THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 792/2015

In the matter between:

TASIMA (PTY) LTD	**APPELLANT**
and	
THE DEPARTMENT OF TRANSPORT	**FIRST RESPONDENT**
THE DIRECTOR-GENERAL: DEPARTMENT OF TRANSPORT	**SECOND RESPONDENT**
THE MINISTER OF TRANSPORT	**THIRD RESPONDENT**
WERNER EDUARD KOEKEMOER	**FOURTH RESPONDENT**
ROAD TRAFFIC MANAGEMENT CORPORATION	**FIFTH RESPONDENT**
COLLINS LETSOALO	**SIXTH RESPONDENT**
KEVIN JOSHUA KARA-VALA	**SEVENTH RESPONDENT**
MORNE GERBER	**EIGHTH RESPONDENT**
GILBERTO MARTINS	**NINTH RESPONDENT**
CHRIS HLABISA	**TENTH RESPONDENT**
MAKHOSINI MSIBI	**ELEVENTH RESPONDENT**

Neutral Citation: *Tasima (Pty) Ltd v Department of Transport* (792/2015) [2015] ZASCA 200 (2 December 2015)

Coram: Brand, Cachalia, Majiedt, Saldulker, Mbha JJA

Heard: **23 November 2015**

Delivered: **2 December 2015**

Summary: Administrative Law – Extension of contract between appellant and first respondent – court orders compelling respondents to comply with contract during period of extension – application for committal of contempt of those orders and related relief – contempt not dependent on validity of extension – counter-application to set extension aside – time limit imposed by s 7 of PAJA.

ORDER

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

It is ordered that:

(a) The appeal against both the dismissal of the main application and the order granted in terms of the counter-application is upheld with costs, including the costs of two counsel, against the first and fifth respondents, jointly and severally.

(b) The order of the court a quo is set aside and replaced with the following:

'An order is issued in the following terms:

1. Declaring:

(a) the first and second respondents to be in breach and contempt of:

   (i) paragraph 1.1 of the order of this court issued under case number 44095/2012, handed down by Mabuse J on 17 October 2012 (the Mabuse Order);

   (ii) paragraph 3 of the order of this court issued under case number 44095/2012 handed down by Strijdom AJ on 26 March 2013 (the Strijdom Order);

   (iii) paragraphs 5 and 6 of the order of this court issued under case number 44095/2012 handed down by Fabricius J on 27 August 2013 (the Fabricius Order);

   (iv) paragraph 1 of the order of this court issued under case number 44095/2012 handed down by Rabie J on 21 January 2014 (the Rabie Order);

(b) the fifth and eleventh respondents to be in breach and contempt of:

   (i) paragraphs 5 and 6 of the Fabricius Order; and

(c) the tenth respondent to be in breach and contempt of:

(i) paragraph 1.1 of the Mabuse Order;

(ii) paragraph 3 of the Strijdom Order;

(iii) paragraphs 5 and 6 of the Fabricius Order;

(iv) paragraph 4.1 of the order of this court issued under case number 44095/2012 handed down by Nkosi J on 5 November 2013 (the Nkosi Order);

(v) paragraph 1 of the Rabie Order;

2. Ordering that:

(a) no transfer of the eNaTIS and the services (as defined in the turnkey agreement for the provision of the eNaTIS system (Contract RT1194KA) dated 3 December 2001, as subsequently amended and extended (the turnkey agreement) may take place except in terms of the transfer management plan envisaged in schedule 15 to the turnkey agreement;

(b) for the duration of the transfer of the eNaTIS and the services:

(i) the applicant is to be paid, by the first respondent, for all services rendered under the agreement, in accordance with, inter alia, the terms of the turnkey agreement and paragraph 1.2 of the Mabuse Order;

(ii) all purchase requisition orders are to be processed in accordance with, inter alia, the terms of the turnkey agreement and paragraph 4 of the Nkosi Order; and

(iii) all material contracts and agreements required to be approved by the first respondent will be so approved within five days of the request by the applicant;

(c) the first, second, fifth, tenth and eleventh respondents are interdicted from taking any steps to implement the purported transfer alluded to in the letters dated 24 February 2015, 25 February 2015 and 4 March 2015 (the transfer correspondence, which respectively comprise annexes FM27, FM25, and FM28 to the supporting affidavit of Fannie Lynen Mahlangu dated 12 March 2015), or to implement any transfer of the eNaTIS, the services (as defined in the turnkey agreement) or any related services contrary to 2.1 above;

(d) the fifth respondent is to desist from advertising for any eNaTIS related positions until at least a transfer management plan has been finalised in terms of the turnkey agreement;

3. Ordering that:

(a) the second and tenth respondents be committed to imprisonment for a period of 30 days.

(b) the order in paragraph 3(a) above will not come into operations unless there is a breach of the order in paragraph 2(c) above;

(c) a warrant of committal is to be issued by this court on the same papers, duly supplemented as necessary, if the first, second and tenth respondents breach the order in paragraph 2(c) above;

4. Ordering the first and fifth respondents, jointly and severally, to pay the applicant's costs of the application dated 12 March 2015, including the costs of two counsel.

5(a) Dismissing the first respondent's counter-application dated 26 March 2015;

(b) Ordering the first respondent to pay the applicant's costs of the counter-application, including the costs of two counsel.

JUDGMENT

Brand JA (Cachalia, Majiedt, Saldulker, Mbha JJA concurring):

[1] The appellant, Tasima (Pty) Ltd (Tasima), brought an application in the North Gauteng High Court for relief essentially twofold in character. First, to declare five of the eleven respondents in contempt of no fewer than seven court orders and, secondly, to interdict all the respondents from acting in breach of these court orders. The orders are defined in the papers by reference to the judges who granted them. I propose to do the same. To the identity of the respondents, I shall presently return. But for purposes of introduction it suffices to describe two of them only, namely, the first respondent, which is the Department of Transport (the Department) and the fifth respondent, which is the Road Traffic Management Corporation (RTMC) that owes its corporate existence to s 3 of the Road Traffic Management Act 20 of 1999.

[2] The various court orders relied upon for the contempt application had their origin in a turnkey agreement between Tasima and the Department concluded on 3

December 2001. It is common cause that the agreement would have expired in May 2007, but for an extension of the contract period relied upon by Tasima. The application was opposed by a number of respondents. In addition, the Department brought a counter-application to review and set aside the decision to extend the contract period upon which Tasima's application relied. In the court a quo the matter came before Hughes J, who dismissed Tasima's application and granted the Department's counter-application, in both instances with costs. The appeal against that order is with the leave of the court a quo.

Background

[3] The exact nature of the dispute between the parties and the issues that arose for determination will be better understood against the factual background that follows. It all started with a tender invited by the Department for the redevelopment and implementation of the National Traffic Information System. The tender was eventually awarded to Tasima. Tasima and the Department accordingly entered into the turnkey agreement for the provision of the electronic National Traffic Information System (eNaTIS), on 3 December 2001. eNaTIS is responsible for, amongst other functions, the management of all licensing requirements and traffic systems. It allows the Department to administer, across all nine provinces, the licensing of all motor vehicles; driver's tests; learner licence tests; contraventions of road traffic legislation; the roadworthiness of vehicles; and so forth. It acts as the interface amongst the Department, all licensing institutions and municipalities; a variety of institutional users such as the South African Police Service; motor manufacturers; the banking industry; and the general public. By all accounts the eNaTIS system is a complex one. It interacts with over 20 pieces of legislation; it manages a vehicle population of over 11,3 million vehicles; it processes 380 million transactions per year at an average of 1,6 million transactions per business day; it comprises millions of lines of computer code and is imbedded into the national economy. The contract is evidently a very valuable one.

[4] Although the turnkey agreement was concluded on 3 December 2001, it only came into operation on 1 June 2002. In terms of clause 4, it was intended for a fixed period of five years only, which would expire on 31 May 2007. The parties clearly contemplated, however, that due to the complexity and wide-ranging import of the

eNaTIS system, its transfer from Tasima to the Department or a third party, could not occur overnight. Hence clause 26 of the agreement provides:

'**26 Transfer management upon termination**

Upon termination of this agreement for any reason whatsoever and howsoever arising, in order to ensure the smooth and uninterrupted transition of the services from [Tasima] to the State, or its nominated contractor, [Tasima] shall comply with the transfer management provisions set out in schedule 15.'

Amongst the pertinent provisions of schedule 15 is the introduction in paragraph 1 which reads:

'In view of the strategic importance of the [eNaTIS system] to the State, it is necessary to make provision for the orderly transfer of this [system] and services provided in respect thereof from [Tasima] to the State or a third party provider should this agreement or any part thereof terminate or expire for any reason whatsoever. This schedule contains the provisions relating to such a transfer.'

[5] Clauses 2.2 and 2.3 of the turnkey agreement provide that, within 90 days after termination of the agreement, the Department can request from Tasima a transfer management plan meeting and the Department and Tasima must agree on a transfer management plan within 30 days of such request. This transfer management plan must, in turn, provide timeframes for transfer, similar to the Migration plan (which governed the original transfer of the system to Tasima), and must be carried out in a timeframe substantially similar to that delineated in the Migration plan. It is common cause that the Migration plan endured for a period of five years from 2002 to 2007.

[6] On the eve of the expiry of the agreement on 31 May 2007, Tasima made written representations to the then Director-General, Ms Mpumi Mpofu, for the agreement to be extended beyond that date. But its representations did not find favour with her. She accordingly wrote to Tasima that the agreement would terminate on 31 May 2007 and that the eNaTIS system had to be transferred to the Department in conformity with clause 26 and schedule 15. But the Department never requested the transfer management meeting contemplated by clause 2.2 of schedule 15. Both Tasima and the Department accept that the contract then continued on a month-to-month basis with no stipulated time period.

[7] Ms Mpofu's contract as Director-General came to an end on 30 October 2009 and Mr George Mahlalela was appointed in her stead. On 12 April 2010 Tasima made written representations to the then Deputy Director-General, Mr Zakhele Thwala, for the Department to consider giving Tasima an extension of the contract for a further period of five years from 1 May 2010 and that it be permitted to develop new software it would maintain for use by the public. Mr Mahlalela accepted the recommendation and informed Tasima by letter dated 12 May 2010 that its contract was extended to 30 April 2015.

[8] The extension was challenged by the Department's Chief Financial Officer, Mr Collins Letsoalo, who was also the acting Chief Executive Officer of RTMC. He wrote to Tasima on 21 May 2010, and again on 27 May 2010, advising it to ignore Mr Mahlalela's letter, since that letter, he asserted, had been withdrawn. This was followed by a further letter by Mr Mahlalela to Tasima, dated 18 August 2010, in which he confirmed the extension of the contract, advised it to ignore any instructions to the contrary from anyone else in the Department. On 22 June 2010 the Minister of Transport confirmed in Parliament that the Director-General had extended the agreement and defended the extension essentially on the basis of the importance of the eNaTIS system and the retention of special skills employed by Tasima in its operation. Mr Mahlalela's contract as Director-General expired on 28 February 2013.

[9] The next episode in the saga occurred in March 2012 when Tasima received a letter from the Department informing it that the turnkey agreement would terminate on 31 May 2012. The reasoning underlying that view was formulated thus:

'The Department of Transport is of the opinion that the contract expired on May 31 2007, and that transfer provisions were invoked that authorised the Department to transfer eNaTIS' services to the Department and placed an obligation on the service provider to continue with the support of the system until transfer is completed. The maximum period for transfer to be completed in five years expiring on 31 May 2012.'

[10] Tasima's response was twofold. First, it invoked the dispute resolution mechanism provided for in clause 24, read with schedule 13 of the turnkey agreement. Secondly, it brought an application for an order that the Department be

directed to perform its obligations in terms of the agreement, pending the finalisation of the dispute resolution proceedings which it had instituted. On 7 August 2011 Teffo J granted an interim interdict against the Department which *pendente lite* preserved the status quo until the finalisation of the main application. On 17 October 2012 Mabuse J decided the main application in favour of Tasima, and granted an order in respect of which, pending the finalisation of the dispute resolution proceedings instituted by Tasima, the Department was directed 'to perform its obligations in terms of the agreement' (the Mabuse J order). From the context of Mabuse J's judgment it is clear that by his reference to 'the agreement' he intended to include the alleged extension of the contract period until 30 April 2015 (contended for by Tasima) as well as the period of transition contemplated in clause 26 and schedule 15. Subsequently, the Department's application for leave to appeal against the Mabuse J order was refused, first by Mabuse J himself and then by this court. A debate arose on the papers as to who was to blame for the fact that the dispute proceedings instituted by Tasima in 2012 had not yet been finalised. As I see it, however, the outcome of this debate is of no consequence. No application was brought to discharge or terminate the Mabuse J order. So it remains extant.

[11] Nonetheless, from about September 2012 to about February 2014 the Department, RTMC and at least some of the other respondents, have persistently conducted themselves in a way which, from Tasima's perspective, constituted contempt, first of the order by Teffo J and then of the order by Mabuse J. An example of such conduct was the failure by the Department to grant the necessary authorisations under the agreement to timeously pay amounts due. Furthermore, the Department rerouted work under the agreement away from Tasima to the RTMC. In consequence, Tasima brought no fewer than seven contempt of court applications, and succeeded every time.

[12] At the beginning of 2015, so Tasima contended, the Department and RTMC again started behaving in a manner which constituted contempt of the Mabuse J order as well as the various court orders that followed. This gave rise to the present litigation. In support of its contempt application Tasima relied in the main on letters and emails sent on behalf of both the Department and RTMC which indicated in no uncertain terms that the former intended to transfer the eNaTIS system in its totality

to the latter with effect from 1 May 2015. The basis for this attitude advanced by the respondents was that the period of the contract, as extended in 2010, would terminate on 30 April 2015. This, of course, completely ignored the transfer provisions of schedule 15. In addition Tasima relied for its contempt application on RTMC's advertising in newspapers for positions associated with the eNaTIS system. RTMC's rather cynical answer to this complaint was that the advertisements were aimed at enabling it to take over eNaTIS on 1 May 2015 and that its efforts to do so proved successful in that '170 out of a total of some 230 skilled Tasima employees' have applied to take up these positions by 1 May 2015 These actions by the Department and RTMC formed the foundation not only of Tasima's contempt of court application, but also of its prayers for other related relief deriving from these orders.

[13] The Department's counter-application was for the setting aside, on the basis of illegality, of the decision by the then Director-General, Mr Mahlalela, in May 2010 to extend the contract period for a further five years. This would, according to the Department, constitute a defence to Tasima's contempt applications. This is so, the Department argued, because the legality of the impugned extension was a prerequisite for the relief sought by Tasima in its main claim. Conversely, argued the Department, because the court would not compel it to continue giving effect to an invalid agreement. As authority for these propositions the Department sought to rely on the recent decision of this court in *Minister of Transport NO & another v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA).

[14] The basis of the Department's legality challenge was formulated in its supporting affidavit thus:

'The impugned extension was in clear contravention of s 217(1) of the Constitution in that it was for the contracting of services without following a system that is fair, equitable, transparent, competitive and cost effective.

In extending this contract Mahlalela failed to comply with Treasury Regulation 16A6.4, read with Treasury Instruction Note 8 of 2007/2008 which provide that in urgent or emergency cases or in case of a sole supplier, other means of procurement may be followed but that the reasons for deviation should be recorded and approved by the accounting officer. The proferred reasons were also lacking in rationality.

In terms of s 38(2) of the PMFA [ie Public Finance Management Act 1 of 1999] an accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated. When Mahlalela extended the contract with effect from 1 May 2010, no money had been appropriated by the Department for the extended contract.

. . .

. . . [A]s a result of this illegal extension the Department has received negative reporting from the Auditor-General.

. . . [T]he relevant portion of the Department's annual financial statements for the year ended 31 March 2014 . . . [shows] that the Department is now forced to shift money from some of its programmes in order to fund this contract. This is a direct result of the failure by Mahlalela to comply with s 38(2) of the PFMA.'

[15] The court a quo obviously endorsed the Department's thesis – also embraced by RTMC – that the setting aside of the impugned extension of the contract period would inevitably be the death knell for Tasima's main application. For once it upheld the counter-application it gave no consideration to the charges of contempt of court and the related relief sought by Tasima. With regard to RTMC the court a quo found another reason why the claim against it could not succeed, namely, that 'RTMC cannot be in contempt of performance as it was not a party to the agreement'.

Tasima's application for committal orders and related relief

[16] I do not share the court a quo's view that the setting aside of the impugned extension would insulate the respondents from a finding that they were in contempt of court. On the contrary, as I see it, the outcome of the review application is entirely irrelevant to the question whether the respondents were acting in contempt of the court's orders. Should the review application be successful, it may impact on the future in that it could serve as a basis for setting the court orders aside. But unless and until these orders are set aside by a court of competent jurisdiction, they stand and must be obeyed. That much was clearly stated by Streicher ADP in *Clipsal Australia (Pty) Ltd & others v GAP Distributors (Pty) Ltd & others* 2010 (2) SA 289 (SCA) para 22. In a constitutional democracy based on the rule of law, court orders must be complied with by private citizens and the State alike. As members of the executive organs of State, the respondent are held to an even higher standard. Not only must they act in strict compliance with court orders, but they are also bound to

facilitate the efficiency of the judicial branch (see eg *Minister of Home Affairs & others v Somali Association of South Africa Eastern Cape (SASA EC) & another* 2015 (3) SA 545 (SCA) paras 34-36 and 27; and *Nyanthi v MEC for the Department of Health, Gauteng & another* 2008 (5) SA 94 (CC) para 43). The setting aside of a contract which forms the basis of a court order, does not negate the force of the order nor does it excuse the failure to comply with it.

[17] The fact that RTMC was not a party to the contract between the Department and Tasima is, in my view, equally irrelevant to the contempt inquiry. First, because Tasima's case against RTMC was not based on breach of contract but on delictual liability arising from intentional interference with contractual rights (see eg *Dantex Investment Holdings (Pty) Ltd v Brenner & others NNO* 1989 (1) SA 390 (A)). Secondly, and in my view of greater import, is the consideration that I have mentioned before, namely, that court orders must be obeyed even if they are considered to be wrong. Chaos and disorder will result if people are allowed to defy court orders with impunity because they are thought to have been wrongly decided (see eg *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) 228F-230A).

[18] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 9. *Fakie* also held that whenever committal to prison for civil contempt is sought, the criminal standard of proof applies (para 19). A declarator of contempt (without imprisonment) and a mandatory order can however be made on the civil standard (see *Fakie* para 42). The applicant for a committal order must establish (a) the order; (b) service or notice of the order; (c) non-compliance with the terms of the order and (d) wilfulness and *mala fides*, beyond reasonable doubt. But, once the applicant has proved (a), (b) and (c), the respondent bears an evidentiary burden in relation to (d) (*Fakie* para 42). Should the respondent therefore fail to advance evidence that establishes a reasonable doubt as to whether his or her non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt (*Fakie* paras 22-24).

[19] I propose to apply these criteria first with reference to the Department and its two officials, the Director-General and Mr Hlabisa, against whom committal orders are sought. In doing so, it is clear to me that the applicant had established requirements (a), (b) and (c). The Mabuse J order and the five subsequent contempt orders were pertinently addressed to the Department and the Director-General, while the terms of these orders were specifically rendered applicable to Mr Hlabisa by the order of Nkosi J. It is common cause that these orders were served on these respondents and that they were fully aware of their terms.

[20] Furthermore, I believe Tasima had demonstrated non-compliance with the terms of these orders by the Department and its two officials concerned. So, for example, these respondents were pertinently directed in terms of the Mabuse J order to give effect to the terms of the turnkey agreement until the dispute resolution proceedings had been finalised. The Fabricius J order interdicted them from taking any steps which would have the effect of rerouting or diverting any of the works pertaining to the eNaTIS system away from Tasima. I agree with Tasima's argument that the transfer of the whole eNaTIS system from Tasima to RTMC on 1 May 2015, to which these respondents committed themselves, clearly constituted non-compliance with the terms of these court orders. The contention on behalf of these respondents that they were not attempting to transfer the eNaTIS system to RTMC on 1 May 2015, but that they were only taking preparatory steps to effect such transfer at a later date, is in my view rather cynical and unsustainable on the facts. As to requirement (d) of *Fakie*, these respondents gave no valid explanation for their failure to comply with the orders against them. They sought instead to challenge the extension of the contract period by way of a counter-application. In consequence they have failed to discharge the evidentiary burden resting upon them to show that their non-compliance was not wilful or *mala fide*. It follows that Tasima has succeeded in proving contempt against the Department and its two officials beyond a reasonable doubt.

[21] Very much the same considerations apply in respect of RTMC. Although it was not a party to the Mabuse J order, the subsequent order by Fabricius J was pertinently directed against it. In terms of paragraph 5 of that order the respondents – including RTMC – were 'interdicted from taking any steps which would have the

effect of rerouting or diverting any of the work (as defined in paragraph 3 of the order granted by the Hon Mr Acting Justice Strydom on 26 March 2013) . . .' An argument raised on behalf of RTMC was that the reference to another court order – by Strydom AJ – which order was not directed against it, rendered the contents of the Fabricius J order unclear. I believe, however, that there are two answers to this argument. The first is that the deponent to RTMC's answering affidavit – Mr Msibi – raised no difficulty with regard to understanding the order against it. The second was the answer given to a proposition of this kind in *Meadow Glen Home Owners Association & others v City of Tshwane Metropolitan Municipality & another* 2015 (2) SA 413 (SCA) para 8, namely that:

'If there were a dispute between them and the appellants regarding the scope of the order and what needed to be done to comply with it, it was not appropriate for the municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings. It should have taken the initiative and sought clarification from the court.'

[22] It follows, in my view, that Tasima's charge of contempt had been established against RTMC as well. The position of RTMC's Chief Executive Officer, Mr Msibi, against whom Tasima also sought a committal order, is somewhat different. In the first place, no order of *mandamus* was directed against him personally (cf *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] 2 All SA 251 (SCA) paras 15-22). What is more, he only joined RTMC in December 2013 and Tasima itself contended in its replying affidavit that Mr Msibi had 'no personal knowledge of any facts pertaining to Tasima'. In these circumstances I do not believe that the contempt charge against him was established beyond reasonable doubt. On the other hand Tasima had made out a case against him, on a balance of probabilities, which is sufficient for the interdictory relief it also sought against him.

[23] That brings me to the related relief sought by Tasima, namely for an order that the respondents should be interdicted from transferring the eNaTIS except in terms of schedule 15 to the turnkey agreement and that the Department and its officials should be directed, in essence, to comply with the terms of the turnkey agreement read with schedule 15. This relief, as I see it, was likewise unconnected to the outcome of the Department's counter-application for the setting aside of the extension of the contract sought by Tasima on the basis of the court orders in its

favour and not on the contract itself. The fact that the court orders were in turn founded on the extended contract period, does not detract from this principle. This, I believe, also answers the Department's alternative argument based on the private law principle which finds expression in the maxim *ex turpi causa non oritur action* (from a dishonourable cause an action does not arise). According to this argument the Department could rely on the defence in private law that it is not bound to perform an illegal contract. But, as I have said, Tasima is not seeking to compel performance of a contract. It is seeking performance of court orders in its favour. Hence the illegality or otherwise of the contract is of no consequence as long as the orders stand.

The counter-application for review

[24] I now turn to the Department's counter-application for the review and setting aside of Mr Mahlalela's decision in May 2010, to extend the period of the turnkey contract until 30 April 2015. In support of this application the Department placed substantial reliance on the judgment of this court in *Minister of Transport NO & another v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA). In *Prodiba* a decision by the same Mr Mahlalela in his capacity as Director-General of the Department to extend another contract for five years, was set aside by this court at the behest of the Department in a counter-application. A cardinal difference between the two cases is, however, introduced by the substantial delay factor in this case, which was absent in *Prodiba*. The impugned decision in this case, as we know, was taken in May 2010. This means that nearly five years had elapsed before the institution of the Department's review application. Since the review application had been brought under s 6 of PAJA it is, at least on the face of it, subject to the time-bar in s 7. In terms of this section proceedings for judicial review in terms of s 6 must be instituted without unreasonable delay and not later than 180 days, unless the court in terms of s 9 allows an extension 'where the interests of justice so requires'.

[25] The Department's first bid to circumvent the obstacle created by the s 7 time-bar was that its counter-application amounted to what has become known in administrative law parlance as a collateral or defensive challenge. Underlying this argument is the principle that a collateral challenge enjoys a somewhat distinct status in our administrative law that renders it immune to limitations of time (see eg

Kouga Municipality v Bellingan & others 2012 (2) SA 95 (SCA) para 18; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 83). The concept of a collateral challenge has its origin in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA). According to the general principle laid down by this court in *Oudekraal* (para 26) administrative actions must be treated as valid until set aside, even if actually invalid. But at the same time it recognises the following exception to this general rule (para 32):

'It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a "defensive" or a "collateral" challenge to the validity of the administrative act.' (Footnote omitted.)

[26] The first difficulty which confronted the Department in its reliance on the concept of a collateral challenge was that there are two recent decisions of this court which held that this defence is not available to organs of State (see *Kwa Sani Municipality v Underberg/Himeville Community Watch Association & another* [2015] 2 All SA 657 (SCA); *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2015] ZASCA 85 (SCA). The Department urged us to find that these cases were wrongly decided for two reasons. First, because they tie up the courts in a doctrinal straitjacket, and secondly, because they are in conflict with the reasoning reflected in the minority judgment of the Constitutional Court per Zondo J (Mogoeng CJ, Jafta and Nkabinde JJ concurring) in *Head of Department, Department of Education, Free State Province v Welkom High School & another* 2014 (2) SA 228 (CC) para 262.

[27] I do not think that the recognition of a principle that a collateral challenge is not available to organs of State constitutes an unwarranted doctrinal restriction to the courts' review jurisdiction. The sole reason why the Department seeks to rely on a collateral challenge in this case is because it wants to avoid the consequences of the 180-day time-bar in s 7 of PAJA. But the time-bar in s 7 itself is not absolute. It can be extended or condoned by the court in terms of s 9 if the interests of justice so dictate. The Constitutional Court's minority judgment in the *Welkom High School* relied upon by the Department has, in my view, been overtaken by the later judgment by a majority of that court in *Kirland Investments* where the reasons for

excluding organs of State from reliance on a collateral challenge was succinctly formulated thus by Cameron J (paras 82-83):

'PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.

Counsel for the department told this court, as he told the Supreme Court of Appeal, that, if the department had to bring a counter-application under PAJA, it would face the PAJA 180-day rule. Well, precisely. An explanation for the delay is a strong reason for requiring a counter-application. . . .' (Footnotes omitted.)

[28] This brings me to the Department's alternative contention that the court a quo extended the 180-day period in the exercise of its discretion and in a manner that does not warrant intervention by a court of appeal. On my reading of the court a quo's judgment I do not believe, however, that it purported to exercise any discretion in terms of s 9 at all. I say that because of the following remark in the judgment (para 99):

'I therefore exercise my discretion and permit the collateral challenge of the validity of the agreement.'

The point is, of course, that if the court permitted the counter-application on the basis of a collateral challenge, it would have no discretion to disallow that application at all (see eg *Kouga* para 18). Even if it were to be assumed that the discretion afforded by s 9 is a discretion in the strict sense, as opposed to a value judgment – an assumption which is in my view open to serious doubt – we would in any event be entitled to intervene on the basis that the court a quo did not exercise its discretion at all (see eg *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami)(Pty) Ltd & others* 2013 (4) SA 539 (SCA) paras 18-20.

[29] In considering whether we should extend the 180-day period to five years, it must be borne in mind that the delay rule performs a vital function in administrative

law. Its purpose was explained as follows by Nugent JA in *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) paras 22-23:

'It is important for the efficient functioning of public bodies . . . that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule . . . 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 importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions . . .

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 upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay . . .'

[30] Furthermore, as was explained by this court in *Opposition to Urban Tolling Alliance & others v South African National Road Agency Ltd & others* [2013] 4 All SA 639 (SCA) para 26, the import of s 7 of PAJA is that after the 180-day period, a court is only empowered to entertain the review application if the interests of justice require an extension under s 9. Absent such extension, the court has no authority to consider the review application at all. Whether or not the decision was in fact unlawful no longer matters. The decision would, as it were, be 'validated' by the delay. It follows that an extension of a condonation of the delay has important consequences and is not merely for the asking. On the contrary, the Constitutional Court expressed itself as follows in this regard in *Van Wyk v Unitas Hospital & another* 2008 (2) SA 472 (CC) para 22:

'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'

[31] In this case it is clear that the Department became aware of the alleged grounds of invalidity of the 2010 extension shortly after Mahlalela's impugned decision to that effect had been taken. Since then the Department had been advised by the State Attorney and various counsel, senior and junior, on numerous occasions about the legal basis on which the decision could be challenged. It sought to explain away the delay by stating that, although Mr Letsoalo wished to challenge the

extension, Mr Mahlalela stood in his way of doing so. But it appears that Mr Mahlalela was the deponent to the Department's answering affidavit where he expressly challenged the validity of his own decision to extend the contract period before Mabuse J and that he did the same in the subsequent petition to this court. It therefore cannot be credible that, simultaneously with challenging the extension, Mr Mr Mahlalela was taking steps to prevent that same challenge. Moreover, Mr Mahlalela's contract as Director-General expired on 28 February 2013. After this date there was therefore no impediment to the institution of review proceedings. What is more, in *Prodiba* the Department brought a counter-application for review in circumstances substantially similar to those of this case. There is therefore no explanation whatsoever for the additional two year delay since 2013 before the counter-application was brought in March 2015. This is in stark contrast with the requirement formulated in *Unitas Hospital* that the explanation must cover the entire period of delay.

[32] A separate contention raised by the Department as to why the five year delay should be condoned, rested on allegations of fraud and corruption. The factual basis relied upon for this contention, was this: After Mr Mahlalela vacated his position as Director-General in February 2013, so Mr Letsoalo testified, he immediately opened a criminal charge against him. Mr Letsoalo also appointed a forensic firm to investigate the extension of the contract and reported the matter to the Special Investigation Unit (the SIU) established in terms of the Special Investigation Units and Special Tribunals Act 74 of 1996.

[33] An affidavit on behalf of the SIU records its finding that an entity, Brand Partners (Pty) Ltd, in which one Mr Ncube was a director, entered into a consultancy agreement with Tasima to provide consultancy services relating to eNaTIS for a monthly fee of R2 million, irrespective of whether any services were performed or not. The contract between Brand Partners and Tasima had as one of its conditions precedent that the eNaTIS contract be extended for a period in excess of 18 months before 30 June 2013. Mahlalela went on to extend the contract on 12 May 2010 (ie before 30 June 2013). Subsequently Mahlalela signed a residential lease agreement to lease the house owned by Mr Ncube of Brand Partners. The rental was stated to

have been R45 000 per month. But he did not pay any deposit nor did he pay any rental between 1 November 2010 and 30 November 2011.

[34] As appears from the formulation of the Department's review grounds to which I have referred earlier, fraud was never one of them. On the contrary, these grounds were confined to Mahlalela's failure to apply a competitive bidding process as required by s 217 of the Constitution, the PFMA and other statutory enactments. The allegations of fraud and corruption were advanced in the Department's answering affidavit, not under the heading 'the illegality of the extension' but under the rubric 'the delay in reviewing Mahlalela's decision'. In this context of explaining the delay, these allegations of fraud and corruption were put forward in support of the thesis that it was Mahlalela who stymied any challenge to the unlawful extension at an earlier stage.

[35] When this was raised with the Department's counsel in argument, the response was that this court should not be deterred from considering serious allegations of fraud merely because they were advanced under the 'wrong heading'. As I see it, however, the response is over-simplistic. Tasima did not respond to these allegations of fraud and corruption at all. It contested the proposition that Mahlalela was to blame for the Department's inaction in another way, namely, by pointing out that Mahlalela deposed to the Department's opposing affidavit in the application before Mabuse J; that he also deposed to the affidavit supporting the application for leave to appeal to this court; and that, in any event, he ceased to be the Director-General in February 2013. In these circumstances Tasima's failure to deal with the allegations of fraud and corruption does not justify the inference that it is unable to do so, nor can it be regarded as an implied admission that these allegations are true. To elevate these allegations to a level where they are deployed as an independent (and in fact sole) reason for extending the 180-day time limit would severely prejudice Tasima.

[36] Furthermore, the Department's contention that a 180-day time limit must be extended on the basis of allegations of fraud, even though these allegations may not be relied upon as a basis for setting the impugned decision aside, defies logic. Why would the review door be opened to the Department on the basis of fraud which

would then become irrelevant in the review itself because the Department does not rely upon it as a review ground? It also begs the obvious question: why is the Department so reluctant to rely on these allegations as a basis to challenge the impugned decision? The only reason I can think of is that the Department has little, if any, confidence in its ability to establish these allegations if they were to be properly challenged in a court of law.

[37] Conversely, if the Department wants to rely on fraud to set the impugned decisions aside, why has it not yet done so? Mr Letsoalo must have been aware of the allegations since at least 2013, otherwise he could hardly have substantiated criminal charges against Mr Mahlalela, nor could he be able to justify the appointment of a forensic firm or make a report to the SIU at that stage. If this is so, why did he not raise these allegations in answer to the five contempt applications that Tasima has brought since then? Why did the Department allow the contract to run for another two years with the possibility of a further extension under schedule 15? Why did it not simply cancel the turnkey agreement and apply for the setting aside of the Mabuse J order on the basis of fraud? Simply stated, I do not believe we would be justified to extend the 180-day time limit on the basis of allegations of fraud which (a) may play no further part in the review proceedings and (b) had been known to the Department for more than two years prior to the application. After all, if the Department believes that it is in a position to establish the serious allegations of fraud and corruption obliquely referred to, there would be nothing preventing it to cancel the turnkey agreement and to seek the setting aside of the Mabuse J order on that basis at any time in the future. Questions of *res iudicata* do not arise, because the allegations of fraud and corruption have never been pleaded as a cause of action nor decided upon.

[38] The Department's final argument was that the closure of the review door on its case would result in an unlawful contract, which might have been induced by fraud, being extended for another five years. But, as I see it, there is more than one answer to this argument. First, if the Department had failed to make out a case for extension of the 180-day limitation, as in my view it did, the extension became 'validated' through delay. Whether or not it was in fact unlawful no longer matters. Secondly, the fact that it may have resulted from fraud, is not part of the

Department's cause of action. If the Department wants to rely on that cause of action, there is nothing that prevents it from doing so. Thirdly, there is no reason why the transfer of the eNaTIS under schedule 15 should take 5 years. On the Department's own version it should take no more than 12 months and may even be completed in four months.

[39] For these reasons I believe that there is no basis for extending the 180-day time limit imposed by s 7(1) of PAJA and that the court a quo was therefore precluded from entertaining the counter-application to review and set the impugned extension decision aside. It follows that, in my view, the appeal against both the dismissal of the main application and the order upholding the counter-application, must succeed with costs.

[40] It is ordered that:

(a) The appeal against both the dismissal of the main application and the order granted in terms of the counter-application is upheld with costs, including the costs of two counsel, against the first and fifth respondents, jointly and severally.

(b) The order of the court a quo is set aside and replaced with the following:

'An order is issued in the following terms:

1. Declaring:

(a) the first and second respondents to be in breach and contempt of:

   (i) paragraph 1.1 of the order of this court issued under case number 44095/2012, handed down by Mabuse J on 17 October 2012 (the Mabuse Order);

   (ii) paragraph 3 of the order of this court issued under case number 44095/2012 handed down by Strijdom AJ on 26 March 2013 (the Strijdom Order);

   (iii) paragraphs 5 and 6 of the order of this court issued under case number 44095/2012 handed down by Fabricius J on 27 August 2013 (the Fabricius Order);

   (iv) paragraph 1 of the order of this court issued under case number 44095/2012 handed down by Rabie J on 21 January 2014 (the Rabie Order);

(b) the fifth and eleventh respondents to be in breach and contempt of:

   (i) paragraphs 5 and 6 of the Fabricius Order; and

(c) the tenth respondent to be in breach and contempt of:

(i) paragraph 1.1 of the Mabuse Order;

(ii) paragraph 3 of the Strijdom Order;

(iii) paragraphs 5 and 6 of the Fabricius Order;

(iv) paragraph 4.1 of the order of this court issued under case number 44095/2012 handed down by Nkosi J on 5 November 2013 (the Nkosi Order);

(v) paragraph 1 of the Rabie Order;

2. Ordering that:

(a) no transfer of the eNaTIS and the services (as defined in the turnkey agreement for the provision of the eNaTIS system (Contract RT1194KA) dated 3 December 2001, as subsequently amended and extended (the turnkey agreement) may take place except in terms of the transfer management plan envisaged in schedule 15 to the turnkey agreement;

(b) for the duration of the transfer of the eNaTIS and the services:

(i) the applicant is to be paid, by the first respondent, for all services rendered under the agreement, in accordance with, inter alia, the terms of the turnkey agreement and paragraph 1.2 of the Mabuse Order;

(ii) all purchase requisition orders are to be processed in accordance with, inter alia, the terms of the turnkey agreement and paragraph 4 of the Nkosi Order; and

(iii) all material contracts and agreements required to be approved by the first respondent will be so approved within five days of the request by the applicant;

(c) the first, second, fifth, tenth and eleventh respondents are interdicted from taking any steps to implement the purported transfer alluded to in the letters dated 24 February 2015, 25 February 2015 and 4 March 2015 (the transfer correspondence, which respectively comprise annexes FM27, FM25, and FM28 to the supporting affidavit of Fannie Lynen Mahlangu dated 12 March 2015), or to implement any transfer of the eNaTIS, the services (as defined in the turnkey agreement) or any related services contrary to 2.1 above;

(d) the fifth respondent is to desist from advertising for any eNaTIS related positions until at least a transfer management plan has been finalised in terms of the turnkey agreement;

3. Ordering that:

(a) the second and tenth respondents be committed to imprisonment for a period of 30 days.

(b) the order in paragraph 3(a) above will not come into operations unless there is a breach of the order in paragraph 2(c) above;

(c) a warrant of committal is to be issued by this court on the same papers, duly supplemented as necessary, if the first, second and tenth respondents breach the order in paragraph 2(c) above;

4. Ordering the first and fifth respondents, jointly and severally, to pay the applicant's costs of the application dated 12 March 2015, including the costs of two counsel.

5(a) Dismissing the first respondent's counter-application dated 26 March 2015;

(b) Ordering the first respondent to pay the applicant's costs of the counter-application, including the costs of two counsel.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	A E Franklin SC, J P V McNally SC, A W T Rowan Instructed by: Weber Wentzel Johannesburg c/o Symington & De Kok, Bloemfontein
For the first, second, third, sixth and tenth Respondent:	D Unterhalter SC, M du Plessis, J A Motepe Instructed by: State Attorney, Pretoria c/o State Attorney, Bloemfontein
For the fifth and eleventh Respondent:	G J Marcus SC, F B Pelser, L N Luthuli Instructed by: Seleke Attorneys, Johannesburg c/o Bezuidenhouts Inc, Bloemfontein