IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2(1) OF THE SPECIAL INVESTIGATING UNIT AND SPECIAL TRIBUNALS ACT 74 OF 1996 (REPUBLIC OF SOUTH AFRICA)

CASE NO.: EC02/2024

In the matter between:

SPECIAL INVESTIGATING UNIT	Applicant
and	
KWASA FOOD SUPPLIERS (PTY) LIMITED	First Respondent
PETER ANTHONY MAMA	Second Respondent
MAVIS MCALLISTER	Third Respondent
CECILIA ZINE GONGXEKA	Fourth Respondent
SOUTH AFRICAN SOCIAL SECURITY AGENCY	Fifth Respondent

JUDGMENT

"Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done.[1]

Introduction

[1] The Special Investigating Unit (SIU) seeks to review and set aside the award of a tender by the South African Social Security Agency (SASSA) to Kwasa Food Supplies (Pty) Ltd for the provision of food parcels under the Social Relief Distress programme (SRD) funded by the State. The essence of the applicant's case is based on the need to root out irregularities in State procurement processes which has resulted in so much devastation for our country. A Social Relief Distress programme which serves the poorest of the poor in our society evokes much emotion where the allegation of irregularities are made. Of importance, however, in the adjudication process of these sometime difficult facts, the overarching goal is to apply the Rule of law to all the litigants equally. In the present case the question is whether the issues raised in relation to the procurement process are consonant with constitutional principles and values.

Parties

[2] The applicant is the Special Investigations Unit (SIU) established in terms of section 2(1)(a) (i) of the Special Investigating Units and Special Tribunals Act No. 74 of 1996. (the SIU Act).

[1] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) Chaskalson P at para 4.

[3] The first respondent is Kwasa Food Suppliers (Pty) Ltd, (Kwasa) the company which was awarded the tender to provide food parcels under the Social Relief Distress (SRD) programme funded by the State.

[4] The second respondent is Peter Anthony Mama; the third respondent is Mavis McAllister and the fourth respondent Cecilia Zine Gongxeka who are all directors of Kwasa. Despite a submission in argument that no relief was sought against them personally, the Notice of Motion seeks relief against them jointly and severally with Kwasa. The usual prayer for the one paying the other to be absolved was not sought.

[5] The fifth respondent is South African Social Security Agency (SASSA), an organ of State and is a national agency of the South African government created to administer South Africa's social security system**,** including the distribution of social grants, on behalf of the Department of Social Development.

Relevant background facts.

[6] The SIU has been mandated in terms of Proclamation 32 of 2020, published on 6 November 2020 in Government Gazette number 43885 (the Proclamation) to conduct investigations into maladministration in connection with the affairs of SASSA. In particular it had to investigate any resultant loss or damage suffered by SASSA in relation to services it awarded to Kwasa.

[7] The SIU has wide powers in terms of section 2(2) of the SIU Act [2] to institute these proceedings and seek relief after being authorised by a Proclamation to investigate irregularities and corruption.

[8] The applicant, as authorised, is also empowered to investigate improper or unlawful conduct by employees of any State institution, the unlawful appropriation

[2] The Special Investigating Unit and Special Tribunals Act 74 of 1996

or expenditure of public money or property and any offences referred to in part 1 to 4 or sections 17, 20, or 21 (insofar as it relates to the aforementioned offences) of chapter 2 of the Prevention and Combatting Corrupt Activities Act, 2004, (POCA). These powers are authorised in connection with the affairs of any State institution and unlawful or improper conduct by any person which has caused or may cause serious harm to the interest of the public or any category thereof.

[9] In terms of section 5(5) of the SIU Act, the SIU may institute civil proceedings in the Special Tribunal if, arising from its investigations, it has obtained evidence substantiating any unlawful conduct contemplated in section 2(2) of the SIU Act.

[10] The particulars of claim explain that the applicant conducted an investigation into the certain aspects of the tender awarded to Kwasa. Its powers of investigation are wide ranging as set out in the Proclamation No. R. 23 OF 2020 43546.

[11] The Proclamation in relevant part is quoted.

> PROCLAMATION NO. R. 23 OF 2020 43546 Special Investigating Units and Special Tribunals Act (74/1996): Referral of Matters to Existing Special Investigating Unit R. 23 PROCLAMATION by the PRESIDENT of the REPUBLIC of SOUTH AFRICA any alleged—
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> (a) serious maladministration in connection with the affairs of the State institutions; (b) improper or unlawful conduct by the officials or employees of the State institutions; (c) unlawful appropriation or expenditure of public money or property; (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property; (e) intentional or negligent loss of public money or damage to public property; (f) offence referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), and which offences were committed in connection with the affairs of the State institutions; (g) or unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof which took place between 1 January 2020 and the date of publication of this Proclamation **or which took place prior to 1**

January 2020 or after the date of publication of this Proclamation, but is **relevant to**, **connected with, incidental or ancillary to the matters mentioned in the Schedule** or involve the same persons, entities or contracts investigated under authority of this Proclamation, and to exercise or perform all the functions and powers assigned to or conferred upon the said Special Investigating Unit by the Act, including the recovery of any losses suffered by the or the State institutions or the State, in relation to the said matters in the Schedule. 23 July 2020.

SCHEDULE 1. The procurement of, or contracting for, goods, works and services, including the construction, refurbishment, leasing, occupation and use of immovable property, **during, or in respect of the national State of disaster, as declared by Government Notice No. 313 of 15 March 2020**, by or on behalf of the State institutions, and payments made in respect thereof in a manner that was— (a) (b) (c) (d) not fair, competitive, transparent, equitable or cost-effective; contrary to applicable— (i) legislation; (ii) (iii) manuals, guidelines, practice notes, circulars or instructions issued by the National Treasury or the relevant Provincial Treasury; or manuals, policies, procedures, prescripts, instructions or practices of or applicable to the State institutions; conducted by or facilitated through the improper or unlawful conduct of— (i) employees or officials of the State institutions; or (ii) any other person or entity, to corruptly or unduly benefit themselves or any other person; or fraudulent, and any related unauthorised, irregular or fruitless and wasteful expenditure incurred by the State institutions or the State. 2. Any improper or unlawful conduct by the officials or employees of the State institutions or any other person or entity, in relation to the allegations set out in paragraph 1 of this Schedule, including the causes of such improper or unlawful conduct and any loss, damage or actual or potential prejudice suffered by the State institutions or the State.

My underlining and bold for emphasis

Issues

[12] The issues that arise and argued in this application are:

12.1 whether condonation should be granted for the failure by the SIU to act expeditiously in launching this application to set aside the tender and whether the undue delay defence by the respondents can dispose of the entire application;

12.2 the ambit of the Proclamation in relation to the purpose of the tender covered by the Proclamation and whether the tender was relevant to the state of the National Disaster period;

12.3 whether the deviation granted by Treasury was lawfully granted;

12.4 the validity of the extension period of the tender;

12.5 whether the National Treasury's decision to grant the deviation was proper

Did the SIU unreasonably delay in bringing these review proceedings?

[13] In assessing whether the delay in bringing these proceedings should be condoned and the merits of the case be determined, a number of factors require consideration. The Constitutional Court in *Buffalo City* has addressed the difference between PAJA and legality reviews in relation State self-review. [3] Whilst this case does not fall into the category of State self-review, the principles on delay nonetheless apply. It is necessary, before addressing these issues directly, to consider the assessment of delay in a legality review vis-à-vis a PAJA review. In both instances , a discretion has to be exercised whether or not to overlook a delay. The majority of the Court in *Buffalo City* confirmed that the issue of reasonableness applies in both a PAJA delay and a legality review delay. Of course, the application of the reasonableness threshold differs between the two. A legality review involves a broader discretion. Theron J stated in *Buffalo City:*

> "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."[4]

[14] The SIU submits that it completed and finalised this application within a reasonable time, having regard to the many challenges it faced. The SIU explains that

[3] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) (2019 (6) BCLR 661; [2019] ZACC 15) para 137.

[4] *Id para 53*

the delay in filing the application was as a result of the overwhelming number of cases of irregularities it had to investigate arising from the procurement processes during the COVID-19 pandemic period. It also faced additional challenges in the appointment process of counsel. In essence the SIU explained that there were a voluminous number of investigations as many State institutions were allegedly reported to be involved in irregular procurement of goods during the State of National Disaster.

[15] Many of the investigations were authorized and conducted during the lockdown. This resulted in many cases requiring investigation. The SIU was finalising a number of applications at the same time which were referred to the State Attorney. The office of the State Attorney became overwhelmed with work because of the COVID-19 matters adding to its already known backlog.

[16] Around July 2021 this matter was referred to the senior staff in the legal division of the SIU to process the matter to launch civil proceedings. It was to be referred to the State Attorney. It would appear that there was a delay in obtaining the necessary approval for the processing of the instruction for the State Attorney to brief legal counsel to pursue the civil litigation.

[17] The matter was approved by the SIU for civil litigation on 20 July 2021 and before the end of that month, the SIU appointed the office of the State Attorney, Pretoria to act as the attorneys of record to represent the SIU and to brief senior and junior counsel. The office of the State Attorney Pretoria delayed in appointing and briefing counsel and the matter therefore remained dormant in the State Attorney's office. The SIU continued to hope that the appointment would be made.

[18] The basis for the SIU's reliance primarily on the office of the State Attorney to be the attorney of record of the SIU is as contemplated in Section 3 (1) of the State Attorney Act No 56 of 1957 as amended. Due to the delays at the time the SIU decided to second one of its members to the office of the State Attorney to deal solely

with SIU matters. This interim arrangement improved matters especially in relation to payments of counsel's fees that were outstanding for a long time. Counsel were withdrawing from briefs generally or would not to do further work until all their outstanding fees had been paid by the office of the State Attorney. This slowed the process of procuring legal counsel.

[19] The SIU then resorted to its own process to establish and appoint a panel of private attorneys to render legal services directly to the SIU. The sourcing of the procurement panel began around June 2022 but was only finalised in January 2023. The “onboarding processes” were finalised in March 2023 and this paved the way for identifying matters that were dormant in the State Attorney’s office and needed to be prioritised by the panel. Quotes were received from various attorneys on 28th March 2023. On 12 April 2023 the SIU through appointed AA Solwandle Attorneys Inc who accepted the offer of appointment on 13 April 2023.

[20] An official of the SIU proceeded with handling the matter and on 11 May 2023 dispatched evidential material to the panel attorney who on 25 May 2023 provided his response in a memorandum of advice and the intended case execution plan. On June 2023 following the acceptance and advice of the plan, the attorney addressed a letter requesting counsel be appointed. It was a slow process as quotations had to be called for and received.

[21] It was during the procurement of legal counsel in June 2023 that a technical point was raised by the Auditor General of South Africa relating to the establishment of a panel of attorneys in private practice. This led to another delay. Various engagements ensued with the view to resolve the matter between the SIU and the Auditor General's office during the first week of July 2023. The SIU decided to halt all further work under the panel of attorneys because of the potential of irregularity. The dispute was later escalated to National Treasury in January of 2024.

[22] By this stage the SIU had engaged with the office of the State Attorney to ensure that the matters would be handled by specific attorneys within the SIU. In November 2023 these matters were transferred to the office of the State Attorney where SIU attorneys had been seconded to the office of the State Attorney to deal with the backlog. On 19 February 2024 the team was appointed, and consultation took place on the 7th of March resulting in the issue of the matter.

[23] The applicant submits that based on good cause and the prospects of success the Tribunal should grant condonation.

[24] The respondents oppose the granting of condonation in the strongest terms. They point out that this application should be considered in accordance with the time frames of PAJA as it is administrative action and the review should have been instituted within 180 days.[5] The applicant contends that the review application is brought in terms of the Constitution more particularly sections 1 (c), 2 and 271 of the Constitution. In this case it is unnecessary to decide whether PAJA applies or a legality review, as the delay is manifestly lengthy. The decision to institute review proceedings was taken in July 2021 and the application was issued on 24 March 2024. The issue to determine therefore is whether this delay can be excused.

[25] Reliance was placed on *Buffalo City* [6] where the time effectively starts running from the time the applicant reasonably became aware or reasonably ought to have become aware of the unlawful act. The Proclamation was issued on 23 July 2020. The investigation ensued. As stated the litigation was approved on 20 July 2021 and only launched in 2024. They contend that no reasonable or acceptable reasons for the delay have been given. Counsel pointed to delays of almost a year in respect of some of steps and proper reasons or explanations were not given. The respondents

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[5] Section 7 (1) of PAJA

[6] *Buffalo City id n3 para 121 "Even where a delay is found to be unreasonable, however, our precedents establish that a court retains a discretion to overlook the delay provided it is in the interests of justice to do so. 122 This stage of the E procedural enquiry should not take place in a 'vacuum'. It must instead involve weighing (a) the effect of the delay on the parties; 123 and (b) the nature of the impugned decision. 124.*

argued that on the applicant's own version the undue delay is self-evident. The respondents submit that they are not taking a technical stance but base their submissions on sound jurisprudence that the applicant delayed unduly.

[26] The principles pertaining to delay in *Buffalo City* relate to State self-review. The applicant in this case relies on the Constitution under the principle of legality whilst the respondents' rely on PAJA. The respondents rely on *Altech*[7]. Again, that case really relates to self-review. The Tribunal Rules do not prescribe time periods for the issue of process from date of alleged delinquency nor finalisation of the investigation. This is not a case of non-compliance within a time period envisaged by the Tribunal Rules. There are no time periods legislated. This however does not absolve an applicant from issuing process expeditiously. The requirement of the "soon as possible" principle applies to a legality review. It is necessary therefore to consider whether the delay was reasonable taking all the circumstances into account.

[27] I am mindful of the all the submissions made by both parties on the question of delay. Guidance is given by Cameron J in *Buffalo City* where he stated:

> *"Even where a delay is found to be unreasonable, however, our precedents establish that a court retains a discretion to overlook the delay provided it is in the interests of justice to do so. This stage of the procedural enquiry should not take place in a 'vacuum'. It must instead involve weighing (a) the effect of the delay on the parties; and (b) the nature of the impugned decision."*[8]

[28] In applying all the principles referred to, I do not apply a mathematically precise approach, but take all the factors into account. I find the delay was not willful but exacerbated by the many factors referred to above. Clearly the various state entities were under-resourced at the time. There was no prevarication in relation to their inefficiencies. The lack of resources and inefficiencies are self-evident and not obfuscated by the applicant. The applicant has been frank with the Tribunal. The veracity of these submissions can be clearly corroborated from the facts presented. I

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[7] *Altech Radio Holdings (Pty) Ltd And Others v Tshwane City 2021 (3) Sa 25 (SCA)*

[8] *Buffalo City* id 3 at para 121

do not discern any willfulness on the part of the applicant. It was caught up in a rather unique set of circumstances. The State of National Disaster was an unusual time in our country and this seems to have resulted in some of the factual consequences in launching this application.

[29] In Munsasmy, [9] Weiner J in weighing up factors pertaining to condonation referred to the Constitutional Court case in *Ferris v FirstRand Bank Ltd* where it was held that:

> '(L)ateness is not the only consideration in determining whether condonation may be granted. . . . (T)he test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors." [10]

[30] It is trite that the delay must be judged together with the merits of the case. The Constitutional Court in *Geldenhuys v National Director of Public Prosecution and Others* held that:

> "(t)he general rule is that non-compliance with the rules of this court will be condoned when it is in the interests of justice to do so." [11]

[31] This is a matter that requires finalisation and the proper analysis of the SIU's cause of action. Its prospects of success must be fully examined, and the interests of justice considered. In other words, the applicant's prospects of success are an issue for determination at this stage. Its prospects of success are not wholly without merit and an analysis is necessary to assess whether the relief sought is appropriate in accordance with our jurisprudence. It is also in the interests of justice to grant condonation for the reasons mentioned above in relation to the many challenges

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[9] *Munsamy and Another v Astron Energy (Pty) Ltd and Others* 2022 (4) SA 267 (GJ) para 43

[10] *Ferris and another v Firstrand Bank Ltd* 2014 (3) Sa 39 (CC) Para 10

[11] *Geldenhuys v National Director of Public Prosecutions and Others* 2009 (2) SA 310 (CC) (2009 (5) BCLR 435; [2008] ZACC 21) para 21.

brought about by the State of National Disaster. The situation is linked to the under-resourced State Attorney at the time of the State of National Disaster which weighed down its resources. It must be emphasised that but for the State of National Disaster this inordinate delay would not have found success in relation to an undue delay defence. In the result I grant the applicant condonation for the late filing of the review application.

The ambit of the Proclamation in relation to whether its subject matter covered the SRD programme.

[32] Upon a proper reading of the Proclamation the material words are underlined:

> "which took place between 1 January 2020 and the date of publication of this Proclamation or which took place prior to 1 January 2020 **or** after the date of publication of this Proclamation, but is relevant to, connected with, incidental or ancillary to the matters mentioned in the **Schedule**."
> *Underlining and bold for emphasis*

The schedule reads a follows

SCHEDULE 1.

"The procurement of, or contracting for, goods, works and services, including the construction, refurbishment, leasing, occupation and use of immovable property, which has caused or may cause serious harm to the interests of the public or any category thereof **during, or in respect of the national State of disaster**,"

[33] At first glance there may appear to be some dissonance between the wording of the Proclamation and the Schedule. Where such a situation arises, it is necessary to apply the necessary cannons of interpretation. Is the Proclamation and the Schedule to be construed as a law? The Interpretation Act, 33 of 1957 defines 'law' as 'any law, Proclamation, ordinance, Act of Parliament or other enactment having the force of law'. Accordingly, the Proclamation is a law which must be interpreted in accordance with its terms. The President's Proclamation is clear in its terms. There is nothing within the Proclamation which suggests of an unconstitutional effect. The wording of the Proclamation and the Schedule when read together must be read in an

harmonious way. On the one hand the Proclamation provides for a situation which "took place prior to 1 January 2020 or after the date of publication of this Proclamation, but is relevant to, connected with, incidental or ancillary to the matters mentioned in the **Schedule**."

On the other hand, The schedule provides for "during, or in respect of the national State of disaster"

[34] The tender was awarded before the State of National Disaster but only finalised during the State of Disaster. Our jurisprudence imposes on us an obligation to read statutes harmoniously. Therefore, an approach has to be taken to read the Proclamation and the Schedule in an harmonious way. The Constitutional Court held in the Independent Institute of Education case as follows

> "It is a well-established canon of statutory construction that 'every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature'. Statutes dealing with the same subject-matter, or which are in pari materia, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the legislature is consistent with itself. In other words, that the legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject-matter should be read together because they should be seen as part of a single harmonious legal system.
> [39] This canon of statutory interpretation was expressly recognised and affirmed by this court in Shaik. In that case it was held that the words 'any person' in s 28(6) of the National Prosecuting Authority Act, despite their wide ordinary meaning, should be construed restrictively to avoid a clash with a provision in another statute.
> [40] More recently, this court in Ruta interpreted provisions of the Immigration Act together and in harmony with those of the Refugees Act. In a unanimous judgment, this court noted that —
> '(w)ell-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together'.
> [41] This canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that words should generally be given their ordinary grammatical meaning, this court has long recognised that a contextual and purposive approach must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where 'the words to be construed are clear and unambiguous'.
> [42] This court has taken a broad approach to contextualising legislative provisions, having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in light of the text of the legislation as a whole (internal context). This court has also recognised that context includes, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this case, other

> legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in Shaik"[12]
> *Footnotes omitted in this quote.*

[35] A plain reading of the Proclamation and the Schedule must be interpreted harmoniously as stated above. It means that the investigation must relate to the period proclaimed in the Proclamation. The complication raised by the respondents is that the SRD has nothing to do with the State of Disaster. The respondents in analysing the wording submit that it is relevant to consider the following words

> SCHEDULE 1. The procurement of, or contracting for, goods, works and services, including the construction, refurbishment, leasing, occupation and use of immovable property, **during, or** in respect of the National State of disaster**,** in the Schedule**.**

[36] The wording in the Proclamation itself is very wide and covers a multitude of unlawful conduct which took place during the National Disaster period. The Proclamation and the Schedule on a plain as well as a contextual reading really covers services rendered during the time of disaster or in respect of the state of National Disaster. The word or is a conjunction which introduces two possibilities or alternatives in the English language.

[37] In *Nedbank Ltd V Houtbosplaas (Pty) Ltd and Another* 2022 (6) SA 140 (SCA) Petse P at para 35

> *"The law relating to the interpretation of documents (whether statute or contract) is now well settled. The logical point of departure in construing a document is the language of the document itself, interpreted in the light of its context and purpose, which is a unitary exercise.*[13]

[38] Unterhalter JA Stated that in *Coral Lagoon* :

> "Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull

[12] *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society And Others* 2020 (2) SA 325 (CC) paras 38 to 42

[13] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) para 18.

> that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.[14]

[39] The Constitutional Court in *Kubyana* held in relation to Acts of Parliament:

> "However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."[15]

[40] In S v Zuma and Others [16] Kentridge AJ, stated:

> "I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination."

[41] While these remarks referred to constitutional interpretation, they apply forcefully in relation to statutory interpretation generally. [17]

[42] The respondents urged that the SRD does not relate to the National Disaster period at all – it was a pre-existing programme and had nothing to do with the National Disaster. The wording in paragraph (a) of the Proclamation is very wide. Whilst the schedule may be a bit more concise it still is rather equivocal. It differentiates by the use of the word <u>or</u> a difference between the national disaster or before, in that it has the word <u>or during</u>**.** Accordingly, if consideration is given to paragraph (a) of the Proclamation its reach is wide. It is not restricted to only the National Disaster period. By the use of the word <u>or</u> it introduces two alternatives.

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[14] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2021 ZASCA

[15] *Kubyana V Standard Bank Of South Africa Ltd* 2014 (3) Sa 56 (CC)

[16] *S V Zuma and Others* 1995 (2) SA 642 (CC) A paras 17-18

[17] Mhlantla AJ stated, in *Kubyana para 18* fn 23, that even though the above remarks referred to constitutional interpretation, 'they apply even more forcefully in relation to statutory interpretation generally'.

This in my view embraces the SRD programme albeit that the tender was awarded before the State of Disaster, the reviewable decision falls with the National Disaster period.

[43] On the timing issue, SASSA advertised the tender for the SRD on 26 April 2019. The tender was cancelled and re-advertised on 14 June 2019. Ultimately it was awarded during the National Disaster period and this fact stands unchallenged. Accordingly, to read the Proclamation and the Schedule harmoniously the Proclamation correctly covers the SRD programme albeit that the tender was initiated before the period of National Disaster. The investigation by the SIU was accordingly valid.

Was the deviation granted by Treasury good in law?

[44] It is important to analyse whether the validity of the approval should be decided in these proceedings? Did Kwasa know about the irregularities that allegedly tainted its appointment?

[45] On 30 January 2020, upon SASSA's request, National Treasury took a decision to allow a deviation in the tender process. The applicant submits that the decision was based on incorrect facts. The respondents not only raised the question of the non-joinder of the National Treasury to these proceedings but primarily that it is the decision of National Treasury to approve the deviation that should be challenged.

[46] As explained by the applicant, after the first tender was cancelled, the quotations were only sourced by SASSA on 13 March 2020 with the closing date of 24 March 2020. All this was pursuant to the National Treasury authorising a truncated tender process, and only offering the opportunity to the four lowest bidders in the first aborted tender. The applicant points out that there was no basis for immediacy because Kwasa was only appointed months later on 1 April 2020.

[47] It is common cause that a deviation can be condoned in exceptional circumstances. It is the applicant's case that a deviation was not lawful in the circumstances of this case. In particular the question raised by the applicant is the fact that the deviation despite being requested on 19 December 2019, the appointment was only made on 1 April 2020. This could not amount to urgency or an exceptional circumstance. In the result the applicant argues that there was no justifiable reason to seek a deviation from the normal procurement process. This delay in the process according to the applicant does not constitute exceptional circumstances, justifying a deviation.

[48] Treasury Regulation 16A6.3 requires the advertisement of a tender for a minimum period of 21 days before closure. This was clearly not done after the first tender was aborted. The validity period of the first open tender lapsed. The reasons given by SASSA was that there were delays in the bidding process, the Bid adjudication and the Bid evaluation process. Based on case law, the applicant correctly argues that process came to an end and there could be no extension of that particular bid.[18]

[49] The applicant argues that this was a material circumvention of the lawful tender process. It also submits that the question of the cost effectiveness of the food parcels could not be determined by taking the lowest bidders in the aborted tender. The applicant submits that based on s 217 (1) of the Constitution, the process was accordingly not a transparent, fair, competitive and cost-effective process and thus unlawful.

[50] The respondents countered this by placing details of four retailers' costing for the same food parcel and Kwasa's was the lowest. The applicant, however, contended that this could not comprise a competitive bid.

[18] *Ekurhuleni Metro Municipality Takubiza Trading & Projects CC and Others 2023 (1) SA 44 (SCA) Telkom SA Ltd v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Ltd [2011] ZAGPHC 1.*

[51] Having noted the above process which the applicant asserts is unlawful, it is the respondents' case that the applicant cannot have the tender set aside without challenging National Treasury's decision and to have the deviation set aside. The applicant has not sought to have the decision of the National Treasury set aside.

[52] Can the deviation be assessed in the absence of the National Treasury being a party to these proceedings or have its decision set aside in their absence. Our jurisprudence is clear that a decision remains valid until set aside. In the absence of a challenge to set aside the National Treasury's decision it remains valid until set aside.

[53] The applicant in relying on section 217(1) of the Constitution, must also take into consideration to the Constitutional provision, subsequent systems and relevant legislation. One of those is that exceptional circumstances allows Treasury to override the 21-day advertisement period. This fact has to be considered when relying upon section 217 (1) of the Constitution.

[54] This leads to the question whether the respondents are entitled to rely on the decision by the National Treasury until it is set aside. In discussing Section 217(1) of the Constitution and subsequent systems, Brand JA stated:

> "Section 217(1) of the Constitution prescribes the manner in which organs of State should procure goods and services. In particular, organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This implies that a 'system' with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of s 217(1), the question whether any procurement is 'valid' must be answered with reference to the mentioned legislation or regulation."[19]

[55] The application for the deviation clearly stipulates the reason for the deviation. The reason was based on the nature of the service, it was urgent, it provide

[19] *Chief Executive Officer, South African Social Security Agency, and Others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) para 15

social relief to the poor. Whilst these humanitarian considerations are of great importance, based on *Oudekraal* the decision of the National Treasury remains in place until set aside. [20]

[56] As pointed out in *Kirland* the decision is in existence. It continues to exist until, in due process, it is properly considered and set aside. Following upon the reasoning in *Kirland* it may well be that the approval was defective, but it remains in place until set aside.

> "This outcome, and the reasoning supporting it, would have untoward consequences for those subject to government decision-making. The evidence is not all before us. And it would be fundamentally unfair to Kirland to set aside the decision now, without requiring government to bring a proper application, in which it explains the history of the decision, its shifting attitudes towards it and its delay in dealing with it. In response, Kirland is entitled to be heard on whether it has been prejudiced and why it would be unfair to it to set the decision aside now. This is a protection the Constitution itself affords Kirland. he main judgment would abrogate that protection. The court should not do so.[21]

[57] The question this Tribunal faces is whether it can decide on the validity of the approval if that approval is unchallenged. To do so would not be in accordance with the principle of legality. As stated in *Kirland* public officials can err and the Constitution anticipates that and allows:

> "for corrections within the constraints of the law…They exist in fact and may have legal consequences. The solution is to challenge the decision on review." … [91] The Constitution entrenches the right to lawful, reasonable and procedurally fair administrative action. But, in the same breath, it obliges parliament to 'provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal'. In doing so, the Constitution foresees that the administration that would answer to it would be imperfect. Those charged with State administration will inevitably on occasion fall short of the high aspiration of just administrative action. When they do, the courts are able to intervene [22]

[58] Accordingly, the failure to impugn the decision by the National Treasury to grant the deviation is fatal to the relief sought by the applicant. In the light of the Tribunal's decision in relation to the failure to set aside the decision of the National

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[20] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1; [2004] ZASCA 48). See also MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) (2014 (5) BCLR 547; [2014] ZACC 6).*

[21] *MEC For Health, Eastern Cape And Another V Kirland Investments (Pty) Ltd T/A Eye & Lazer Institute* 2014 (3) SA 481 (CC) *Kirland* para 67

[22] *Kirland id n* 21 *para* 91

Treasury it is unnecessary to deal with the remaining issues including the non-compliance with the tax matters and the joinder of the directors of Kwasa.

Costs

[59] Although the applicant was successful on the question of condonation and the ambit of the Proclamation, the respondent has been substantially successful in the main relief sought by the applicant. The applicant has failed in the reviewing and setting aside of the tender sought. Costs are therefore awarded to the respondents including the cost of counsel on the C scale.

Order

The applicant is dismissed with costs including the costs of counsel on the C scale

JUDGE M VICTOR
PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances:

For the first to fourth respondents.
Counsel: Adv. M Salukazana.

Attorney: Ms C Brock, Ramsaywebber.

For the fifth respondent:
Attorney: Ms Z Sahib, Office of the State Attorney Johannesburg.

For The applicants;
Counsel: Adv. M Mphaga SC assisted by Adv. M R Mokwala
Attorney: Mr J Van Schalkwyk, Office of the State Attorney, Pretoria

Date of hearing: 13 December 2024

Date of judgment: 12 February 2025

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, up loading on Caselines and release to SAFLII and AFRICANLII. The time for delivery is deemed to be 14H00.