THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 121/2020

In the matter between:

GOVAN MBEKI MUNICIPALITY **APPELLANT**

and

NEW INTEGRATED CREDIT SOLUTIONS (PTY) LTD **RESPONDENT**

Neutral citation: *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* (121/2020) [2021] ZASCA 34 (7 April 2021)

Coram: NAVSA ADP and DAMBUZA and MOCUMIE JJA and KGOELE and GOOSEN AJJA

Heard: 10 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 April 2021.

Summary: Procurement by municipality of debt management services – quintessentially a constitutional issue – factors to be applied in considering delay in self-review by public authority – contract invalid for want of compliance with applicable regulations and constitutional imperatives – s 172(1)*(b)* applied – just and equitable remedy to avoid denying accrued rights – part of contract not set aside – concern about frequency of late self-review applications where contract periods have run their course and no sanctions for aberrant officials.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Brauckmann AJ sitting as court of first instance):

1 The appeal and cross-appeal succeed only to the extent reflected in the substituted order set out hereafter.

2 In respect of the appeal, no order is made as to costs.

3 The order of the court below is set aside and substituted as follows:

'(a) The contract for the provision of debt management services, concluded by the parties during September 2015, which is the subject of this action, is declared unconstitutional and invalid but is set aside only in relation to recovery by the defendant of the commission of 2.5% in respect of debts younger than 60 days, so as to preserve the accrued rights of the defendant as set out in (b) below.

(b) The defendant is thus not precluded from recovery of the commission of 16.5% on debts older than 60 days in the amount calculated by the arbitrator, Justice Harms.

(c) No order is made as to costs.'

JUDGMENT

Navsa ADP (Dambuza and Mocumie JJA and Kgoele and Goosen AJJA concurring)

Background

[1] This case concerns the validity of a debt management services agreement concluded between the appellant, the Govan Mbeki Municipality (the GMM), a municipality established in terms of s 1 of the Local Government: Municipal Structures Act 117 of 1998, and the respondent, New Integrated Credit Solutions (Pty) Ltd (NICS). This appeal and cross-appeal are directed against an order of the High Court, Mpumalanga Division, Middelburg, in terms of which only a part of that agreement was declared invalid,

unconstitutional and void ab initio. The GMM sought to have the entire agreement declared invalid, whilst NICS contended that the entire agreement was valid and enforceable. The appeal and cross-appeal are before us with the leave of the court below. This case is part of an ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed and overturned, for want of legality, more often than not after the contracts have run their course and services have been rendered thereunder.[1] But more than that, as will be demonstrated hereunder, after failing in the most basic fashion in their duty to ensure they comply with constitutional norms and statutory prescripts, and after compounding the initial errors and, as in this case, litigating at large, organs of state falsely seek to claim the moral high ground. All of this at public expense and free of sanctions against the functionaries involved. The background, culminating in the present appeal, which is convoluted and tortuous, is set out hereafter.

[2] During the last quarter of 2014 the Newcastle Municipality issued a tender notice, published in two local newspapers, inviting bids from service providers for debt management services. The notice indicated that on 17 October 2014 there would be a compulsory briefing session by the municipality regarding the bids. The briefing session occurred on that day, and it was made clear that tenders were being invited *only* in respect of the management of debts older than 60 days and the contract duration would be 36 months. The debts to be managed were in relation to rates, taxes and services rendered by the Newcastle Municipality to residents and others within its area of jurisdiction.

[3] The closing date for the submission of bids was 5 November 2014. Seventeen service providers submitted their bids. NICS submitted a bid for 'Debt Collection (debt 60 days and older)'. It set out the terms of its bid as follows, 'NICS will charge 16.5% (including VAT @ 14%) on all successfully recovered revenue'. It submitted an alternative

[1] In *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122 para 1, Ponnan JA said the following: 'State self-review is a novel, but burgeoning, species of judicial review that has occupied the attention of our courts in a number of recent decisions. Although it seems axiomatic that unlawful conduct must be undone, to borrow from Dr Seuss "simple it's not". Particularly worrisome are public procurement cases, where, as here, an organ of state seeks to undo its own prior decisions.'

proposal, which for present purposes we need consider no further. The Newcastle Municipality's bid adjudication committee resolved that NICS be appointed to provide debt management services in relation to debts exceeding 60 days. On 3 February 2015 NICS was advised that it was the preferred bidder. This was confirmed by the Municipality in a written communication on 25 March 2015, wherein NICS was informed that it would be responsible for collecting debts exceeding 60 days, and that its services would be utilised for a period of 36 months, on the basis of 'commission of 16.5% on collected debt from customers exceeding 60 days'.

[4] Consequently, on 30 April 2015, a written agreement was concluded between the Newcastle Municipality and NICS for the provision of debt management services. The agreement, notably, included a clause that the latter would be entitled to commission of 2.5 percent on amounts collected on debts younger than 60 days. The circumstances under which this clause was added are dealt with in para 11 below.

[5] The GMM, being aware that the Newcastle Municipality had procured debt management services from NICS, but apparently, at that stage, not certain about the details of the bid and the bid adjudication process, acting in terms of reg 32 of the Municipal Supply Chain Management Regulations,[2] which provides that a Supply Chain Management Policy may allow an accounting officer to procure goods or services for a municipality or municipal entity under a contract secured by another organ of state, sought the consent of the Newcastle Municipality to procure such services from NICS.

[6] In seeking consent from the Newcastle Municipality the GMM, on 31 July 2015, wrote as follows:

'Govan Mbeki Municipality would like to request procurement in terms of Section 32 of the Municipal Supply Chain Management Regulations for the service of New Integrated Solutions (Pty) Ltd.

We therefore require your consent in writing and send the following to us:

- Letter of consent.
- Appointment letter for New Integrated Solutions (Pty) Ltd.

[2] General Notice 6868, *GG* 27636, 30 May 2005.

- Copy of bid or proposal.
- Any other document that will enable us to consider their appointment.'

The letter was signed by the GMM's Municipal Manager.

[7] On 12 August 2015 the Newcastle Municipality wrote back as follows:

'It is hereby confirmed that the Newcastle Municipality has no objection if the Govan Mbeki Municipality utilizes this tender . . . subject to the conditions applicable to the tender.

Accompanying this tender are the following necessary documentations:

(i) Copy of an advert
(ii) Copy of contract form
(iii) Copy of appointment letter
(iv) Copy of BAC minutes
(v) Copy of BEC report
(vi) Copy of SLA
(vii) Copy of bid document

Also note that it is the responsibility of the Govan Mbeki Municipality to obtain consent from the service provider.'

[8] Regulation 32 provides that this mechanism for procuring goods or services, may be resorted to only *if*:

'a) the contract has been secured by that organ of state by means of a *competitive bidding process* applicable to that organ of state;
b) the municipality or entity has no reason to believe that such contract was not validly procured;
c) there are *demonstrable discounts or benefits* for the municipality or entity to do so; and
d) that other organ of state and the provider have consented to such procurement in writing.' (Emphasis added.)

[9] NICS agreed to provide the services sought by GMM. Consequently, on 12 September 2015, the GMM and NICS concluded a written agreement for the provision of debt management services for a period of three years, until 31 August 2018 – from the effective date, 1 September 2015. It essentially adopted the Newcastle Municipality's contract regime. The written agreement contained an extensive list of obligations undertaken

by NICS. It also included an agreement to submit to arbitration in the event of a dispute arising from the agreement. It included a standard clause that the decision of the arbitrator shall be final and binding on the parties and may be made an order of court. The following are the material contractual provisions which set out NICS' primary obligations:

'5.1 Time is of essence in the execution of the obligations by the NICS under this Contract. In particular, the NICS shall at all material times ensure complete compliance of the implementation of its obligations to ensure complete compliance to set Targets.

. . .

6.1 NICS herein undertakes to, and shall within the duration of this Contract:

(i) In respect of Debt Management and Debt Administration

6.1.1 Collect and administer debt collection and debt administration services and all monies recovered shall be paid directly into the Municipal banking account;

6.1.2 Identify and evaluate possible write-offs of outstanding debt;

6.1.3 Perform debt management, including:

. . .

6.1.5 Prepare and submit management reports every month, quarter, and annual performance of its obligations, including . . .'

[10] It is necessary to note that the remuneration for the provision of the debt management services set out in the agreement between the GMM and NICS was in identical terms to the agreement between the Newcastle Municipality and NICS, as set out in para 3 above, namely commission of 16.5 percent of collected debts exceeding 60 days and 2.5 percent of collected debts younger than 60 days.

[11] It was uncontested that at the time that the Newcastle Municipality published the tender notice for debt management services, referred to in para 2 above, it contemplated establishing a debt management unit of its own to manage debts younger than 60 days. That did not eventuate because of budgetary constraints. And when that realisation struck home, the Newcastle Municipality, according to its Director: Financial Management, Ms Haripersad, who testified at the trial in the court below, referred to later in this judgment,

turned to NICS ‘to see if they would help us with collecting debts under 60 days’. That led to negotiations between NICS and the Newcastle Municipality that resulted in the abovementioned agreement during September 2015. In justifying the addition of the management of younger debts, the Newcastle Municipality sought refuge in what they considered to be their power in terms of s 116(3) of the Local Government Municipal Finance Management Act 56 of 2013 (the LGMFMA), which entitles a variation of an existing contract, provided the variation is within certain parameters. As will be demonstrated later, this approach was flawed, as accepted by Ms Haripersad, because the variation was outside of the statutory limitation and because no resolution to that effect had been tabled for approval by the Council of the Newcastle Municipality.

[12] Two months thereafter, on 7 November 2016, unsurprisingly, the Auditor-General of South Africa sent a letter to the Newcastle Municipality that essentially took issue with the provision made in the agreement with NICS for the additional 2.5 percent commission for debt management services in relation to debts younger than 60 days, which had not been called for in the tender notice and had not been part of the bid by either NICS or any of the other bidders, or considered in the evaluation or adjudication of the bids. The Auditor-General complained that the procurement process was thus unfair to other suppliers and tenderers of like services. In the written communication the Auditor-General, inter alia, said the following:

‘[W]e believe the procurement process was not fair as other suppliers were disadvantaged and the chosen supplier might not have been the lowest if the price awarded were taken into account into evaluation or the other companies’ prices might have been different if the changed scope of the work might have been known. Given that the variation was signed before awarding of contract, the municipality should have therefore started the procurement process afresh if it was now intended to change the scope of the work to give other companies a fair opportunity. The amount paid to the supplier above the 16.5% is therefore considered to be irregular.

It should also be noted that the fact the company is entitled to a percentage from all debtors below 60 days is considered not to be cost effective as that might be inclusive of debtors that would pay without the need for debt collectors thus resulting in expenditure in vain and that could have been avoided.’

[13] A few months thereafter, in February 2017, the GMM, apparently itself now having been made aware of the above, purported to terminate in writing its agreement with NICS, by reliance, first, on s 217 of the Constitution,[3] which it quoted in full, asserting that 'it is evident that neither [NICS], nor any of the other unsuccessful bidders was invited or requested to submit a bid for the collection of any outstanding debts from customers "under 60 days"'. It went on to say that for *that reason* the additional clause, catering for the additional 2.5 percent commission was *ultra vires* and void. The GMM went further, and placed reliance on reg 32, which it also quoted in full. In this regard, the GMM professed ignorance of the Newcastle Municipality's failure to adhere to these statutory prescripts. The following part of the letter bears repeating:

'In the result your client is not entitled to claim 2,5% commission in respect of monies collected from our client's customers in respect of current accounts. Your client's "entitlement" to claim 2,5% commission on debt collected from our client's customers (with specific reference to current accounts) was not subjected to a competitive bidding process referred to and provided for in Regulation 32(1)*(a)* of the Municipal Supply Chain Management Regulations.'

[14] The bases for termination did not stop there. The GMM went on to state that NICS had failed to fulfil its contractual obligations. The following appears in the letter of termination:

'14. The obligations of our client pursuant to the conclusion of the agreement are reciprocal. Your client has not complied with its responsibilities and obligations referred to and contained in the agreement, with specific reference to clauses 5.1, 6.1 and 6.2.6.

15. *In addition your client is only entitled to 16,5% commission on the debt which it has collected from our client's customers.* Your client is most definitely not entitled to claim payment in respect of all the amounts which our client's customers have paid into our client's bank account since 1 September 2015 (ie our client's gross revenue or income).

. . .

17. Your client's conduct therefore constitutes a material breach of the agreement, which entitles our client to terminate the entire agreement with 30 days' notice, as envisaged in clause 10.1.2 thereof.

[3] Section 217 provides that where an organ of state contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

18. Our client therefore gives notice to your client of its decision to cancel or to terminate the entire agreement, as provided for in clause 10.1.2, read together with the provisions of clause 11.2 thereof.'

(Emphasis added.)

[15] Finally, the letter of termination stated that in the event of contestation by NICS of its right to terminate the agreement, the GMM consented, in advance, to arbitration. It is necessary to pause here to note that at this stage, approximately 17 months after the conclusion of the agreement and approximately 18 months after all the bid related documents had been supplied by the Newcastle Municipality, the only challenge by the GMM to the validity of the agreement, as distinct from the alleged breaches of the agreement, was the add-on of the 2.5 percent in relation to debts younger than 60 days. As is evident from what is set out in para 15 of the letter, an entitlement to commission by NICS was at that stage recognised by the GMM in relation to amounts *actually* collected in relation to debts older than 60 days, subject, of course, to its claims in relation to the breaches.

[16] NICS did not accept the GMM's entitlement to terminate the agreement and consequently, on 1 March 2017, approached the high court for relief, seeking an interdict against the purported cancellation, ostensibly pending further proceedings. On 6 March 2017 the GMM launched a conditional counter-application for an order that the contract for the provision for debt management services entered into on 12 September 2015 'be declared unconstitutional, invalid and unlawful, and void ab initio'. The urgent application by NICS was settled by agreement between the parties, on the basis that the issues raised be referred to arbitration before retired Justice Harms. The counter-application remained in abeyance. That agreement was made an order of court on 14 March 2017. Paras 2, 3, 4 and 5 of that order are relevant:

'2. The issue of the validity of the Respondent's purported termination and the amount owed to the Applicant is referred to arbitration, before retired Judge Harms, to take place from the 8th to the 12th of May 2017;

3. The Applicant shall leave the Respondent's site by the 22nd of March 2017;

4. The Respondent's purported termination is suspended pending the outcome of the arbitration;

5. The Respondent shall continue to provide the following information to the Applicant:

   5.1 PF05; PF06; PG09 and PF10 on a daily basis; and

   5.2 PF15 on a monthly basis.'

[17] The arbitration proceedings were finalised, and an award, dated 23 August 2017, was made in favour of NICS. The arbitrator held that the GMM's purported cancellation of the agreement on the basis of the alleged breaches of the agreement in question was invalid and of no force and effect. Ultimately, the arbitrator ordered the GMM to pay NICS an amount of R22 344 374.32 in respect of debts older than 60 days and R23 767 462.03 in respect of debts younger than 60 days. The arbitrator held that he had jurisdiction to deal with the termination of the agreement, other than on the basis of its constitutional validity. That issue, as accepted by the parties before him, was beyond his remit. During September 2018 an arbitration appeal panel dismissed GMM's appeal against the arbitrator's decision.

[18] For a better appreciation of the issues that ultimately crystallised, both in the court below and before us, it is necessary to have regard to the relevant, extensive parts of the arbitral award by Justice Harms, and thereafter his material conclusions. Counsel did not suggest before us that the arbitrator's findings on the contractual terms and the obligations of the parties were flawed and presently challengeable. In any event, they appear to me to be correctly reasoned. In dealing with the peculiarities of the agreement, after referring to the general obligations of NICS, the arbitrator noted the following:

'47 Against these generalities one then must have regard to clause 6 as a whole. Clause 6.1 sets out the obligations of NICS under four headings, namely (i) in respect of debt management and debt administration; (ii) preparation and submission of reports; (iii) infrastructure; and (iv) operating costs.

48 The debt management and administration obligation under (i) is extensive. It can for present purposes be broken down into two sections: namely debt collection (clause 6.1.1) and debt management (clause 6.1.3 with at least 15 sub-items).

49 Clause 6.1.1 is rather inelegantly drawn and reads as follows:

"Collect and administer debt collection and debt administration services and all monies recovered shall be paid directly into the Municipal banking account."

50 Accepting that it deals with more, it at least obliges NICS to "collect" municipal debts and ensure that "all monies recovered shall be paid directly into the Municipal banking account."

51 It is not necessary to deal with the other obligations undertaken by NICS in terms of clause 10.1 save to add that it undertook to carry all costs related to the performance of its debt collection and management services.

52 Against that background one has to turn to the obligations placed on the Municipality in terms of clause 6.2 (reproduced earlier) and in particular the payment clause as quoted.

53 It is clear that NICS is not paid per function performed but by result. And the percentage commission is calculated with reference to the amount of the debt collected. But debt is not only collected by NICS. It is also collected by the Municipality since it is a duty of the Municipality to issue invoices and rendering revenue management services thereto (clause 6.2.1).

54 All monies collected are paid into the Municipality's banking account. These payments are not earmarked and cannot be earmarked. In other words, it is not possible to identify which payments are made pursuant to the efforts of NICS or otherwise. As Mr Mabusa said, it is simply not possible to prove a causal link between a debt collection action and payment, and that the contract is impossible of performance on the Municipality's interpretation. This is why the Municipality wished to enter into an addendum which would have provided for the creation of a trust account into which the NICS moneys had to be paid.

55 The concession during argument by counsel for the Municipality that the causal link test – which was the issue between the parties – cannot be the test was fairly made. However, his proposed "subsequent to" test (subsequent to a text message, email, letter or telephone call) does not make any business sense.

56 This means that if one gives business efficacy to the agreement, the reference to "debt collected" refers to debts paid into the Municipality's account and not to debt factually or causally collected by NICS, always remembering that NICS has to do substantially more than debt collecting.

57 There is a qualification. One does not in ordinary parlance refer to debt collection where a debtor pays within the grace period for payment (that accords with NICS's understanding of

the contract, at least sometimes) or until handover of the debt to the debt administrator. What this means in respect of the <60 days' accounts, the calculation of the commission of 2,5% has to be based on all payments made on account after handover to NICS of the outstanding debts for collection. The same issue does not arise in respect of the >60 days' accounts.'

[19] The following were the conclusions reached by the arbitrator:

'58 The Municipality amended its plea shortly before the hearing. Therein it made a tender. The tender was repeatedly confirmed during evidence and in argument. It tendered payment of "all debts that were collected by [NICS] since the inception of the [contract] at the rate of 16,5%, meaning in respect of debts older than 60 days. (I understood from the argument that it also made a tender in respect of the 2,5% on the >60 days debts provided NICS establishes that it "collected" those debts but since the tender was not properly formulated I shall ignore it.) The tender was not in the alternative and was subject to one condition only and that was the proof of causation (collection). It is not understood how in these circumstances the Municipality could proceed with its other defences such as cancellation, non-performance and lack of reciprocity.

59 The evidence cast light on the Municipality's problems around the contract and it is apparent that the Municipality is mainly to blame. First, the Municipality was over-eager to find a solution for its debt problems. *It took over the Newcastle contract regime without giving consideration to the fact that its administrative structure differs from that of Newcastle Municipality and that it had different problems.* It also did not give proper attention to the list of exclusions which meant that its bulk industrial clients (such as Sasol) were included in the commission structure. The Municipality gave scant or no attention to the obligation to pay commission on <60 days accounts. Importantly, the Municipality did not follow up the issue of the setting of targets and was then unhappy about the result of the debt collecting process. This could have been prevented if targets had been set. The Municipality is the author of its own problems by agreeing that debt collected by NICS should be paid into the Municipality's account and not providing for a trust account or another method of earmarking of payments.

60 It will be necessary to make declaratory orders and leave it to the parties to make the necessary calculations. If an additional award is required, the parties may approach me in writing within one month of this award.' (Emphasis added.)

As stated above the amounts due were later quantified.

[20] The GMM, on 21 June 2017, approximately 22 months after the effective date, whilst the arbitration was being conducted, instituted the action in the court below, seeking a declarator that the entire agreement between it and NICS be declared unconstitutional, invalid, unlawful and void ab initio, alternatively, that the part of the agreement relating to the additional 2.5 percent for managing debts younger than 60 days be reviewed, declared unconstitutional and set aside because it had not been subject to a competitive bidding process and there were no demonstrable discounts or benefits in respect thereof. The stated bases for the action were that the agreement was in conflict with s 217 of the Constitution and reg 32, and for the first time, reliance was placed on reg 51, which reads as follows:

'CONTRACTS PROVIDING FOR COMPENSATION BASED ON TURNOVER –

If a service provider acts on behalf of a municipality or a municipal entity to provide any service or acts as a collector of fees, service charges or taxes and the compensation payable to the service provider is fixed as an agreed percentage of turnover for the service or the amount collected, the contract between the service provider and the municipality or municipal entity must stipulate -

(a) a cap on the compensation payable to the service provider; and

(b) that such compensation must be performance based.'

The GMM also contended that the agreement was in contravention of the provisions of the LGMFMA, including s 116(3).[4]

[21] The GMM stated that the delay in seeking relief was justified and prayed that it be overlooked. After NICS raised a special plea of *lis pendens*, the counter-application by GMM, was withdrawn. NICS, in defending the action, insisted that the delay in seeking relief, which essentially was a legality review, was inordinate and that it should not be entertained and that the claim by the GMM be dismissed with costs. In relation to the merits of the legality challenge NICS denied that the agreement was invalid and that it did not comply with s 217 of the Constitution, or was in contravention of any of the applicable statutory prescripts. In the alternative, NICS pleaded that in the event that the court held that it was compelled to declare the contract invalid, justice and equity dictated that the court preserve the rights already accrued by NICS. The matter proceeded to trial in the court below. The trial

[4] Section 116(3) provides for a specific procedure to be followed by a municipality if it intends to amend a contract concluded in terms of its supply chain management policy, including providing reasons having to be tabled in council.

commenced on 4 November 2019, more than a full year after the contract period had run its course.

[22] After hearing fairly limited evidence and considering submissions by the parties, the court below (Brauckman AJ), with reference to *Harnaker 2 v Minister of the Interior*,[5] held that notwithstanding that the principal relief sought by the GMM was in the form of a declaratory order, rather than, strictly speaking, by way of an application for a review, the delay rule in relation to reviews was applicable. In dealing with the reasonableness of the delay, Brauckman AJ considered that the GMM had been unaware of the illegality complained of, namely, the inclusion by the Newcastle Municipality of remuneration for collection of debts younger than 60 days without the proper tender procedures being followed in relation thereto until it wrote the letter of termination in February 2017, and that less than a month had passed before it launched its counter-application. The court below therefore concluded that there had been no undue delay on the part of the GMM, even if one were to accept that it would have become aware of the illegality of the agreement when the Auditor-General raised the issue with the Newcastle Municipality in November 2016.

[23] The court went on to consider the prescripts of reg 32, against the constitutional imperatives set out in s 217 of the Constitution, namely that when an organ of state in the national, provincial or local sphere of government procures goods or services it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. It held that the GMM was bound by all the requirements of reg 32, which must be read conjunctively. It found, essentially in line with the Auditor-General's conclusions, that the bids received by the Newcastle Municipality were only in relation to collection of debts older than 60 days. The court below had regard to the evidence led on behalf of the GMM that it had intended to set up its own debt collection unit in relation to debts younger than 60 days but that it was held back by budgetary constraints, resorting at the eleventh hour to including in the agreement a provision relating to the collection of debts younger than 60 days, and that NICS 'gladly accepted the windfall'.

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[5] *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 375C.

[24] The court below agreed with the Auditor-General, that permitting the NICS to receive commission on debts younger than 60 days was not cost-effective because persons in that category included those who would have paid anyway, without the need for debt collectors, and that if other bidders had been allowed to bid for both, the percentage commission on either category might have been lower. Brauckman AJ went on to conclude that there had thus been no fair, transparent, equitable, competitive and cost-effective process and that the inclusion of the additional 2.5 percent commission offended against reg 32 and s 217 of the Constitution. It had regard to the submission on behalf of the GMM that the relief sought was not constitutional in nature and found it unpersuasive. This is an aspect to which I will revert later in this judgment. The court below did not deal at all with the provisions of reg 51.

[25] The court below considered whether to set aside the agreement between NICS and the GMM in its entirety. It took the view that the offending part could be severed from the good. In this regard it relied on the decision of this Court in *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another*.[6]

[26] The court held that it was bound to declare that part of the agreement that catered for the collection of debts younger than 60 days unconstitutional and unenforceable. It went on to make the following order:

'1. That the reference to "as well as 2,5% to debt collected to customers under 60 days" contained in clause 6.2.5 of the "contract for provision of debt management services" be declared unconstitutional invalid unlawful and void ab initio;

2. That the defendant will not be entitled to recover any compensation/commission in respect of the debts recovered by the plaintiff from customers under 60 days for the duration of the agreement between plaintiff and defendant;

3. That the defendant is ordered to pay the plaintiff's costs, including the costs consequent upon the employment of three counsel where applicable.'

[6] *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* [2013] ZASCA 70; 2014 (3) SA 251 (SCA) at paras 46 and 47.

[27] It is against the aforesaid conclusions and resultant orders that the present appeal and cross-appeal are directed. It was contended on behalf of the GMM that the court below erred in holding that the clause relating to the collection of debts older than 60 days was severable and that the agreement ought to have been set aside in its entirety. In argument in the court below the GMM apparently had abandoned any reliance on a claim for relief based on constitutional validity and called on the court below to disregard any references to the unconstitutionality of the agreement where they appear in the GMM's particulars of claim. The GMM submitted that as a consequence, the court below was precluded from invoking the provisions of s 172(1)*(b)* of the Constitution, which entitles a court, after declaring any law or conduct to be unconstitutional and invalid, to make an order that is just and equitable, including but not limited to limiting the retrospective effect of the declaration of invalidity. That contention was persisted in before us. It was submitted, with reference to this Court's decision in *Municipal Manager: Quakeni Local Municipality and Another v FV General Trading CC*,[7] that the GMM's challenge was a self-review challenge, rather than a constitutional challenge. It was contended that the decision in *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality*[8] was authority for the proposition that a failure to adhere to the prescripts of reg 32 should result merely in a declaration of invalidity. Presumably, also in order to further counter NICS' submissions in relation to delay and a resort to s 172(1)*(b)*, it was contended before us that the GMM's case in essence was that it had raised a collateral challenge to NICS' 'coercive attempts to coerce payment'.

[28] On behalf of NICS it was contended that the delay by the GMM in seeking relief in the court below was unreasonable and ought not to have been overlooked, and for that reason alone the claim for a review and setting aside of the agreement ought to have been dismissed. NICS also submitted that reg 32, applied to the facts of this case, does not impact on the validity of the agreement between the GMM and NICS, as distinct from its effect on the agreement between the latter and the Newcastle Municipality. Furthermore, it was asserted on behalf of NICS that the GMM's claim, properly analysed, is based on the

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[7] *Municipal Manager: Quakeni Local Municipality and Another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA); [2009] 4 All SA 231 (SCA).
[8] *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* [2015] ZAECELLC 16; [2016] 1 All SA 721 (ELC); 2017 (1) SA 172 (ECG).

principle of legality, which is essentially a constitutional challenge and that s 172 of the Constitution comes into operation, and that in the exercise of its discretion the court below ought to have held that NICS was entitled to payments of the amounts computed and awarded by the arbitrator.

[29] Is the categorisation by the GMM of its challenge to the validity of the agreement as a collateral challenge, thereby compelling adjudication justified? It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he or she is threatened by a public authority with 'coercive action, precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question'.[9] Classically, that is how it was formulated by this Court.

[30] In *Merafong City v Anglogold Ashanti Ltd*,[10] the Constitutional Court was considering an appeal from this Court, which had relied on the aforesaid formulation in denying relief to the public authority, Merafong City. In that case the Constitutional Court was dealing with a decision by the Minister of Water Affairs and Forestry in July 2005, which had overturned a decision by Merafong City to levy a surcharge on water for industrial use by Anglogold Ashanti. Merafong City had taken advice that the Minister had acted beyond her powers and, in consequence, threatened to cut off Anglogold Ashanti's water supply, unless it paid the surcharge. Anglogold Ashanti paid under protest and negotiations ensued to see if an agreement could be reached. The negotiations failed. In April 2011 Anglogold Ashanti launched proceedings in the high court, seeking to compel Merafong City to comply with the Minister's ruling. Merafong raised a conditional counter-application seeking a declarator that the Minister had acted beyond her powers. The Constitutional Court had regard to this Court's formulation, referred to in the preceding paragraph, in these terms:

'Only an individual whom a public authority threatens with coercive action can [raise a collateral challenge]; and no one outside the category. Never a public authority. This approach squeezes collateral challenge into a rigid format – one format that neither doctrine nor practical reason appears to warrant.'

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[9] See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 at para 35.
[10] *Merafong City v Anglogold Ashanti Ltd* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC), wherein the Constitutional Court had regard to that formulation.

The Constitutional Court, after exploring decided cases over the years, went on to say the following (at para 55):

'While reactive challenges, in the first instance, and perhaps in origin, protect private citizens from state power, good practical sense and the call of justice indicate that they can usefully be employed in a much wider range of circumstances. There is no practical, or conceptual, justification for straitjacketing them to private citizens. It is readily conceivable, for instance, that an organ of state may through legal proceedings seek unjustly to subject another organ of state to a form of coercion. *Where appropriate,* that other should be able to raise a defensive or reactive challenge. Categorical exclusions should be eschewed. A reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts.'

(Emphasis added.)

[31] In the next paragraph the Constitutional Court said the following:

'The permissibility of a reactive challenge by an organ of state must depend on a variety of factors, invoked with a "pragmatic blend of logic and experience". And – as in *Bengwenyama* – it would be imprudent to pronounce any inflexible rule.' (Citations omitted.)

[32] At para 69 of *Merafong*, the Constitutional Court noted that in the classical field of operation of reactive challenges, namely, where an individual was provided a defence to resist the enforcement of the law he or she was not confronted with before, as where the State threatens consequences or 'coerces' payment, the virtue is that delay plays no role, and a court is bound to entertain such a challenge. In my view, it is for that very reason that the GMM strained to style its challenge a collateral or reactive challenge. However, the Constitutional Court in relation to *Merafong City*, the public authority concerned, said the following:

'Here, Merafong was well aware of the Minister's decision, which was specifically addressed to it. It does not dispute that it knew that a legal challenge was immediately available to it. This means that Merafong's reactive challenge is of the category that necessitates scrutiny in regard to delay.'[11] The Constitutional Court went on to say that delay in that context, though relevant, need not be conclusive.[12] In stating this and remitting the matter to the high court, the Constitutional Court said that the Minister in that case had expressed the view that the reactive challenge

[11] *Merafong City* para 72.
[12] *Merafong City* para 77.

could be considered by the court. The high court was directed by the Constitutional Court to consider the legality of the Minister's decision and, if necessary, what remedy was to be granted.

[33] In the present case I struggle to understand why the challenge by the GMM is reactive, or collateral. In my view that characterisation has been resorted to expediently. The GMM was not coerced, least of all by NICS. It drove the process of piggybacking on the Newcastle Municipality's procurement process. Years later, faced with the Auditor-General's interrogation of the Newcastle Municipality's tender process and the resultant contract, it was spurred into action and purported to terminate the contract on the basis provided by the Auditor-General. It also complained that NICS had breached the agreement. By approaching the high court on an urgent basis NICS only sought to preserve its contractual position to which it had been bound by the agreement with the GMM. At that stage the only part of the agreement considered offensive was the 2.5 percent add-on, which one will be reminded was at the instance of Newcastle Municipality, and replicated by the GMM. It was never suggested that NICS, in either instance, had solicited the add-on. In both the letter of termination and in the action ultimately instituted, the GMM took the lead in its frontal attack on the validity of the agreement. To describe that challenge as reactive is an exercise in distortion.

[34] I now turn to deal with the true nature of the review we are here concerned with and will then consider the question of delay in relation thereto. It is now firmly established that self-review by organs of state are not reviews in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), but rather are legality reviews.[13] Unlike the control period of 180 days provided for in PAJA and a court's discretion in extending that period, where the interest of justice so requires, a court dealing with a legality review has no such fixed period within which an application must be brought. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,[14] the Constitutional Court, with reference to prior decisions, and

[13] See *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC).
[14] *Asla* above.

comparing the discretion under PAJA to the discretion to be exercised in a legality review, said the following in relation to when the time period starts to run:

'[I]n both assessments the proverbial clock starts running from the date that the applicant became aware or *reasonably ought to have become aware* of the action taken.'[15]

(Emphasis added.)

[35] The Constitutional Court went on to state the following:

'The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to s 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.'[16]

At para 51 the Constitutional Court explained that an assessment of the reasonableness of the delay must involve, amongst others, the explanation for the delay. The entire period of the delay must be explained. Where the delay can be explained and is justified then it is reasonable, and the merits of the review can be considered. Where there is no explanation for the delay, the delay will necessarily be unreasonable.

[36] In *Asla*, the Constitutional Court taught that even if the unreasonableness of the delay has been established, it cannot be evaluated in a vacuum. The next leg of the test is to see if it ought to be overlooked. It went on to state the following:

'Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.'[17] (Citations omitted.)

[37] The Constitutional Court in *Asla*, with reference to its prior decisions, described the appropriate approach as follows:

'The approach to overlooking a delay in a legality review is flexible. In *Tasima I*, Khampepe J made reference to the "factual, multi-factor, context-sensitive framework" expounded in *Khumalo*. This

[15] At para 49.
[16] At para 50.
[17] At para 53.

entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this court's power to grant a just and equitable remedy and this ought to be taken into account.'[18] (Citations omitted.)

[38] Theron J, in *Asla* set out another factor to be taken into account in considering whether to overlook delay, namely the nature of the impugned decision. She went on to state the following:

'This, in essence, requires a consideration of the merits of the legal challenge against that decision.'[19]

In the next paragraph she expounded on it as follows:

'This court has made plain that even within the context of PAJA, the extent and nature of the deviation from constitutional prescripts directly impacts upon an application for condonation in terms of s 7 of PAJA. In the context of legality review, in *Khumalo*, Skweyiya J . . . explained that "an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision and considering the legal challenges made against that decision".'

Theron J went on to cite, with approval, the following dictum in the decision of this Court in *South African National Roads Agency Ltd v Cape Town City*:[20]

'It is true that in [the Supreme Court of Appeal's judgment in *Opposition to Urban Tolling Alliance*] 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 interests of justice dictate that the delay should be condoned. *It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.'* (Emphasis added.)

[39] In *Asla*, the Constitutional Court spoke thus:[21]

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

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[18] At para 54.
[19] At para 55.
[20] *South African National Roads Agency Limited v City of Cape Town* [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) para 81.
[21] *Asla* para 58.

[40] The Constitutional Court in *Asla* noted yet a further factor for consideration, namely the conduct of an applicant. In this regard it pointed out, as our courts have done repeatedly in the past, that a much higher standard is required of organs of state. On this aspect it cited the following dictum in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute*:[22]

'[T]here 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.'

In *Merafong*,[23] it was said that it is the State's duty to rectify unlawful decisions.

[41] Finally, with reference to its decision in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*,[24] where it was held that even where there was no basis to overlook an unreasonable delay the court is nevertheless compelled to declare the State's conduct unlawful, because s 172 (1)*(a)* of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution,[25] the Constitutional Court in *Asla* recognised the tension between the delay rules and the injunction to declare conduct unlawful that conflicts with the Constitution. The Constitutional Court in *Asla* reflected on a long line of cases that held that the State must apply timeously to courts and the implication in *Gijima* that time hurdles must yield to that injunction. On this aspect the Constitutional Court in *Asla* said the following:

'The *Gijima* principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined. At the same time, this is not a matter in which the *Gijima* principle can be ignored and thus impliedly overruled. So the injunction it creates – to declare invalid that which is indisputably and clearly inconsistent with the Constitution – must be followed where applicable.'[26]

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[22] *MEC for Health, Province of Eastern Cape NO and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2013] ZASCA 58; 2014 (3) SA 219 (SCA) para 82.
[23] *Merafong* para 61.
[24] 2018 (2) SA 23 (CC) [2017] ZACC 40.
[25] *Gijima* para 52; and paras 63, 65 and 66 of *Asla*.
[26] *Asla* para 71.

[42] In *Asla* the Constitutional Court went on to hold that there was no reason in that case to overlook the delay. However, it held that the contract in the case was clearly unlawful and declared it unconstitutional. It was common cause that the contract in that case had been practically completed and the Constitutional Court said the following in relation to the agreement in that case:

'In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.'[27]

[43] The minority judgment in *Asla* (Cameron J and Froneman J with Khampepe J concurring) chose another route, reaching the same practical result. The minority considered that although the cases in which a public authority's delay in bringing self-review is so prodigiously and lamentably inexcusable are rare, they exist, and thought the case before them was one such instance. The minority postulated that in such a case there was no public interest or constitutional necessity for pronouncing on the validity of what was being challenged. The minority pointed to academic criticism against *Gijima* for having selected legality as the pathway for public authority self-review. The minority took the view that drawing a distinction between PAJA and legality self-review promoted bifurcation. They considered that *Gijima* warranted re-consideration because it departed from earlier decisions. It accepted that the case before it was not the case to do so, not least of all because it did not have the benefit of submissions in that regard.[28]

[44] The minority in *Asla* recognised the tension created by prior decisions, where despite not overlooking delay they had sought to 'impose a square on [a] circle' by nevertheless inquiring into the legality of the conduct by the public authority and granting a deserving subject just and equitable relief, as was done by the majority. They noted that where there was no delay a declaration of unlawfulness should invariably be made – it was the default

[27] At para 105.
[28] At paras 109 and 112.

position that accords with the principle of legality. It was an affirmation that the State was complying with its duty to correct suspected unlawful decisions, expeditiously and diligently. The minority described this as a win-win for the rule of law.[29]

[45] The minority saw the delay rule at common law as serving the public interest in the certainty and finality of decision-making. The minority said the following:

'It is an opportunity for the state to demonstrate that its self-review seeks to promote open, responsive and accountable government *rather than the self-interest of state officials seeking to evade the consequences of their prior decision.*'[30] (Emphasis added.)

[46] The minority accepted that even where a delay was found to be unreasonable, according to precedent, our courts retained a discretion to overlook the delay provided that it was in the interests of justice to do so. This evaluation was done with reference to the effect of the delay on the parties and the nature of the impugned decision. It explained how it differed from the majority as follows:

'We suggest an alternative route. This is that, in the absence of adequate explanation for unreasonable delay, courts should not intervene to inquire into a final and determinative holding into unlawfulness, *unless the seriousness of the unlawfulness at issue warrants overlooking the manifest deficiencies in the state actor's case.*'[31] (Emphasis added.)

The minority went on to hold that on the facts before the Constitutional Court it was not in the interests of justice to entertain the self-review. The minority stated that 'resorting to s 172(1)*(a)* is not necessary to arrive at a just outcome'.[32] The following passage of the minority judgment, on the path to that conclusion bears repeating:

'When determining the unreasonableness of the delay and exercising its discretion whether to allow consideration of the review, the court must balance the seriousness of the possible illegality with the extent and unreasonableness of the delay. In the circumstances of this case, the delay is sufficiently more inexcusable than the possible illegality is egregious, and the balance tips against this Court's intervention.'[33]

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[29] At para 118.
[30] At para 120.
[31] At para 127.
[32] At para 149.
[33] At para 147.

The minority agreed that it would be 'grossly unjust' to deprive the respondent in that case of its contractual bargain and to leave it to an enrichment claim, that the municipality in that case had submitted must suffice.[34] I pause to note that the same claim was made by the GMM in the present case.

[47] Appreciating that our law on self-review has become somewhat encrusted, it would nevertheless be presumptious of us to become embroiled in the differences between the majority and minority judgments in *Asla*. Our courts might, in time, after adjudicating a string of cases with various permutations streamline an approach to self-review, or the legislature might intervene, in a constitutionally compliant manner, to cover all forms of review, including those that pertain to the executive and provide for how delay is to impact on such reviews. The Constitutional Court might, in time, revisit prior decisions. An aspect however, that is of immediate concern, noted at the commencement of this judgment, is that self-review is now a burgeoning and troubling phenomenon. As recorded by the Constitutional Court in *Asla*, corruption and maladministration are inconsistent with the rule of law and are the antithesis of open, accountable and democratic government.[35] The functionaries involved are almost never subject to scrutiny and sanctions and in some cases falsely assume the moral highground. The problem, as the cases demonstrate, is that corrective action, by way of self-review, is usually sought a considerable time after an impugned decision was made and disciplinary steps against those concerned might face time problems. However, if the maladministration or corruption is discovered late by conscientious officials seeking to take corrective and appropriate action, courts might insist in the future that public authorities seeking time indulgences set out the steps they took in relation to the misconduct by errant officials, that resulted in the need for corrective action, including, but not limited to disciplinary actions, and where appropriate, criminal proceedings. All the more so, if the corruption or maladministration was hidden from disclosure by inept or corrupt officials. If a service provider was complicit then questions might be asked about what steps were taken by the public authority in relation to such complicity. Beyond the courts, these aspects might even be catered for by legislation. We must all of us, in every branch of the State and civil society,

[34] At para 148.
[35] At para 96.

make every effort to protect public monies and ensure that our country's necessary developmental goals as envisaged by the Constitution, in the interest of all our people are met.[36] However, for present purposes we are bound to follow the rules dictated by the majority in *Asla*. It is to that task that I now turn.

[48] How long was the delay in the present case and was it unreasonable? First, one must determine when the clock started running and how far the delay extended. In this case, as in other cases, the allied issue of the higher standard of conduct that can be expected of state officials already at this stage arises, which invites scrutiny of the conduct of the officials concerned. In the present case alert and constitutionally conscientious officials would have been intent on ensuring that the constitutional procurement imperatives and the requirements of reg 32 were met. After all, it will be recalled that already in July 2015 the request to piggyback on the Newcastle Municipality bid and contract, relying expressly on the provisions of reg 32, was made. The underlying documents were sought and provided during August 2015. From the GMM's presently asserted perspective of the flaws in the agreement with NICS, for failure to meet constitutional imperatives and the requirements of regs 32 and 51, supported by the views of the Auditor-General, the evidence led during the arbitration, the findings of the arbitrator and the evidence adduced during the trial in the court below, the conclusion is ineluctible, that the most cursory scrutiny of the documents received from the Newcastle Municipality would have revealed that the agreement was of questionable validity. At that early stage, before the agreement in question was concluded, the documents would have revealed to the GMM that in respect of the agreement as a whole the requirements of reg 32*(a)* to *(c)*, set out in para 8 above, and the applicable constitutional imperatives, had not been met. The GMM ought reasonably to have known or have been aware from inception, at the time that it received the documents, and certainly at the time of the conclusion of the agreement in September 2015 that the agreement was of questionable validity.

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[36] At para 99 of *Asla* the following appears:
'The important principle at play in this matter is how this court manages complex institutional settings of corruption and maladministration, particularly at local government level and where the organ of state has not taken the court into its confidence.'

[49] In the present case the GMM would have seen that the Newcastle Municipality had included in the agreement the add-on in relation to debts younger than 60 days, without having called for submisions in regard thereto in the invitation to tender. It ought to have done its own calculations, which would have demonstrated that the add-on was not within statutory permissable amendments, as conceded by Ms Haripersad. A basic check would have revealed that, in any event, the Newcastle Municipality's officials had not tabled the intended amendment before the council as required by s 116(3) of the LGMFMA, referred to in para 20 above. Scrutiny of the Newcastle Municipality bid and contract would have brought home to it the many flaws it now complains about, which the Auditor-General red-flagged. It would have been abundantly clear to the GMM that constitutional imperatives in relation to procurement were not being met and that the applicable regulations were being flouted. The alarm bells for the GMM ought to have started ringing even before it concluded the agreement with NICS. At the latest the clock started running when its agreement with NICS was concluded. Moreover, early on in the execution of the agreement the GMM would have experienced the issues identified later by the arbitrator, namely how cost-inefficient it all was, and how one could not determine whether payments were made as a result of intervention by NICS. That too ought to have spurred it into better enquiry of the propriety of the agreement. The court below erred in having regard only to the time from which the Auditor-General raised the queries with the Newcastle Municiplaity or shortly thereafter.

[50] In addition, when it wrote the letter of termination, approximately 17 months after the effective date, the GMM was concerned, certainly as far as the question of legality was concerned, only with the question of the 2.5 percent add-on commission. This is clear from what is set out in para 13 above. Approximately 18 months after the effective date, the counter-application by GMM referrred to above was launched. That was interrupted by the settlement in respect of the application by NICS, which was made an order of court. The parties then went to arbitration and during that process accepted that the arbitrator's jurisdiction did not extend to the question of a legality challenge. When assessing the delay and moral culpability in relation thereto, sight should not be lost of the tender by the GMM, albeit in unacceptable form, referred to by the arbitrator in his award, in respect of both categories of debts.

[51] The arbitration process was further extended by the appeal to an arbitration appeal panel. However, during the arbitration proceedings, as stated above, on 21 June 2017, approximately 22 months after the effective date the GMM instituted the action culminating in the present appeal. When the GMM was met with a special plea of *lis pendens* it only then withdrew its counter-application. However, the GMM was ordered to pay the costs incurred in relation to the special plea, including the costs of two counsel, limited to the time up to the date of delivery of the notice of withdrawal of the counter-application. By the time the trial started in the court below the contract period had expired.

[52] Mr Mokgatsi, the erstwhile Chief Financial Officer of the GMM, when being led at the trial in the court below, was asked when, after the conclusion of the agreement with NICS, the GMM first considered there might be a problem with the validity of the agreement. His response was not to address that question, but rather to speak to the failure by NICS to meet contract 'deliverables'. He said there had been 'a problem with the execution of what was contained in the agreement'. Much of what followed afterwards was by way of leading questions by counsel representing the GMM, relating to the events set out above. Effectively, there was no explanation for the delay. Little surprise then that condonation is not dealt with at all in the heads of argument on behalf of the GMM. Counsel appear to have been content to rest on the contention that the review in question was a collateral challenge. By any measure there was undue and unreasonable delay, both in initiating and finalising review proceedings. Should it be overlooked? It is to that issue that I now turn.

[53] In this assessment, as appears from what is set out above, the merits of the matter, including the degree of non-compliance with statutory prescripts must feature. In the present case there can, in my view, be no doubt, especially in relation to the 2.5 percent add-on that there was non-compliance by the Newcastle Municipality with reg 32 and that the non-compliance was egregious. There had been no competitive bidding process in relation thereto. No thought was given to whether there were demonstrable discounts or benefits for the Newcastle Municipality. All the indications were to the contrary. It could rightly be expected that a substantial, if not the greater percentage of consumers, would pay their accounts within the first 60 day period, as noted by the arbitrator and recognised by the Auditor-General. In relation to the bid as a whole and the resultant agreement no thought

appears to have been given to how recovery of revenue would or could be connected to efforts made or steps taken by the service provider. There was no cap placed on the commission to be earned. Therefore, the prescripts of both reg 32 and reg 51 were not even close to being adhered to. In respect of the tender itself it is necessary to record at this stage that there was no indication at all that NICS was remiss in any way in either not bidding in the form invited or insisting on particular contractual provisions. However, in respect of the add-on it could not have been lost on NICS that it was receiving preferential treatment, as opposed to other bidders, and it was not being asked to revisit the commission on which it had put in a bid. It was more than a windfall that it was glad to accept. That unwarranted benefit was repeated in the GMM agreement. As the computation by the arbitrator proves, the commission on the under 60 day period was especially lucrative, earning NICS approximately R1 million more than it did on the over 60 day revenue. It bears repeating that the total earned in relation to debts younger than 60 days amounted to more than R23 million based on a fraction of the commission in relation to debts older than 60 days. By any measure this is startling. To add insult to consumer injury, payments by the GMM's bulk consumers were included in the computation of what was earned by NICS. There is eveything fundamentally wrong with all of this. This will be borne in mind when an order is made at the end of this judgment.

[54] There is no merit to the submissions on behalf of NICS that the flaws attendant upon the Newcastle Municipality bid process and the resultant agreement did not translate into a flawed agreement between NICS and the GMM. One cannot build on such a flawed foundation. There was a duty on the GMM to satisfy itself that the bid process was in accordance with constitutional norms and in line with statutory prescripts. All the more so when the documentation was sought, ostensibly to do just that. As recorded by the arbitrator the GMM did not do its own needs analysis. It accepted unthinkingly that it should replicate the Newcastle Municipality agreement and did not concern itself with constitutional imperatives or statutory prescripts. If anything, it compounded Newcastle Municipality's many errors.

[55] As to the conduct of the GMM itself, it is necessary to repeat that it is clear that there was a most serious and egregious breach by its officials of their constitutional duties. There

was no concern shown for good governance, or what was in the best interests of its customer base. There was, at source, no scrutiny to see whether any of the material prescripts of the applicable regulations were met. No consideration was given to the constitutional imperatives of fair, equitable, transparent, competitive and cost-effective procurement of services. It was only spurred into action with the threat of the Auditor-General looming. And even then it embarked on a protracted litigation course with concomitant costs at public expense. It must have occurred to its legal representatives that the question of legality was the overarching anterior question. Yet, the counter-application remained in place while the GMM continued to press on with the arbitration process before instituting action in the court below. The GMM was accordingly made to bear the costs of the special plea because it had left its counter-application in abeyance. Before us, as in the court below the GMM was represented by two senior counsel and by one junior counsel. All of this at extra cost to ratepayers and other customers.

[56] There was a strange irony in the submissions by the GMM, that it was egregious to have the agreement in question remain in stead, at great cost to the public purse. There was ostensible righteous indignation where there was no actual righteousness on the part of the GMM's office bearers. The contrary is true. It is as if they were in denial of how all of this came to pass. The submission that NICS could pursue its rights by way of an enrichment action, when seen against the background set out above is equally difficult to understand, especially, as it would involve further litigation with attendant costs. That too against the finding by the arbitrator as to what could and could not be established. To borrow from the words of Theron J in *Asla*, the Municipality had a flippant attitude towards its obligations under the Constitution that reeked of impropriety.[37] The words of the minority are equally applicable. The minority judgment described the attitude and conduct of the Municipality in that case as follows: 'The Municipality's hands are thoroughly smudged and grimy.'[38]

[57] As to prejudice, there is of course prejudice to the public purse when remuneration is agreed without regard to efficiencies and costs savings and when it is open ended and

[37] At para 98.
[38] At para 144.

there are no means of measuring effort against results. There is also prejudice to a service provider when it has performed what appears to be extensive services without remuneration. In *Natyawa v Makana Municipality*,[39] the Constitutional Court pointed out that nullification of an administrative decision long after it was taken may be ameliorated by the benefits of a wide remedial power to grant a just and equitable remedy in terms of s 172(1)*(b)*. The same applies to self-review.

[58] As in *Asla* there is, in the present case, no reason to overlook the delay. But, as in *Asla*, the agreement in the present case is clearly unlawful and there is a duty to declare it so. There is no merit to the surprising submission on behalf of the GMM that the present case is one that is simply a legality challenge without constitutional overtones. The complete answer is to be found in *Asla*. I can do no better than to quote the relevant passages:

'There is a clear basis for jurisdiction as the matter concerns s 217 of the Constitution. It deals with procurement by an organ of state, judicial review of a decision by an organ of state and the question of a just and equitable remedy in terms of s 172 (1)*(b)* of the Constitution. Lawful procurement is patently a constitutional issue.

In this court, the Municipality relies on a legality review. By its nature, legality review raises a constitutional question. It is founded upon the rule of law, which is a founding value of our Constitution.'[40] (Citations omitted.)

The abandonment of reliance on constitutional invalidity by the GMM in argument in the court below was opportunistic and expedient and designed to obviate the need for a just and equitable order in terms of s 172(1)*(b)* of the Constitution, including relief to be afforded to NICS. The abandonment could not transform a case that was quintessentially constitutional into one which was not. I turn hereafter to deal with the court's powers in terms of s 172(1)*(b)* of the Constitution.

[59] In *Gijima* the Constitutional Court described a court's power in terms of s 172(1)*(b)* as wide and bounded only by considerations of justice and equity.[41] In that case the Constitutional Court declared the award of the contract unlawful but with a rider that the

[39] *Natyawa v Makana Municipality* [2019] ZACC 43 (CC) at paras 50-51.
[40] At paras 35 and 36.
[41] At para 53.

service provider not be divested of rights that would have accrued but for the declaration of invalidity.[42] In *Electoral Commission v Mhlope & Others* the Constitutional Court spoke thus: 'Section 172(1*)(b)* clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresoluble situations. And the operative words in the section are "any order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy then it ought to prevail as a constitutionally sanctioned order contemplated in s 172(1)(b).'[43]

[60] In *Asla* the majority and minority agreed that the service provider there should not be deprived of accrued rights and made an order to that effect. In this case, in assessing a just and equitable remedy there are several factors to consider. In this regard, the provisions of the agreement that militate against constitutional prescripts and the applicable regulations in the manner described above, have to be seen alongside the remarks and the findings by the arbitrator, set out in para 18 above, which appear to be sound and which the parties in any event, in relation to the contractual issues, agreed to be bound by. Paragraphs 53 to 57 of the arbitartor's award are apposite, as are his findings at paras 58 to 60 and what was stated by the court below at para 77 of its judgment.

[61] As stated above, in the present case, NICS benefited by a calculation of commission on all amounts paid into the Municipal accounts, regardless of whether they were connected to NICS' efforts to recover debt. The amounts paid into those accounts included payment from bulk consumers from which one would ordinarily not expect defaults. There was no way, *ex post facto*, of determining which amounts were paid because of efforts by NICS. In relation to debts under 60 days amounts paid into the GMM's account would include amounts paid in the regular course by scrupulous consumers who were intent on paying on time. It is thus no surprise that the amount calculated by the arbitrator on the much smaller 2.5 percent rate is greater than the amount calculated in relation to the much higher 16.5 percent rate on debts older than 60 days. The amounts are set out in para 17 above. In relation to debts

[42] At para 54.
[43] 2016 (5) SA 1 at para 132.

younger than 60 days the probabilities are high that the greater part of monies paid into the the GMM's account was paid in the ordinary course rather than being due to the efforts of NICS. The opposite is probably true for debts older than 60 days. Even then, there must be some percentage due to people paying late without intervention by NICS. The amount of close to R24 million in relation to debts under 60 days is quite staggering and, as already alluded to above, is more than just a windfall as described by the court below. One must, of course, bear in mind, as found by the arbitrator, that there was a range of services provided by NICS which extended beyond debt collection. The total amount calculated by the arbitrator as being due to NICS is more than R46 million. One cannot but marvel at this.

[62] One further factor to be taken into account in considering what is just and equitable is that in relation to debts older than 60 days NICS was in no better or worse position than other service providers. It put in a bid on terms that were accepted. There is no indication that it sought to impose any of the terms of the agreement in relation thereto. In respect of commission on debts younger than 60 days NICS must have known it was in an unjustifiably advantaged position in relation to other bidders. As stated earlier it had not, as a *quid pro quo*, been requested to revisit its bid on debts older than 60 days that might result in a cost benefit for the Newcastle Municipality. But then neither were any of the other bidders afforded that opportunity. NICS was thus, in relation to the 2.5 percent add-on, complicit in the unlawful conduct of the GMM. A message should be sent to service providers that they will not be allowed to reap the benefits of such complicity. On the other hand, the GMM should not be permitted because of its own unreasonable delay to unduly benefit at the expense of NICS in respect of work done and services rendered in relation to debts older than 60 days.

[63] In my view, therefore, a just and equitable result would be to not deprive NICS of the benefits that accrued under the agreement in relation to commission earned on debts older than 60 days, but to do so in relation to all the commission in relation to debts younger than 60 days. For all practical purposes the result is the same as that reached by the high court, save that we arrive at that result for very different reasons. The high court erred by not holding that the entire agreement was invalid and not following the prescripts of *Asla* and in not considering the proper application of s 172(1)*(b)* of the Constitution. Peculiarly, the result would have been the same if the delay had been overlooked and the review entertained,

save that the argument might have been made that the GMM would have been entitled to costs, which in turn might have been met with the response that the GMM's conduct precluded that result. Furthermore, the result would have been the same if one had engaged in the balancing exercise in relation to egregiousness of the invalidity in juxtaposition to the unreasonableness of the delay, and the alternate route proposed by the minority in *Asla*, referred to in para 46 above. Especially in relation to the 2.5 percent add-on. The order made by the high court will, of course, have to be set aside and substituted in line with the conclusions reached above. In relation to costs, each party in the court below would have achieved a degree of success and in my view, bearing in mind the conduct of each of the parties the best course in relation to proceedings in the court below and the appeal in this court is to make no order as to costs. It should be borne in mind that NICS was ordered by the court below to pay the GMM's costs, including the costs of three counsel, where so employed.

[64] The following order is made:

1 The appeal and cross-appeal succeed only to the extent reflected in the substituted order set out hereafter.

2 In respect of the appeal, no order is made as to costs.

3 The order of the court below is set aside and substituted as follows:

'(a) The contract for the provision of debt management services, concluded by the parties during September 2015, which is the subject of this action, is declared unconstitutional and invalid but is set aside only in relation to recovery by the defendant of the commission of 2.5% in respect of debts younger than 60 days, so as to preserve the accrued rights of the defendant as set out in (b) below.

(b) The defendant is thus not precluded from recovery of the commission of 16.5% on debts older than 60 days in the amount calculated by the arbitrator, Justice Harms.

(c) No order is made as to costs.'

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M S NAVSA

ACTING DEPUTY PRESIDENT

Appearances:

For appellant:	M C Maritz SC, with him F W Botes SC and D D Swart
Instructed by:	Cronje, De Waal – Skosana Inc., Secunda
	Kramer Weihmann Attorneys, Bloemfontein
For respondent:	M M Rip SC, with him C M Rip
Instructed by:	De Jager Inc., Pretoria
	Jacobs Fourie Attorneys, Bloemfontein