruple the maximum time allowed under the Act and more than double under, even, the outer limit beyond which it would be unreasonable *per se* under PAJA.

[41] The Reserve Bank submitted that if Evergrand's undue delay in bringing this application were to be overlooked, it would be seriously prejudicial to the administration of justice, the public interest and the national fiscus [referring to the Transkei Development Corporation decision, *supra*, at pars 22-23]. The Reserve Bank pointed this

Court to the Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd 2012 (2) SA 637 (CC) decision, at para 16, when it was held that an inordinate "*delay induces a reasonable belief that the order has become unassailable*".

[42] The Reserve Bank argued further that it is in any event trite that the question of whether condonation is necessary and should be granted is necessarily a preliminary issue: the Court must decide if condonation of a review application brought out of time is appropriate before it deals with the merits of the matter [relying on Alsa Construction (Pty) Ltd v Buffalo City Metropolitan Municipality 2017 (6) 360 (SCA) at para 10]. In this regard the Reserve Bank furnished the following excerpt from the decision of the SCA in OUTA v Sanral (2013) 4 All SA 639 (SCA) at para 26, for its submissions:

"*After the 180-day period the issue of unreasonableness [of a delay] is pre-determined by the Legislature: it is unreasonable per se. It follows that the Court is only empowered to entertain the application if the interest of justice dictates an extension in terms of s9. Absent such extension the Court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matter...*"

[43] The Reserve Bank explained that when a Court considers whether or not to extent the time period for review under PAJA (and under the principle of legality), the Court is guided by the dictates of the interest of justice and all the facts and circumstances of the particular case should be taken into consideration [Sanral v City of Cape Town, *supra*, at para 80; Tasima (Pty) Ltd v Department of Transport (2016) 1 All SA 465 (SCA) at paras 29-30].

[44] The Reserve Bank contended further that due to the nature of the delay both under PAJA and the Act is a relevant and critical circumstance which suggests that it can only be condoned when Evergrand offers a complete and compelling set of explanations for such delay, which the Reserve Bank argues, are absent and that Evergrand should not be afforded the condonation it seeks.

[45] According to the Reserve Bank, Evergrand's justification for its delay is untenable, for the following reasons:

(i) Evergrand did not set out the full causes for the delays and their consequences, which is required to enable the Court to understand fully the reasons and responsibility, and it merely provided a range of generalised averments [relying on Uitenhage Transitional Local Council v South African Revenue Services 2004 (1) SA 292 (SCA) at paras 6-7].

(ii) Evergrand did not provide a full and reasonable explanation for the delay that covers the entire period over which it failed to launch this application, as it was supposed to do at the first possible opportunity and failing which the delay is simply compounded [relying on Camps Bay Ratepayers' Association v Harrison (2010) 2 All SA 519 (SCA) at para 54,

Beweging vir Christelik – Volkseie Onderwys and Others v Minister of Education and Others (2012) 2 All SA 462 (SCA) para 27 and MEWUSA obo Mahatola and Others v F and J Electrical (2016) ZALCJHB 167].

(iii) Evergrand attempts to avoid its obligations under the ECR by relying on the more generous standards provided under PAJA, which, in the opinion of the Reserve Bank, is not applicable in this case. The Reserve Bank then indicates that Evergrand argued that the 180-day period under PAJA has not expired because that period begins to run once Evergrand knows the reasons for the forfeiture, which Evergrand claims it still does not know [FA para 130 at pg 002-37]. This, the Reserve Bank submitted, is founded on disputed facts and based on the application of wrong legislation and this argument misunderstands the language of section 7 (1) (b) of PAJA, which was already referred to above.

(iv) according to the Reserve Bank, there is no dispute about the date on which Evergrand was informed of the decision (administrative action). The circumstances contained in section 7 (1) (b) relating to when the time period starts to run are disjunctive in the opinion of the Reserve Bank: that is, the 180-day period commence when Evergrand is informed of the decision, or when Evergrand becomes aware of the decision and its reasons or when Evergrand might reasonably have been expected to have become aware of the decision and its reasons [relying for example on Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (2010) 3 All SA 577 (SCA)]. The Reserve Bank referred this Court to the Fines4U (Pty) Ltd and Another v Deputy Registrar, Road Traffic Infringement Agency and Others, (2017) 2 All SA 571 (GP) decision, at para 50, but advised that this case is completely distinguishable from the present matter before this Court and that none of the factors that were relevant to that decision arise in this matter, and accordingly, the Reserve Bank argued, that decision is not relevant to the issues in this application and this Court need not consider them for purposes of the condonation application, and, alternatively if the Court disagrees with the submission of the Reserve Bank in the latter regard, it submits that the judgment is in direct conflict with a series of authorities of appeal and is, as such, wrong.

[46] The Reserve Bank argues that, once the affected party is notified of the decision, the 180-day period under section 7 (1) of PAJA commences and to hold differently, would render the words in section 7 (1) (b) "was informed of the administrative action" meaningless. It further argued that if the 180-days only starts to run when the reasons for the decision becomes known, then these latter words could and should have been omitted, and they were not so omitted, and when making laws, the Legislature is held to chose its words for a reason, as our law favours interpretations which do not render words chosen for statutes purposeless [referring to MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC) at para 53]. In light of the said submissions, the Reserve Bank argues that the time started

running on 08 November 2019 when it notified Evergrand of its decision, and if it was wrong on this issue, and the time started running from the date the reasons were furnished, as per Evergrand's contentions, it would still not assist Evergrand. According to the Reserve Bank, Evergrand was furnished with reasons even if it (Evergrand) regarded said reasons as insufficient, the latter is not relevant to the question of whether it was notified of the reasons.

[47] The Reserve Bank went further to contend that even if the time frame under PAJA did not start running on 08 November 2019, the 90-day time limit for a review in relation to the forfeiture decision under the Act and the ECR is the operative period. This period commenced when the notice of forfeiture was published and which lapsed on 06 February 2020.

[48] The Reserve Bank disputed the argument of a lack of funds for the late bringing this application as raised by Evergrand. According to the Reserve Bank, Evergrand cannot substantiate this claim or argument. The Reserve Bank maintained that Evergrand, on its own version, stated that the forfeited money was a deposit received from HBKS and that the latter cancelled the contract between them and now demand a refund of the deposit from Evergrand, but it (Evergrand) provides no documentary evidence to support its claim. According to the Reserve Bank, and in terms of the record of the meeting of 14 February 2018, it came to light that shareholders of Evergrand have companies which fund it and that it had another bank account held at Standard Bank. Evergrand's director, the deponent to its FA, Mr C J Shih, informed the Reserve Bank, at said meeting, that when Evergrand engages in foreign transactions, he transfers money from their Standard Bank account into the Bidvest Bank account. The Reserve Bank submitted in this regard that despite requesting the Court to accept that the forfeiture order made it unable to afford legal assistance, Evergrand did not inform the Court of this Standard Bank account or any other aspect of its finances.

[49] At the same meeting, Evergrand claimed that it had other customers and businesses, but it did not, according to the Reserve Bank, disclose any evidence of same in its papers or representations letter – none of its assets, liabilities or commercial arrangements were disclosed to this Court in the view of the Reserve Bank. Evergrand only stated that it became "an empty shell" "unable to pay any operational expenditure and therefore unable to continue trading" [para 9 of its FA]. The Reserve Bank finds it strange that this allegation by Evergrand, that the loss of the deposit in relation to a project, would render the entire business of Evergrand defunct.

[50] According to the Reserve Bank, Evergrand's Bidvest bank account had no funds immediately prior to 16 January 2018, the date on which it made the first impugned transaction. The Reserve Bank submits that if this was correct, the lack of funds in the Bidvest account evidences an empty shell and this is not in line with the scenario

Evergrand paints of itself in its papers or any information it provided at the meeting on 14 February 2018. Further, so the Reserve Bank argues, Evergrand did not state any details regarding how, when or where it acquired the funding for the legal assistance it obtained and which it claims it had been without for such a long period of time. The Reserve Bank went on to conclude, regarding this aspect, that, taken as a whole, Evergrand's claim of being impecunious as a result of the forfeiture decision, makes little sense and is wholly unsupported.

[51] With regards to the impact of the national lockdown on Evergrand's inability to launch this application, the Reserve Bank disputes this aspect. The Reserve Bank submitted that Evergrand does not provide information as to how or why the lockdown resulted in delay in bringing this application. According to the Reserve Bank, lawyers continued to work throughout the hard lockdown and it (Reserve Bank) finds it difficult to understand why, in a declining economy, lawyers would work less and were not more available to accept work, for instance, on a contingency basis.

[52] Evergrand's contention that its attorneys was unable to advance the matter or make adequate representations due to a lack of expertise in the field of foreign exchange law, is also disputed by the Reserve Bank. According to the Reserve Bank, Evergrand's attorney, Mr Teng, worked at the time, or still works for Simplex Law, which firm sent the letters containing its representations, and which describes itself as "*a law firm that focuses on China-Africa business transactions by providing legal services that goes beyond other firms*". On this said firm's website, the firm indicated that it "*is experienced in dealing with Chinese investments into Africa, especially South Africa*" and "*takes complex legal matters such as cross border investments and simplifies them*". The Reserve Bank argues that, in light of these facts, Evergrand's attorneys had the relevant experience and worked for them throughout the delay period, that despite Evergrand's claim of financial difficulty. According to the Reserve Bank, it cannot explain why Evergrand retained the said attorneys throughout this application, although it complained that said attorneys did not have the legal expertise to deal with this matter.

[53] The Reserve Bank, on this point, submitted that the reasons Evergrand has offered for its delay, are at best circumspect and at worse, contrived, as it failed to provide the requisite evidence to substantiate its claims and which is contradicted by the record, and, as such, the Reserve Bank submits that the condonation application be rejected.

[54] The Reserve Bank contended that condonation would prejudice the Reserve Bank itself and the public administration. The following arguments were advanced in support of this contention:

(i) the Reserve Bank takes issue with Evergrand's contentions that condonation for its delay will not prejudice the Reserve Bank significantly. This was denied on the pleadings

by the Reserve Bank and it was contended by the latter that its version will succeed in motion proceedings where there is a dispute of fact, and this is because, as Evergrand says, the Reserve Bank raises only the potential prejudice to the national fiscus.

(ii) the Reserve Bank is of the opinion that the state and administration of the national fiscus is not an insignificant matter and to allow effected persons such a long statutory period in which to launch a review of a forfeiture decision, would cause havoc on the Bank's ability to plan and administer the fiscus, which prejudice is, in its view quite significant.

(iii) the prejudice to the Reserve Bank in the event of such long delays is borne out by the statutory scheme of the Act and the ECR, for example section 9 (2) (d) (ii) of the Act requires the review application to be brought within a 90-day period, whereas the ECR requires the Reserve Bank not to dispose of forfeited assets for the same 90-day period after the forfeiture notice is published, and further that if a review application is launched within said period, the Reserve Bank may not dispose of those forfeited assets until final judgment has been granted in such an application [referring to Regulation 22B (3) of the ECR].

(iv) the Reserve Bank refers us to the Transkei Development Corporation Ltd decision, *supra*, at para 24-25 which reads as follows:

"*whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including an explanation that is offered for the delay. A material fact to be taken into account in making that value judgment bearing in mind that rationale for the rule is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside*

...

personnel decisions that are susceptible to review are no doubt made by any large organisation on a regular and ongoing basis, and some measure of prompt certainty as to their validity is required. The very nature of such decisions speaks of the potential for prejudice if they were all to be cable of being set aside on review after the lapse of any considerable time" and submitted that the same considerations mentioned in the aforegoing quote are true in relation to forfeiture decisions and argues that it is for those reasons that reviews of these decisions are subject to the much stricter timeframe contained in the Act.

(v) the Reserve Bank continues to argue, on this latter aspect, that if condonation were to be granted without good reason and after the lapse of such long periods of time (four times more than what is permitted *in casu*), it would be contrary to the judgments of our

appellate Courts and would result in significant prejudice, and the ability to properly plan and administer the fiscus would be compromised.

(vi) according to the Reserve Bank, Evergrand overlooked the prejudice to the rule of law, which includes the principle of finality of decisions and the expeditious administration of justice. The Reserve Bank referred this Court to the Associated Institutions Pension Fund v Van Zyl decision, *supra*, at para 46, where the SCA held that the failure to bring a review application within a reasonable time may not only cause prejudice to respondent, but also harm the public interest in the finality of administrative decisions. According to the Reserve Bank, relying on Chairperson, Standing Tender Committee and Other v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA), the SCA indicated that pragmatism and practicality are additional factors forming the basis of the limitation on the time in which the review may be brought and condoning Evergrand's delay would have unpragmatic and impractical consequences, would harm the public interest in finality of decisions affecting the administration of the most essential resources of the state, its fiscus, and this prejudice would be severe.

[55] In light of the above reasons and circumstances, the Reserve Bank contends, Evergrand failed to provide complete, sound and sufficient explanation for its delay, particularly where the delay is significant, and accordingly, Evergrand's application for condonation should be dismissed.

- the Minister's contentions:

[56] This Court could not locate any contentions or submissions made by the Minister in relation to the condonation of the late filing of Evergrand's review application on the papers or at the hearing of the matter.

E. LEGAL PRINCIPLES AND DISCUSSION:

[57] The authorities and legislation that were consulted will appear from the discussion below:

(a) The factors which should be taken into account in determining condonation application include the degree of the lateness and the explanation for it, the prospects of success and the importance of the case [Dengetenge Holdings (Pty) Ltd v Sourthern Sphere Mining and Development Company Ltd and Others (2013) ZA SCA 5; Melane v Santam Insurance 1962 (4) SA 531 (A)].

(b) It is trite that condonation is not to be had merely by asking and a detailed account of the cause of the delay and their effects must be provided to enable the Court to comprehend the reasons and to assess the responsibility. If the non-compliance is time

related then the date, duration and extent of any obstacle on which reliance is placed, should be outlined [Uitenhage Traditional Local Authority, *supra*, at para 6].

(c) In Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) at 76D, the Constitutional Court determined that:

"*A party seeking condonation must make out a case entitling it to the Court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rule or the Court's directions of great importance, the explanation must be reasonable to excuse the defendant.*"

(d) In Van der Merwe v Minister of Police and the NDPP, the Court referred to the principles that normally relate to condonation, which include the degree of non-compliance, the explanation for same, the avoidance of unnecessary delay in the administration of justice [2530/2018 [2019] ZAFSHC 118 (11 July 2019) at para 5].

(e) In Van Wyk v Unitas Hospital and Others 2008 (4) BCLR 442 (CC) at para 22, it was held that:

"*An application for a condonation application must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay.*"

(f) The Court can decide whether to grant of refuse an application for condonation and the test to be applied it the interest of justice [Melane, at 532B-E and Grootboom, at para 22, *supra*]. The concept of interest of justice was considered in the said Grootboom decision and explained as follows:

"*... The interest of justice must be determined with reference to all the relevant factors. However, some factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of the delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and condonation will prejudice the other party. As a general preposition the various factors are not individually decisive, but should all be taken into account to arrive at a conclusion as to what is in the interest of justice.*"

(g) In Van Wyk, *supra*, at paras 20 and 22, the interest of justice concept was explained as follows:

"*This Court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends*

on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation of the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

(h) The SCA considered the concept of prospects of success in the Smith v S 2021 (1) SACR 567 (SCA) decision and held that:

"*What the test of reasonable prospects of success postulates is a dispassionate decision based on the facts and the law that a court of appeal can reasonably arrive at a conclusion different to that of a trial Court. In order to succeed therefore, the appellant must convince this Court on proper grounds that he has prospects on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects for success on appeal* [at para 7]. In Brummer v Gosfil Brothers Investments (Pty) Ltd and Others (2000) ZACC 3; 2000 (5) BCLR 465 (CC) at para 3, it was held that the presence of the prospects of success is an important consideration in deciding whether to grant or refuse condonation.

(i) In Melane, *supra*, it was held that, in deciding whether sufficient cause have been shown, the basic principle is that a Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both sides [at 532B-E].

(j) In terms of section 9 of PAJA, the period of 180-days referred to in section 7 (1) may be extended by agreement, or by a Court or tribunal on application by a party concerned, where the interest of justice so require. This so-called "delay rule" have the purpose of ensuring that judicial challenges to the validity of decisions are brought without undue delay [Louw v Mining Commissioner Johannesburg (1896) 3 OR 190], where this principle was explained to non-suit a litigant who "*wishes to drag a cow which has long been dead out of the ditch*"].

(k) In the decision of Transkei Development Corporation, *supra*, it was held that:

"*It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that long standing rule-reiterated most recently by Brand JA in Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more important, there is a public interest element in the finality of administrative decisions and the exercise of*

administrative functions. As pointed out by Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41 E-F (my translation):

It is desirable and important that finality should be arrived at within a reasonable time in elation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after a unreasonably long period of time has elapsed – interest republicae ut sit finis litium... Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule." (frontnote omitted)

"*Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely on its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (Wolgroeiers Afslaers, above, at 42C).*"

(l) In Beweging vir Christelik-Volkseie Onderwys and Others, *supra*, at para 46, the SCA held that a two-stage approach should be followed. The first stage involves the answering of the questions whether the delay in bringing the application was unreasonable, or whether it was launched more than 180-days after internal remedies had been exhausted or the applicant had been informed of, had knowledge of or ought to have had knowledge of the administrative action under challenge. The second stage, if the first question is answered in the affirmative, is whether it is in the interest of justice to condone the delay [Woodlands Diary (Pty) Ltd and Another v Minister of Agriculture, Forestry and Fisheries and Others (82044/18) [2021] ZAGPPHC 109; [2021] 3 All SA 619 (GP) (22 February 2021) at para 50].

(m) In Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality (2017) 1 All SA 677 (SCA) at paras 11-13, the Court explained the manner in which the discretion to extend statutory time periods should be exercised:

"*The manner in which the discretion to extend the statutory time period should be exercised was described in Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) paragraph 54 in the following terms:*

"[11] And the question whether the interest of justice require the grant of such extension depend on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include 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 in the intended proceedings and the prospects of success "[My emphasis] [12] Although a consideration of the prospects of success of the application for review requires an examination of its merits this does not encompass their determination. In Beweging vir Christelik-Volkseie Onderwys v Minister of Education [2012] ZASCA 45; [2012] 2 All SA 462 (SCA) paragraphs 42-44, the proposition that a Court is required to decide the merits before considering whether application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect, was rejected. Thereafter in Opposition to Urban Tolling Alliance v South Africa National Roads Agency Ltd [2013] ZASCA 148; [2013] 4 All SA 639 (SCA), paragraphs 22, 26 and 43 it was decided that a Court was compelled to deal with the delay rule before examining the merits of the review application because in the absence of an extension the Court had no authority to entertain the review. The Court there concluded that because an extension of the 180-day period was not justified, it followed that it was not authorised to enter into the merits of the review application. However, in South African National Roads Agency Ltd v Cape Town City [2016] ZASCA 122; [2016] 4 All SA 332 (SCA), paragraph 81, a submission based on this decision, namely that the question of the delay had to be dealt with before the merits of the review could be entertained, was answered as follows:

"It is true that ... this Court considered it important to settle the Court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which 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 interest of justice dictates the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious."

[13] A full and proper determination of the merits of the review was accordingly dependent upon a finding that the respondent's failure had to be condoned. As stated in the Opposition to Urban Tolling Alliance (supra), paragraph 26:

"Absent such extension the Court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay ..."

It was thus impermissible for the Court a quo to have entered into and decided the merits of the review application without having first decided the merits of the condonation application."

(n) From the said OUTA decision, supra, the position is that after the expiry of the 180-day period in terms of PAJA, a Court may only review if the interest of justice require an extension of time. After the 180-day period lapsed, and no extension was granted, a Court is not authorised to consider the review application. Whether the decision was in

fact unlawful, is then of no consequence – the decision would be 'validated' by the delay [Woodlands, *supra*, at para 52; Tasima (Pty) Ltd v Department of Transport and Others (2016) 1 All SA 465 (SCA)].

(o) In Tasima and Van Wyk, *supra*, it was further held that an extension of time in terms of section 7 may have important consequences and is not merely for asking:

"An applicant for condonation must give a full explanation for the delay. In addition the explanation must cover the entire period of the delay. And, what is more, the explanation must be reasonable" [Woodlands, *supra*, para 53].

[58] As indicated above, Evergrand contended that the time period, that applies to this review application is regulated by PAJA, whereas the Reserve Bank argued that the Act and the ECR is applicable. In this regard Evergrand relies on section 7 (1) (b) of PAJA which requires the application to be brought without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action or became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[59] Initially, in its FA, Evergrand submitted that the Reserve Bank never provided reasons for its decision and was therefore never in a position to bring its application, and, accordingly, the application was not brought out of time. In its HOA Evergrand later acknowledged that the application was brought approximately a year later after the Reserve Bank made its decision and conceded that the application was brought out of time and hence this application for condonation.

[60] In light of the above, Evergrand then submitted that an application for an extension under section 9 of PAJA should be granted as it would be in the interest of justice for such an extension to be granted, relying on the SANRAL V Cape Town City decision, *supra*, at para 80. In this latter regard, Evergrand argued that for purposes of such extension, the Court should take into consideration, *inter alia*, the length of the delay, explanation for the delay, prejudice ensuing from the delay, prospects of success on review and public interest considerations, relying on the Altech, Centre for Child Law and SANRAL decisions, *supra*.

[61] The Reserve Bank submitted that the Act and ECR is applicable to the condonation of this application. It contended that section 9 (2) (d) (iii) of the Act requires an aggrieved party, in the case of a forfeiture decision, to institute review proceedings within 90 days of the date of publication of the forfeiture notice in the Gazette. It is the Reserve Bank's argument that in cases where forfeiture decisions are involved, which it regards as an action of a *sui generis* nature, legislation and case law indicate a need to regulate the time periods differently in respect of different fields because the type of prejudice that may arise is varied – relying on the Rustenburg Matinum Mines decision *supra* and section 3

(5) of PAJA. The Reserve Bank went on to contend that in cases of forfeiture decisions, the applicable system is set out in the Act and the ECR – Regulation 22D of the ECR provides that a review must be instituted at any time but not later than 90 days as per section 9 (2) (d) (iii) of the Act. Therefore, the Reserve Bank argues, the legislature chose to impose the 90-day period time limitation, and this 90-day time periods will prevail over the longer time period set out in PAJA.

[62] From the concession made by Evergrand mentioned above, it would appear that it was made in relation to the time limitations for review applications in terms of PAJA. It further seems that the concession is made to the extent that Evergrand now only argues in favour of an extension under section 9 of PAJA and then only on the ground of the interest of justice and not under its initial grounds for the delay previously alluded to. If this Court is correct in its aforementioned evaluation of Evergrand's position, then the question to be answered here is whether the extension requested would be in the interest of justice or not.

[63] In the view of this Court, it would still be necessary to ascertain which piece of legislation regulates the condonation in cases like the present. This Court is persuaded by the submission of the Reserve Bank in this regard, which have been denied, but not refuted by Evergrand. This Court agrees that the system applicable to instances where forfeiture orders are involved, is regulated by the Act read with the Regulations. Therefore, any review concerning forfeiture decisions must be instituted at any time but not later than the 90-day period. The said time limitation has been imposed by the legislature and is therefore applicable in this matter under the current circumstances, and which prevails over the 180-day period allowed for in PAJA.

[64] This Court is further of the view that the effective date upon which the 90-day period under the Act and ECR commenced was the date of publication of the forfeiture notice, namely 08 November 2019. The date upon which the calculation period ended was in the opinion of this Court the dates on which the application was served on the Respondents, on the 16 November 2020 on the Minister and on 03 December 2020 on the Reserve Bank. This Court therefore aligns itself with the calculations presented by the Reserve Bank that the application was served 390 days after date of the publication of the forfeiture notice, that is a delay of approximately 300 days. In the words of the Reserve Bank, more than quadruple the time permitted under the Act, and approximately 351 days, therefore 261 days late if the 180-day period under PAJA would have been applicable.

[65] Evergrand contended that it was in the interest of justice that the delays referred to above, be extended in the interest of justice. This contention was opposed by the Reserve Bank. In the Melane and Grootboom decisions, *supra*, it was held that the interest of justice demanded that reasons for the delay be advanced for the Applicant to

seek the indulgence of the Court. The main reasons for the delay Evergrand has submitted, was that it was deprived from all its funds by the decision of the Reserve Bank, which rendered it unable to trade and to secure the services of an expert legal representative to assist it in the preparation and bringing of this application.

[66] These submissions were disputed by the Reserve Bank which contended that Evergrand, on its own version, argued that the moneys forfeited was a deposit received from HBKCS and whereafter the latter cancelled the contract between them and now HBKCS demands a refund of the said deposit, but, so the Reserve Bank submitted, Evergrand did not provide any documentary or other proof for this submission. Further, the Reserve Bank stated that Evergrand's director, at the meeting of 14 February 2018, in terms of the record of said meeting, stated that when Evergrand engages in foreign transactions, he would transfer the required funds from Evergrand's Standard Bank account into their Bidvest bank account for such transactions. The said director also indicated, at said meeting, that its shareholders have other companies funding it. This, the Reserve Bank says, is not proper if Evergrand expects this Court to accept that the forfeiture decision made Evergrand impecunious and unable to secure the specialised legal assistance it required.

[67] This Court would have expected Evergrand to disclose all the facts relevant to its condonation application, including those relating to its full financial position and specifically it funding and its Standard Bank account. This is so because Evergrand relies on its poor financial position allegedly being caused by the Reserve Bank's forfeiture decision. Evergrand failed to disclose to this Court, for instance, information relating to its assets, liabilities, customers and funding. It failed to take this Court into its confidence regarding these latter aspects. Evergrand therefore failed to put this Court in a position to determine and understand the truth regarding its financial position and whether the forfeiture decision indeed rendered it an empty shell, unable to pay for any operational expenses and unable to trade.

[68] Another issue that concerns this Court is Evergrand's contention that, due to the Reserve Bank's decision, its whole business operation collapsed. The amount that was forfeited was, on the version of Evergrand, the deposit received for the transaction in question, from HBKCS. If the forfeiture of the deposit rendered Evergrand defunt, it follows that it was impecunious without such deposit. In such a case Evergrand's argument will not hold water. The deposit was in any event not Evergrand's money, it was HBKCS's money to be used to cover interim expenses relating to the transaction. Evergrand can therefore not claim that the forfeiture of these monies rendered it unable to trade further or made it unable to afford legal assistance.

[69] In the latter regard, the Reserve Bank further submitted that Evergrand had no funds prior to 16 January 2018, the date on which it made the impugned transaction. Evergrand

was therefore, if its Bidvest Bank account is considered, already an empty shell by then and the image that Evergrand portrays of itself in the papers is therefore questionable.

[70] Evergrand's submission that it only received funds for the required legal representation around May 2020 is also disputed by the Reserve Bank. The Bank contended that Evergrand also did not disclose how, when and where it acquired the said funding. From the papers before this Court, no details of this funding, as the Reserve Bank submitted, was disclosed to this Court. This is problematic as the Court is again left in a position not being able to comprehend and determine the true facts surrounding the funding. One would have thought that if a party seeks the indulgence of a Court, it would disclose all facts relevant to the grounds upon which such indulgence is sought. This causes this Court to doubt the bona fides of Evergrand. It seems to this Court that again, Evergrand chose not to take this Court into its confidence relating to this aspect.

[71] With regards to the contention that the occasion of the national lockdown complicated its ability to launch this application, it was also disputed by the Reserve Bank. The Courts and the legal profession, as far as this Court is aware, functioned properly, except during the so-called hard lockdown period from middle March to end of March 2020. Evergrand did not appraise this Court in sufficient detail about its efforts made during the rest of the lockdown period (that is, excluding the hard lockdown) to acquire the expert legal practitioner to assist with the review application. This non-disclosure made this Court to sense some reluctance on the part of Evergrand of its duty to inform this Court of all the factors and circumstances required to substantiate its reliance on the grounds raised by it.

[72] Evergrand's contention that it could not obtain the services of a legal expert, well versed in administrative and/or foreign exchange law is also disputed by the Reserve Bank. The argument that Simplex Law, Evergrand's attorneys, held itself out to be experts and go beyond other firms and to take complex legal matters such as cross border investments and simplifies them, speaks for itself. Evergrand utilised the services of said Simplex Law and Mr Teng throughout these proceedings, therefore it was duly represented by an expert law firm. This contention by Evergrand, in the view of this Court, cannot be sustained.

[73] The issue of prejudice has also been heavily contested between the parties. In the view of this Court, the submissions of both parties have been set out in detail herein-above and need not be repeated. Evergrand's main contention in this regard is that its prejudice was more severe than that of the Reserve Bank in that it was rendered impecunious and unable to trade. The Reserve Bank submitted that its prejudice is more severe than that of Evergrand in that it would not be able to plan and administer properly one of the most important sections of government, the fiscus. The Reserve Bank also contended in the latter regard that prejudice of the rule of law, which includes the principle

of the finality of decisions and the expeditious administration of justice will also be suffered. This Court agrees with the contention of the Reserve Bank that its prejudice is more serve than that of Evergrand. The forfeiture decision only affect Evergrand while the prejudice of the Reserve Bank affects the whole government and the citizens it represents. It is unthinkable that the prejudice to the fiscus can be equated or even seen to be less significant than that of a particular party. The prejudice to the fiscus or the treasury will always be a consideration in the national and public interest and has to weigh heavier than that of a private individual or legal entity. This Court therefore agrees with the views expressed in the Van Zyl and JFE Sapela Electronics decisions, *supra*, in relation to the latter aspects. This Court cannot agree with Evergrand regarding the latter aspects.

[74] In the view of this Court, in light of the contentions made by the parties, Evergrand did not furnish this Court with full details regarding the delay and its explanations left out information and documentation regarding its financial position, its funding, clientele, assets and liabilities. Evergrand was not open with this Court about these issues.

[75] This Court further is not persuaded by Evergrand's submissions in respect of how its alleged poor financial position made it impossible for it to acquire the expert legal practitioner to assist in its application and that the national lockdown made it more difficult to secure specialised, legal assistance. These contentions were dealt with herein-above.

[76] As stated above, this Court cannot accept the submission of Evergrand in relation to its alleged prejudice and that it suffered more severe prejudice than the other parties hereto, for the reasons advanced above.

[77] In the view of this Court, Evergrand changed its stance on its grounds for condonation from the grounds raised in its FA, where it first blamed the Reserve Bank for not furnishing proper reasons, caused it funds to be forfeited, the impact of the national lockdown and the lack of funds to appoint specialised legal assistance to an extension under section 9 of PAJA, in the interest of justice. In any event, it is this Court's opinion that Evergrand did not provide a full explanation of the degree of the lateness, the causes thereof in order to enable the Court to comprehend the reasons and to assess the responsibility, as envisaged in the Dengetenge, Uitenhage Traditional Local Authority and Melane decisions, *supra*.

[78] This Court is further not convinced that Evergrand made out a proper case to entitle it to the Court's indulgence if regard is had to the missing information, documentation and evidence, referred to above. In the view of this Court, sufficient cause were not shown and the explanation provided did not cover the entire period of the delay, and, the reasons that were provided, were insufficient in relation to the grounds upon which it places its

reliance. This does not commensurate with the principles and requirements set out in the Van Wyk, Van der Merwe and Grootboom decisions, *supra*.

[79] This Court is therefore not persuaded that the delay was reasonable. It was very excessive. The time period of the delay is, in the opinion of this Court, prejudicial to the Respondents, the administration of justice and not in the public interest [refer in this regard to the Altech, Louw and Centre for Child Law decisions, *supra*]. This Court is convinced that the delay in bringing this application undermines the finality of administrative decisions and the exercise of public functions. The delay is prejudicial to the public that depend on the functioning of the Respondents and the fiscus, and as such, contrary to the principles laid down in the Wolgroeiers Afslaers and Transkei Development Corporation decisions, *supra*. In light of the aforementioned, it is this Court's view that the delay was unreasonable.

[80] Evergrand did not provide, in the opinion of this Court, sufficient reason why it submitted that it has prospects of success on review. It merely pointed the Court to its reasons already mentioned above, namely the Reserve Bank's decision rendered it out of pocket, unable to trade and unable to pay for the required legal assistance, the complications to do so brought about by the lockdown restrictions and the prejudice it suffered. In the assessment of this Court, this approach by Evergrand does not accord with the principles in relation to prospects of success referred to in the Smith, Grootboom and SANRAL decisions, *supra*. Having had regard to the contentions of the parties, all circumstances, facts and evidence before it, this Court is not convinced that there are prospects of success on review for Evergrand in this matter.

[81] With regards to the issue of the interest of justice, as envisaged in the Beweging vir Christelik-Volkseie Onderwys, Woodlands, Asla and Camps Bay Ratepayers' decisions, *supra*, this Court is of the view that, since Evergrand failed to provide a proper and complete explanation for the delay which covers the entire period thereof, the excessive nature of the delay, the prejudice to the other parties, the public, the administration of justice, the fact that there are no prospects of success on review, it is not persuaded that the granting of an extension would be in the interest of justice.

[82] This Court is therefore of the opinion that, in view of the above, the application for the extension of the time period under PAJA cannot be granted.

F. CONCLUSION:

[83] (a) This Court is of the view that review the application is regulated by the Act and the ECR and not by PAJA.

(b) The delay in bringing this application was undue and unreasonable, even if it would have been brought under the time period allowed for under PAJA.

(c) If the application for review under PAJA would have been applicable, the extension of time of the delay, would still have been unreasonable and not in the interest of justice.

(d) The application can therefore not be sustained.

G. COSTS:

[84] (a) The general rule is that costs follows the result and this rule may only be departed from where good cause to do so exist [Myers v Abramson 1951 (3) SA 348 (C) at 455].

(b) The Reserve Bank submitted that Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (03 June 2009), does not apply in this matter and therefore requested an order on a party and party scale to be awarded.

(c) The Minister also submitted that the Biowatch decision, *supra*, is not applicable to this matter and that costs be awarded, including costs of two counsel.

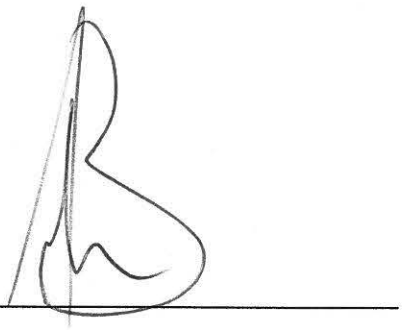
(d) It is clear that no punitive costs is sought against Evergrand by the Respondents and this Court is inclined to agree that such costs is not warranted in the circumstances. This Court is further of the opinion that the Biowatch decision is not applicable, as this is a commercial matter, not involving constitutional issues.

H. ORDER:

[85] Accordingly, the following order is made:

(a) the condonation application in respect of the late filing of Minister's Heads of Argument is granted;

(b) the review application is dismissed with costs, including cost of counsel.



B CEYLON

Acting Judge of the High Court of South Africa

Gauteng Division

Pretoria

Hearing date:	17 March 2022
Judgment date:	03 October 2022
For the Applicant:	Adv O Ben-Zeev
Instructed by:	Teng (Hung-Han) Inc
	C/O Jennings Inc
	Pretoria
For the Respondent:	Adv M Stubbs

Instructed by:	MacRobert Inc
	Pretoria
For the 2nd Respondent:	Adv B Lekokotla
Instructed by:	State Attorney
	Pretoria