THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 216/2020

In the matter between:

SPECIAL INVESTIGATING UNIT **FIRST APPELLANT**

THE ACTING NATIONAL COMMISSIONER OF THE NATIONAL DEPARTMENT OF CORRECTIONAL SERVICES REPRESENTING THE DEPARTMENT OF CORRECTIONAL SERVICES FOR THE REPUBLIC OF SOUTH AFRICA **SECOND APPELLANT**

and

ENGINEERED SYSTEMS SOLUTIONS (PTY) LTD **RESPONDENT**

Neutral citation: *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* (Case no 216/2020) [2021] ZASCA 90 (25 June 2021)

Coram: NAVSA, SALDULKER and DLODLO JJA and ROGERS and MABINDLA-BOQWANA AJJA

Heard: 3 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 25 June 2021.

Summary: Legality review – state organs as co-applicants – validity of decisions to award tenders – validity of pursuant contracts – whether delay unreasonable – whether delay should be overlooked.

ORDER

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

The appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

JUDGMENT

Mabindla-Boqwana AJA (Navsa, Saldulker and Dlodlo JJA and Rogers AJA concurring):

Introduction

[1] This is an appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court), in terms of which it dismissed a review application brought

by the Special Investigating Unit (the SIU) and the Acting Commissioner of the National Department of Correctional Services, representing the Department of Correctional Services (the Department), against the respondent, Engineered Systems Solutions (Pty) Ltd (ESS). It concerns the validity of the decisions taken by the Department to award tenders to ESS and the subsequent service level agreement (the SLA) concluded between the Department and ESS. The appeal is with the leave of the high court.

[2] In the review application the SIU was the main applicant while the Department supported the application as the second applicant. The SIU is an organ of state established by Proclamation No. R 118 of 2001[1] issued in terms of s 2(1)*(a)* of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act), read with s 2(2), to investigate certain irregular and unlawful conduct by state institutions and their employees, including serious maladministration in connection with the affairs of any state institution; improper or unlawful conduct by employees of any state institution; unlawful appropriation or expenditure of public money or property; any unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon state property; and intentional or negligent loss of public money or damage to public property (among others).

[3] The SIU has the power, inter alia, to 'institute and conduct civil proceedings in a Special Tribunal or any court of law for – (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution; (ii) any relief relevant to any investigation; or (iii) any relief relevant to

[1] *Government Gazette* No. 22531 of 31 July 2001.

the interests of a Special Investigating Unit'.[2] The SIU also 'may institute and conduct civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law'.[3]

[4] On 15 April 2016, the President of the Republic of South Africa issued a proclamation[4] referring for investigation to the SIU, certain allegations in respect of the affairs of the Department, relating to irregularities in the procurement of an Electronic Monitoring System (EMS) and payments relating thereto. The SIU alleged that its investigation revealed a number of irregularities in the procurement processes relating to tenders awarded to ESS by the Department in relation to the EMS. That is what led to the review application.

Background

[5] During 2011, a decision was taken by the Department to introduce, in phases, a system (EMS) which would be used to monitor offenders who had been released on parole and/or remand detainees who had been placed under supervision. The system or project was initiated to immediately deal with the result of a judgment of the Constitutional Court in terms of which inmates who had been sentenced to death before 1 March 1994 became eligible for parole. The scope was, however, later extended beyond that immediate need. The project would also promote public safety by imposing restrictions on the movement of offenders and serve as a deterrent against other non-compliant behaviour through various technologies.

---

[2] Section 4(1)*(c)* of the SIU Act.
[3] Section 5(5) of the SIU Act.
[4] Proclamation No.R.18 of 2016, as published in *Government Gazette* No. 39935.

[6] A procurement project in respect of the introduction of the EMS got underway on 8 June 2011 with a proposal to nominate members to serve on the Bid Specification Committee (BSC) as well as the Bid Evaluation Committee and Project Steering Committee. The nominees for the BSC held two meetings, on 7 June 2011 and 10 June 2011, prior to their formal appointment by the National Commissioner of Correctional Services (National Commissioner) on 23 June 2011. The manner in which these appointments were done as well as the holding of the two meetings were identified as an irregularity by the SIU. Before us that issue was not persisted in.

[7] On 26 August 2011, the Department advertised a tender for the '[s]upply, delivery, installation, commissioning, training and maintenance of a National Pilot Project for an electronic monitoring solution for the Department of Correctional Services, over a one-year period' (the pilot tender). If the pilot project proved to be a success, a full-blown final project would be implemented. Bids were received from various entities, including ESS.

[8] In December 2011, the pilot tender was awarded to ESS followed by a contract concluded between the Department and ESS at a cost of R6 510 375. The pilot project was to endure from 1 April 2012 to 31 March 2013, but the contract was extended three times. With the final extension, the contract would expire on 30 June 2014. This, according to the appellants, was irregular and legally impermissible, as the Department could not extend a contract that had expired. These extensions, so the appellants contended, increased the contract price by an additional R8 167 894 (125% of the original contract price), yielding a total price, inclusive of extensions, of R14 678 269 (ie 225% of the initial contract price).

[9] During the pilot stage, ESS designed the EMS in consultation with the Department. This involved a released offender being fitted with a tamperproof ankle bracelet. The movement and location of that offender could then be monitored electronically. ESS contracted, among others, 3M South Africa (Pty) Ltd (3M) and Geo-Satis SA Technology (Geosatis) to provide it with the bracelets.

[10] In February 2014, the Department advertised a further tender, after a previous one was aborted, for the 'supply delivery, installation, commissioning, training and maintenance of a National Electronic Monitoring Solution by way of lease for a period of five years for the Department of Correctional Services' (the final tender), which was awarded to ESS in April 2014. On 21 May 2014, a Service Level Agreement (the SLA) was concluded between the Department and ESS in respect of the final project to the value of R301 611 772.

[11] In August 2016, the Department stopped paying ESS for services rendered, claiming breach of contract, while it nevertheless expected ESS to continue to render the services. This was followed by cancellation of the SLA on 15 March 2017 by the Department. Reasons advanced for the cancellation were stated in a letter dated 13 March 2017, written to ESS by the Department's attorneys. In the letter the attorneys alleged that ESS had overcharged the Department by substantially underperforming and had breached its contractual obligations.

[12] The Department further relied on the findings of the SIU that the Department could not embark on a tender process or conclude an SLA when goods and services procured constituted 'information technology' as defined in s 1 of the State

Information Technology Agency Act 88 of 1998 (the SITA Act)[5] without the involvement of the State Information Technology Agency (the IT Agency). (I shall call this the SITA issue.)

[13] The letter further highlighted that the goods and services procured in the tender process constituted 'security equipment' and 'security services' defined in s 1 of the Private Security Industry Regulation Act 56 of 2001 (the PSIR Act).[6] For that reason, persons and/or entities who rendered such services ought to have been registered with the Private Security Industry Regulatory Authority (the PS Authority) established in terms of the PSIR Act. It was alleged that the subcontractors and personnel used by ESS to render the services were not registered as required by the PSIR Act, and that this was a criminal offence in terms of s 38 of the PSIR Act. (I shall call this the PS issue.)

[14] Furthermore, the Department's attorneys alleged that ESS had made misrepresentations in its bid documents concerning security clearance(s) by the State Security Agency, as neither it nor its directors, personnel and subcontractors had security clearance up to the level of 'Confidential', as required in terms of the SLA. This issue was not pressed in the hearing on appeal, rightly so. ESS alleged that Mr Francis Matabane, who was a project manager for the Department, informed ESS' legal representatives that the inclusion of the requirement that ESS and its personnel

---

[5] 'Information technology' in s 1 of the SITA Act 'means all aspects of technology which are used to manage and support the efficient gathering, processing, storing and dissemination of information as a strategic resource'.

[6] In s 1 of the PSIR Act, 'security equipment' means '*(a)* an alarm system; *(b)* a safe, vault or secured container; *(c)* a satellite tracking device, closed circuit television monitoring device or surveillance equipment; *(d)* a device used for intrusion detection, access control, bomb detection, fire detection, metal detection, x-ray inspection or for securing telephone communications; *(e)* a specialised device used to open, close or engage locking mechanisms; or *(f)* a specialised device used to reproduce or duplicate keys or other objects which are used to unlock, close or engage locking mechanisms'. 'Security service' includes '*(h)* installing, servicing or repairing security equipment' and '*(i)* monitoring signals or transmissions from electronic security equipment'.

must be cleared up to the purported level of confidential was an oversight on his part during the drafting of the SLA, having made use of an old service level agreement as a template. Despite its inclusion, the parties were of the common understanding that only clearance in terms of the PSIR Act and criminal checks at the SAPS were required. This allegation was also not addressed in reply by the appellants, but simply noted. There would be no reason to reject it on the papers, similar to many other allegations not addressed by the Department in reply.

[15] Finally, it was alleged that ESS had, as part of its tender, proposed the use of Ekasi IT Solutions (Pty) Ltd (Ekasi), a 100% black-owned company. Ekasi's profile, qualifications, expertise and previous work experience featured significantly in its bid, when it knew that it was not intending to utilise Ekasi. This, it was alleged, constituted a misrepresentation of the facts to the Department. (I shall call this the fronting issue.) Although in their review application the appellants alleged a number of other irregularities as well, at the hearing of the appeal counsel for the appellants said that he would be relying only on the SITA issue, the PS issue and the fronting issue.

[16] The Department gave three months' cancellation notice, which was from 1 April 2017 to 30 June 2017, during which period ESS was expected to hand over all goods and services to the Department in terms of the Exit Management Plan as contained in the SLA. According to the appellants, ESS refused to co-operate with the hand-over process, and to avoid risk to public safety and security that could result from the sudden discontinuation of the EMS from 1 July 2017, the SIU held discussions with 3M and Geosatis to provide security bracelets for the EMS during the cancellation period. These discussions failed to bear any fruit. After the expiry of the three months' cancellation period, and on 6 July 2017, the Department took a

decision to de-tag the offenders that were being monitored and continued to monitor the affected offenders manually. It maintained that the de-tagging posed no risk to public safety.

[17] The cancellation of the SLA was met with an urgent application, launched by ESS in the high court on 31 March 2017, wherein ESS sought a declaratory order that the SLA was valid and enforceable. It also sought payment of outstanding invoices for goods it had supplied and services that it had rendered. The parties agreed to have the dispute referred to arbitration before a retired judge. This agreement was made an order of court on 20 April 2017. In it, the appellants reserved their right 'to challenge the validity of the administrative decision underpinning the agreement and/or the agreement itself in a court of law in due course'.

[18] The arbitration served before retired Judge W J van der Merwe. During the arbitration hearing, the Department, through its attorney, admitted liability for services rendered by ESS and made known its intention to pay the invoices and even offered to settle the matter. The Department however sought a postponement in order to verify the invoices. The arbitrator refused a postponement, and the matter proceeded. On 29 November 2017, the arbitrator ruled in favour of ESS and issued two arbitration awards for payment in the amounts of R83 859 822 and R27 934 931 with interest at 5% above the prime lending rate. The arbitration awards were made orders of the high court by Senyatsi AJ on 17 May 2018 and the Minister, who had opposed the application, was ordered to pay costs on the scale as between attorney and client. On 30 April 2018 and 23 May 2018, the Department instituted two separate review applications for the setting aside of the arbitration awards. We were told that these applications are still pending.

[19] The review application, which is the subject of this appeal, was lodged on 28 March 2018. In the review application, the appellants sought condonation for the delay in bringing the application in terms of the common law, to the extent necessary, alternatively an extension of the period of 180 days in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). They further sought orders to review and set aside the 'decisions taken by various officials in the employ of [the Department] . . . underpinning:

'2.1 the award of a tender to the Respondent, Engineered Systems Solutions (Pty) Ltd ("ESS") with Company Registration No. 2004/024978/07 for "a pilot project" with tender number HK 07/2011 ("the Pilot tender") which resulted in the appointment of ESS for a pilot project for the "supply, delivery, installation, commissioning, training and maintenance of a national pilot project for 12 months for an electronic monitoring solution for the Department [of] Correctional Services" ("the Pilot project"). The Department issued Purchase Orders in the aggregate value of R 14 678 269.50 in respect of the Pilot project; and

2.2 the award of a tender to ESS under bid number HO 01/2014 ("the Final tender"), which resulted in the appointment of ESS for a project to "supply, deliver, install, train, commission and maintain a National Electronic Monitoring Solution by way of lease for the period of five (5) years for the Department of Correctional Services" ("the Final project"). The Department issued Purchase Orders in the aggregate value of R 151 116 144.05 in respect of the Final project.'

[20] The appellants also sought the review and setting aside of the SLA(s) and any other contracts entered into pursuant to the pilot and final tenders and/or projects; and orders declaring that the decisions to award the tenders, and the respective SLA(s) and other contracts, were unconstitutional, unlawful, invalid and void *ab initio*. A relief of unjust enrichment was sought in the alternative.

[21] The high court dismissed the application for condonation on the basis that the delay was unreasonable. It did not consider whether, despite the finding of

unreasonableness, the delay should nonetheless be overlooked. The high court erred in this respect if one has regard to the principles established in various judgments, to which I shall return.

[22] Before I deal with the main issues in the appeal, it is convenient to dispose of some preliminary issues. The first issue is the contention by ESS that the review application is fatally defective, because the relief sought by the appellants was in conflict with Senyatsi AJ's order, which made the arbitration awards orders of court. There is no merit in this challenge. In the court order dated 20 April 2017, the SIU and the Department clearly reserved their rights to challenge the validity of the 'administrative decision underpinning the agreement and/or the agreement itself in a court of law in due course'.

[23] The second contention by ESS is that the decisions sought to be reviewed were not properly identified. That too has no merit and can be disposed of summarily. The validity of the pilot and the final tenders to ESS as well as the conclusion of the SLA and any other contracts between the Department and ESS pursuant to the award of the tenders are in dispute and although the founding affidavit is unnecessarily long the bases for the review set out above were provided.

PAJA and Legality

[24] The next question is whether PAJA finds application in this case. Post-*State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*,[7] it is now settled that an organ of state cannot apply for the review of its own decision under PAJA. Counsel for the appellants argued that insofar as the SIU was concerned,

[7] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240; 2018 (2) SA 23 (CC).

PAJA would be applicable, as the SIU was not reviewing its own decision but that of another organ of state. He contended that, although the Constitutional Court in *Gijima* stated that an organ of state may not avail itself of PAJA, it went on to state, obiter, that this did not mean one organ of state may not use PAJA against another. In this regard, the Constitutional Court in *Gijima* said '[w]e must emphasise that the issue has nothing to do with a scenario where an organ of state *that is in a position akin to that of a private person* (natural or juristic) may be seeking to review the decision of another organ of state'.[8] (My emphasis.)

[25] Although the scenario seemed to have been left open by the Constitutional Court in *Gijima*, it seems doubtful that the SIU would be regarded as being *in a position akin to that of a private person.* The Constitutional Court in *Gijima* went on to say 'it seems inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights. This must, indeed, be an indication that only private persons enjoy rights under section 33',[9] and by extension under PAJA. In regard to the delay question, it would, in any event, be in favour of the appellants to proceed by way of legality than PAJA.

Assessment of delay in legality reviews

[26] The principles applicable in assessment of delays in legality reviews are succinctly summarised in the recent decision of this Court, *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd.*[10] I recount them briefly.

---

[8] *Gijima* para 2.
[9] *Gijima* para 27.
[10] *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* [2021] ZASCA 34; [2021] 2 All SA 700 (SCA).

[27] The key difference between PAJA and reviews brought under the legality principle is the 180-day limit which is applicable in PAJA as a period in which to bring a review of an administrative action. In legality review this specified period plays no role in the assessment of the delay.[11] The test in legality review is whether the delay is unreasonable.[12] In both PAJA and legality reviews 'the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken'.[13]

[28] The Constitutional Court in *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd*[14] endorsed the test followed by this Court in *Gqwetha*,[15] and later approved by the Constitutional Court in *Khumalo*,[16] that in assessing delay the first question to be determined is the reasonableness of the delay. If the delay is found to be unreasonable, the next question is whether it should nevertheless be overlooked in the interests of justice.[17]

[29] The reasonableness of the delay is assessed by considering the explanation for the delay, which must cover the entire period of the delay. 'Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered . . . But . . . where there is no explanation for the delay, the delay will necessarily be unreasonable'.[18]

---

[11] *ASLA* para 46.
[12] *ASLA* para 49.
[13] Ibid.
[14] *ASLA* para 48.
[15] *Gqwetha v Transkei Development Corporations Ltd and Others* [2005] ZASCA 51; [2006] 3 All SA 245; 2006 (2) SA 603 (SCA) para 33.
[16] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 49.
[17] *ASLA* paras 48 and 50.
[18] *ASLA* para 52.

[30] Where the delay is found to be unreasonable, there must be a basis for a court to exercise its broad discretion to overlook it. This must be gathered from the available facts.[19] In this evaluation a number of factors must be taken into account. The first '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 [the Court]'s power to grant a just and equitable remedy and this ought to be taken into account'.[20] The second factor to be considered is the nature of the impugned decision. This entails 'a consideration of the merits of the legal challenge against that decision'.[21] Navsa JA in *South African National Roads Agency Ltd v City of Cape Town*[22] highlighted the point that the merits of the impugned decision are a critical factor in determining whether it is in the interests of justice to condone the delay. That 'would have to include a consideration of whether the non-compliance with statutory prescripts was egregious'.[23] A third factor to be considered is the conduct of an applicant. In *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited t/a Eye & Lazer Institute*,[24] Cameron J stated that:

'[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.'

---

[19] *ASLA* para 53.
[20] *ASLA* para 54.
[21] *ASLA* para 55.
[22] *South African National Roads Agency Ltd v City of Cape Town* [2016] ZASCA 122; [2016] 4 All SA 332; 2017 (1) SA 468 (SCA).
[23] *SANRAL* para 81.
[24] *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82.

[31] Finally, even if there is no basis to overlook the unreasonable delay, a further principle arising from *Gijima* is that the court is obliged by virtue of the provisions of s 172(1)*(a)* of the Constitution to declare invalid any law or conduct that is inconsistent with the Constitution, to the extent of its invalidity.[25] The Constitutional Court in *ASLA* held that this applies when the unlawfulness is clear and undisputed.[26] It further went on to state that the *Gijima* principle should 'be interpreted narrowly and restrictively so that the valuable rationale behind the rules of delay are not undermined'.[27] At the same time it should not be ignored, but applied where there is indisputable and clear inconsistency with the Constitution. I now turn to the facts of this case.

Was the delay unreasonable?

[32] The decision to award the pilot tender and the conclusion of the related contract took place some seven years before the review application was brought, whilst the decision to award the final tender and conclusion of the SLA was approximately four years before the review application was launched. One glaring fact in this case is that while the review application was brought by the SIU and the Department as co-applicants, it deals almost exclusively with the SIU's involvement and its acquired knowledge of the facts. The organ of state whose decision is sought to be reviewed and set aside took a back seat in the application.

[33] As stated in the judgments I have referred to, the applicants were obliged to give a full account of the facts for the entire period of delay. In this case it is from 2011, when the first tender was awarded, to 2018, when the review application was

[25] *ASLA* para 63 referring to *Gijima* para 52.
[26] *ASLA* para 66.
[27] *ASLA* para 71.

launched. According to the SIU, the proverbial clock, insofar as it was concerned, started in September 2016, when it gained sufficient knowledge of the irregularities. In as far as the Department is concerned, it seems to be claimed that the proverbial clock started ticking in January 2017, when it was advised by the SIU to cancel the agreement with the ESS.

[34] No account is given by the Department as to what occurred before 15 April 2016, when the SIU received its mandate to investigate its affairs. In fact, the deponent to the founding affidavit, Mr Cornelius du Toit (an SIU investigator) categorically stated that he would only deal with the supervening events which occurred after 15 April 2016.

[35] The supporting affidavit deposed to by Mr Jephtha Mkabela, the Acting National Commissioner of the Department and Head of Department, is unhelpful. In it he simply 'make[s] common cause with the SIU in every respect. Since this Application is mainly based on investigation findings made by the SIU, as set out in the Founding Affidavit of the SIU (as read with its annexures), and in order to avoid unnecessary duplication, I will not repeat, or deal with the case made out by the SIU as regards to the irregularities that occurred'. The Minister's affidavit also did not add any facts. It simply confirmed the authority of Mr Mkabela to institute the review application and depose to his affidavit.

[36] This approach to adducing crucial evidence was criticised by this Court in *Drift Supersand (Pty) Ltd v Mogale City Local Municipality*,[28] where the Court said:

[28] *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 31.

'[T]he Municipality adopted the sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called "confirmatory affidavit" by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and "confirmed the contents thereof in so far as it relates to me and any of activities". This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.'

[37] It was crucial to have witnesses within the Department to depose to the events that occurred before and after the SIU's involvement in its affairs. Apart for there being insufficient allegations in the founding affidavit pertaining to the decisions by the Department to award tenders to ESS, it is not clear whether Mr Mkabela and the Minister had personal knowledge of any of the facts in the founding affidavit attributed to the Department. It appears that Mr Mkabela was only appointed as Acting National Commissioner in January 2018 after the removal of Mr James Smallberger. No one in the Department deposed to oversight measures, if any, in relation to the procurement process. The court was not told what was done by the Department at material times to monitor compliance with regulatory legislation. Indeed, the court was not told that the Department commenced the review process as soon as possible. The compelling conclusion, having regard to the timeline, is that such an assertion was not possible.

[38] The Department had a duty to explain its actions and those of its officials. Repeated allegations were made in the founding affidavit that 'at all relevant times, the Department was not aware and did not appreciate that the Contracts relevant to the Pilot tender were unconstitutional, unlawful, invalid and void *ab initio'*. These

are facile and unhelpful and were made in parts of the founding affidavit dealing with the alternative and conditional cause of action of unjust enrichment.

[39] As was stated in *ASLA*, organs of state 'ought to become aware much sooner . . . (even prior to, and without the benefit of an independent investigation), that its employees awarded the . . . contract without going through a procurement process. [They] must have effective structures and mechanisms in place to ensure proper oversight for its service delivery projects. This is one of its core responsibilities. It must detect and prevent the abuse of taxpayer's monies. A lack of effective oversight leads to dysfunctionality within [organs of state] by creating loopholes for fraud and corruption'.[29]

[40] Mr du Toit stated in the founding affidavit that where he relied on hearsay evidence 'the necessary application will be made that same may be allowed'. Such an application was not made. To the extent that Mr du Toit alleged anything of which he or deponents to confirmatory affidavits from the Department had no personal knowledge, it remained inadmissible hearsay evidence. We do not even know that the responsible officials within the Department even agree that the EMS projects were irregular in the respects identified by the SIU.

[41] The explanation given by the appellants as to what transpired from April 2016 is also unsatisfactory. The SIU alleged that after receiving its mandate to investigate the Department on 15 April 2016, it started with its investigations in May 2016. Its investigators, so it was alleged, had to wade through tens of thousands of documents, which took them until August 2016. Mr du Toit became aware of Mr Nkosi, the

[29] *ASLA* para 81.

Chief Executive Officer (CEO) of Ekasi, in September 2016, whom he requested to comment on various documents. According to the SIU, this is when the proverbial clock started ticking, as it then gained sufficient knowledge about the reasons for the awarding of the tenders.

[42] The SIU had everything it needed to have to launch the review application by early October 2016. By this time, they had consulted with Mr Nkosi of Ekasi and received his affidavit and no new irregularities were discovered after that period. The SIU instructed the State Attorney to brief counsel during December 2016. At the same time, the Department had briefed its own attorney and counsel to provide the Department with advice concerning possible breaches of contract and poor service delivery by ESS. Counsel was eventually briefed by the SIU on 30 January 2017. This is when the SIU advised the Department to cancel the SLA with ESS.

[43] The first consultation with counsel took place on 7 February 2017. The focus shifted from compiling documents in preparation for the review application to cancellation of the SLA and the court processes which followed. The SIU also moved its attention to the hand-over process of the EMS from ESS to the Department. The SIU, despite being a non-party to the contract, nevertheless negotiated with the subcontractors of ESS to continue providing services when the main contract had been cancelled, when on their own version the subcontractors did not, in terms of prevailing legislation, qualify to render the services.

[44] There is a deafening silence about the further delay until 26 September 2017, when counsel apparently completed the first draft of the founding affidavit, which was sent to Mr Walser of the SIU to settle. He received it on 5 October 2017. A

further delay in finalising the review application was attributed to Mr Walser's heavy workload. He finally interacted with counsel in December 2017. Another delay was allegedly caused by the change of Acting National Commissioner, whom the SIU was only able to meet on 18 January 2018 to brief him about the application and for him to be identified as the second applicant. No explanation was tendered of what had occurred between the period of 18 January 2018 to 28 March 2018, when the review application was issued, and to 5 April 2018, when it was served on ESS.

[45] Although the appellants contended that they did not sit idly by, allowing the clock to tick away, the explanation they gave did not account for the full period. It does not withstand scrutiny. The appellants did not act promptly in bringing the review application. On the contrary, they dithered and focused instead, unreasonably, on cancellation of the agreement and on other court and arbitration processes, which the SIU admitted it was not party to until it intervened at a later stage. The explanation consists of unaccounted periods and the delay is clearly unreasonable.

Should the delay be overlooked?

[46] Having found the delay to be unreasonable, the next question is whether it should be overlooked. I will first consider the nature of the impugned decision as one of the components to be considered in this leg of the assessment.

[47] A number of irregularities were raised in the founding affidavit, but as mentioned earlier, counsel for the appellants informed us that he was only relying on three: the SITA issue, the PS issue and the fronting issue.

The SITA issue

[48] The appellants contended that the procurement process was unlawful and invalid, because the pilot and final projects were concluded without the intervention and referral to the IT Agency as required by the SITA Act, since the projects envisaged by the Department had to do with 'information technology'. 'Information technology' is defined in the SITA Act as 'all aspects of technology which are used to manage and support the efficient gathering, processing, storing and dissemination of information as a strategic resource'.[30]

[49] In terms of s 7(1), to achieve its objects, the IT Agency –

'*(a)* must, on behalf of a department, and may, on behalf of a public body, which so requests in terms of subsection (4) or (5)-

(i) provide or maintain a private telecommunication network or a value-added network service in accordance with the Telecommunications Act, 1996 (Act No. 103 of 1996);

(ii) provide or maintain transversal information systems; and

(iii) provide data-processing or associated services for transversal information systems; and

(b) may, on behalf of a department or public body, which so requests in terms of subsection (4) or (5), provide –

(i) training in information technology or information systems;

(ii) application software development;

(iii) maintenance services for information technology software or infrastructure;

(iv) data-processing or associated services for departmentally specific information technology applications or systems;

(v) technical, functional or business advice or support, or research, regarding information technology; and

(vi) management services for information technology or information systems.'

[30] Section 1 of the SITA Act.

[50] Section 7(3) provides:

'Despite any other law to the contrary, every department must, subject to subsection (4), procure all information technology goods or services through the Agency.'

And in terms of s 7(4), a department that wishes to acquire a service contemplated in subsections (1)*(a)* 'must (i) acquire that service from the Agency in accordance with business and service level agreements concluded in terms of section 20; or (ii) procure that service through the Agency in terms of subsection (3) if the Agency indicates in writing that it is unable to provide the service itself'.

[51] If services are contemplated in terms of section 7(1)*(b)*, a department must, in terms of s 7(4)*(b)*, either acquire that service from the IT Agency in accordance with business and service level agreements concluded in terms of section 20 or procure that service through the IT Agency in terms of subsection (3).

[52] The appellants also referred to regulation 16A6.3*(e)* of the Treasury Regulations, amongst others, which states that the accounting officer or accounting authority must ensure that contracts relating to information technology are prepared in accordance with the SITA Act and its Regulations.

[53] In order for the SITA Act to find application in this case, the appellants had to show that the services provided by ESS to the Department fell within the services listed in s 7(1) of that Act. ESS alleged in its answering affidavit that it was given assurances by the Department that the SITA Act did not apply, because the Department did not regard the services to be rendered by ESS as information technology services. ESS presumed this to be so, because the services it provided to the Department primarily included the provision of hardware such as ankle bracelets to be worn by parolees. The composite does not appear to fall within the services contemplated within s 7. Indeed, the Department did not, prior to the review

application consider it to be so. In its opposing papers, ESS alleged that it would have been inconceivable and impracticable to separate a tender for the bracelets from the 'peripheral information technology services'. This received no substantive answer from the SIU or from the Department.

[54] ESS made further allegations in its answering affidavit that:

'Not only was ESS given repeated assurances that this is not an IT project, but ESS was also informed that [the IT Agency's] participation in the Rollout Project was limited to providing the IT Hosting environment. ESS would deploy the Electronic Monitoring Software. IT was only an enabler to the Electronic Monitoring program, as per the tender document issued by the DCS.

Despite [the IT Agency]/DCS being obliged to provide the Hosting Environment for purposes of deploying the monitoring software, it failed to do so and as a result and in order to ensure proper service delivery, ESS took it upon themselves (at the request of the DCS) to provide the complete IT environment to enable delivery of the EM program, until such time as [the IT Agency]/DCS complied with their obligations.

Not only were ESS given repeated assurances that this was not an IT project and ESS need not be concerned with [the IT Agency], it should also be remembered that this aspect falls within the specific and exclusive knowledge of DCS.'

[55] There is no evidence to gainsay what has been alleged by ESS. Extraordinarily, the Department failed to provide any explanation in the founding affidavit in relation to its alleged non-compliance with the SITA Act as a co-contractor or attempt to deal with ESS' allegations in reply. Instead, they noted and reserved them for argument. ESS' version is accordingly not disputed on this issue. Moreover, I am unpersuaded that the services provided by ESS are covered by the provisions of s 7(1).

[56] Counsel for the appellants took us to the tender document prepared by the Department, which referred to 'System/Data Requirements' and 'Software Requirements', and to the proposal by ESS to the Department dated 10 March 2014 listing the business and system requirements, in order to demonstrate that the functions listed therein fell within the provision of services contemplated in the SITA Act.

[57] The issue of non-compliance with the provisions of the SITA Act is a question of interpretation. That interpretation cannot be done in a vacuum, it must have a factual basis. The mentioning of 'software' in a document is not sufficient to come to a conclusion that the provisions of the SITA Act were involved. Whether software services played less of a role than hardware required an understanding of the underlying facts pertaining to the function of the ankle devices in relation to the technology employed. It would have helped not only to have the Department's view on this issue but to also have someone with expertise, possibly from the IT Agency, to give insight as to how EMS would fit into the services listed in the SITA Act. The SIU simply listed the provisions of the SITA Act and arrived at the conclusion that there was a breach without interrogating the difficult questions raised by ESS. I am not satisfied that there are sufficient facts available to invalidate the contract on the basis contended for.

The PS issue

[58] The challenge under this heading is that the goods required for the EMS' pilot project were deemed to constitute 'security equipment' and the monitoring and service of such equipment were deemed to constitute 'security services' as defined in the PSIR Act. ESS, including its subcontractors and their respective staff, were

not registered to render the security services at the time the ESS submitted its bid response and when they purported to render services to the Department.

[59] Section 20(1)*(a)* of the PSIR Act prohibits the rendering of services without a person registering as a security service provider in terms of that Act. Further, in terms of s 20(2) a security business[31] may only be registered as a service provider if all persons performing executive or managing functions in respect of such security business are registered as security service providers.[32] In the case of a security business which is a company, every director must be registered as a security service provider. Any contract which is inconsistent with these provisions is invalid (s 20(3)).

[60] It is common cause that at all material times ESS was registered as a security business. Two individuals, Mr M Ferreira and Mr P Reddy, who were performing executive and management functions, were registered as security service providers at the commencement of the rollout project. No specific allegations were made as to how services provided by subcontractors, consortium partners and joint ventures were linked to the PSIR Act. ESS alleged that individual subcontractors did not render security services as contemplated in the PSIR Act. These allegations were simply noted in reply by the appellants.

[61] The appellants listed a number of individuals whom it was alleged were employed by ESS to perform security service functions without being registered. In response thereto, ESS alleged that at all material times, the security officers it

[31] In terms of s 1 of the SITA Act 'security business' means 'any person who renders a security service to another for remuneration, reward, fee or benefit, except a person acting only as a security officer'.
[32] A 'security service provider' means 'a person who renders a security service to another for a remuneration, reward, fee or benefit and includes such a person who is not registered as required in terms of this Act' (s 1 of the SITA Act).

employed were registered with the PS Authority. They were employed at different times and accordingly their registration periods would differ. Additionally, not all the persons mentioned in the spreadsheet attached to the founding affidavit were employed by ESS. Of the eight that were employed during the pilot project, seven were registered between 1999 and 2010 and one was no longer working at ESS and therefore ESS could not obtain his certificate from the PS Authority.

[62] As to the other employees against whom non-compliance was alleged in the founding affidavit, they either joined ESS after the pilot tender was awarded or were registered before joining ESS. In other instances, the registration process was delayed. The appellants did not deal with these matters in reply, they simply noted them as matters for argument. At the end, ESS alleged substantial compliance with the PSIR Act.

[63] Referring to ESS' proposal dated 10 March 2014, counsel for the appellants submitted that ESS misrepresented that it had complied with the PSIR Act when it stated the following:

'Vetting of personnel will take place, ensuring security clearance; currently ESS under "Good Industry Practice" ensures that the company and required staff are PSIRA Registered. All the current EM Staff is PSIRA vetted/registered.'

[64] The PSIR Act prohibits the rendering of security services by a person who is not registered at the time of providing those services. A person who is not registered before they render a service is not in breach. Therefore, a bidder whose personnel is not registered at the time of bidding cannot be infringing the provisions in the PSIR Act. Same should be the case when the bidder is awarded a tender but has not yet commenced with work and does not yet have all its employees registered. It goes

without saying that when the successful tenderer actually provides the services, they are then obliged to comply. It would make no sense to employ staff and get them accredited in anticipation of a tender which may not be awarded.

[65] There appears to have been no misrepresentation at the time of bidding by ESS. For there to have been misrepresentation the tender documents would have had to require bidders to state that they were in compliance with the PSIR Act at the time of the bidding. Firstly, the statement in ESS' proposal, that counsel for the appellants referred to, indicates that '[v]etting of personnel will take place'. An honest statement made about what is to occur in future cannot amount to actionable misrepresentation, even if the person who made the statement thereafter fails to do what was needed to bring about the state of affairs in question.[33]

[66] Secondly, the Department could not have been induced to contract with ESS based on the statement 'all current ESS staff is PSIRA vetted/registered', as this was not a requirement in the tender document. The Department has in any event not alleged that it was in fact so induced. While the appellants sought to provide facts relating to non-compliance with the PSIR Act for the duration of the projects, no focused specific allegation was made that as at 10 March 2014, some employees were not registered, contrary to the statement made by ESS in its proposal.

[67] To the extent that there be any breach of the provisions of the statute, the PSIR Act does not invalidate the entire contract. In terms of s 20(3) of the PSIR Act '[a]ny contract, whether concluded before or after commencement of this Act, which is inconsistent with a provision contained in subsections (1) [or (2)] . . . is invalid to

[33] *Feinstein v Niggli* 1981 (2) SA 684 (A) at 695B-D; *Watson NO v Ngonyama and Another* [2021] ZASCA 74 (SCA) para 59.

the extent to which it is so inconsistent'. As a result, the award of the contracts to ESS are invalid only to the extent that they are inconsistent with the PSIR Act. Notwithstanding, the appellants have not pointed to any tender specifications or provisions of the contracts which are in conflict with the PSIR Act.

Fronting

[68] The contention in this regard is that ESS in its offer for a final bid, contained in the letter dated 10 March 2014, made fraudulent misrepresentations that it had partnered with and intended to use the services of a 100% black-owned subcontractor, Ekasi, which it did not do. The alleged misrepresentations were as follows:

'[ESS] has partnered with Ekasi IT Solutions, a black owned and managed skills training software and IT services company that takes IT strategy into thoroughly practical implementation. Over the last six years Ekasi has designed and implemented superior IT based solutions for customers.

. . .

[ESS] together with Ekasi IT Solutions will make use of predominantly previously disadvantaged individuals (PDI's) to perform various manpower functions, eg the Control Room Monitoring functions. This project will create approximately 100 new jobs.'

[69] It was alleged by the appellants that Mr Nkosi, who was the sole director and CEO of Ekasi, confirmed that he was approached by TMM Holdings (Pty) Ltd (TMM), ESS' holding company, to be a partner or subcontractor in a bid proposal that ESS intended to make in respect of the final tender. Mr Nkosi however never heard anything from TMM or ESS after that time and no tender documents were ever given to him to complete or sign in support of the tender. When he later learnt that the final tender had been awarded, he made inquiries to ESS and was informed that ESS did not make use of Ekasi as part of its bid proposal, which according to the appellants was misleading.

[70] Mr Nkosi deposed to an affidavit in support of the review application, wherein he stated that he handed 'all the relevant tender documents needed for the compilation of the tender documents to ESS official Mr Monde Ncapai and . . . did also sign documents that [were] needed for the tender'. The appellants contended that this statement was incorrect, as it was inconsistent with the rest of Mr Nkosi's affidavit, where he denied that the initials and signature appearing in tender documents that were identified to him were his. It was contended that he denied having completed these documents.

[71] Refuting these allegations ESS alleged that before the rollout tender was due for submission, Mr Nkosi was provided with the relevant documents, which he signed. These were collected at his residence in Soweto by Mr Ncapai. Mr Nkosi also submitted Ekasi's tax clearance certificates and a certified copy of his identity document (ID). The appellants denied this but offered no alternative version. Mr Nkosi was not asked to confirm or deny allegations made in the answering affidavit, in this regard. Mr Ncapai's version in fact seems to accord with Mr Nkosi's assertion that he signed all the documents. Whether he signed all or some is of no great moment. If he did not sign any documents relating to the tender why would he positively state that he did?

[72] According to Mr Ncapai, the next day, after Mr Nkosi had signed documents, there were additional tender documents requiring his signature. Mr Ncapai called Mr Nkosi to request him to attend at ESS's offices in order to sign these documents. Mr Nkosi indicated that he would not be able to attend ESS' offices. In view of the urgency required to submit the documents, Mr Ncapai requested Mr Nkosi's permission to sign on his behalf, which Mr Nkosi granted.

[73] The facts show that the final tender was submitted with the full knowledge and participation of Mr Nkosi. Not only did he sign some documents, he gave permission to Mr Ncapai to sign further documents on his behalf. Mr Ncapai did not attempt to forge Mr Nkosi's signature, he effected his own signature. This is consistent with his version that he was permitted to do so.

[74] It is strange that ESS would go to the lengths of discussing the possibility of partnering with Ekasi with Mr Nkosi, obtain his tax clearance certificate and a copy of his ID, get him to sign some documents (which he accepted that he did in his affidavit), only to conceal the rest of the documents and effect a signature of an employee of ESS without his permission. What strengthens ESS' version further is that Mr Nkosi's details including his ID number and Ekasi's tax registration number were filled in in the tender documents. Mr Ncapai also answered 'yes' next to the question that asked whether the tax clearance certificate was submitted. Where would Mr Ncapai have obtained this information if it was not submitted by Mr Nkosi? The suspicion raised by counsel for the appellants that the process was hurried is not sufficient to indicate fraudulent conduct. It was explained by Mr Ncapai why the documents with signatures were required urgently.

[75] Counsel for the appellants sought the court to draw another inference relating to the fact that ESS only requested invoices for training services from Ekasi a year after the final tender was awarded (ie in or about May 2015). This issue was not raised in the founding affidavit as a ground for review. It arose in the answering affidavit when ESS raised an issue that the quotation (attached to the answering affidavit) it received from Ekasi was exorbitant. Ekasi required R15 000 per person for a five-day training course. This was way in excess of the EMS training budget. In terms of the EMS pricing schedule, an amount of R2 896 per person was budgeted

for training. If ESS were to go with Ekasi's quotation the total amount spent on training 600 individuals as tendered would be R9 000 000, which is R7 262 438 more than the amount tendered for training. ESS alleged that Ekasi was informed of this but did not change its stance. As a result, ESS decided to do the training in-house in order to keep to the tendered amount. It partnered with another 100% black-owned company, Nokifurn Consulting, for a completely different project of change management.

[76] In order to show fraudulent misrepresentation, the appellants would have to show that the false statements which induced the awarding of the tender were made at the time of ESS submitting its proposal. From the facts set out above, no misrepresentation could be shown. ESS submitted the bid with Ekasi's knowledge and participation. That changes may have occurred after the bid was awarded due to different reasons is not a ground on which the award of the tender or the conclusion of the contract can be found to have occurred in violation of the legality principle or to be actionable as misrepresentation.

[77] Consequently, the appellants have failed to show non-compliance with statutory prescripts, the tender specifications or misrepresentation on all three challenges. Even if non-compliance were to be remotely shown in some instances, the degree is not so egregious so as to invalidate the procurement process or the contracts concluded. Assessed in terms of the appellants' prospects of success in the review application, such prospects were bleak or poor.

Conduct

[78] As to conduct, it has been demonstrated that the Department remained supine throughout the process, even after it was alerted of any possible irregularities.

Although it took steps to terminate the SLA with ESS after receiving advice from the SIU, it remains puzzling why it would be unsighted of any possible wrongdoing throughout the implementation of the tender process. Not only did it fail to explain its role in the review proceedings, it failed to provide a rule 53 record. Moreover, the Department did not cover itself in glory during the arbitration proceedings either. Through its attorneys, it admitted liability for the services rendered by ESS and made an offer to pay all the invoices. The review proceedings were brought long after the arbitration proceedings.

Prejudice

[79] The prejudice that would be caused to ESS and other service providers goes without saying, as they rendered services to the Department in terms of the SLA until the expiry of the cancellation period. They have undoubtedly been affected by the inordinate delay in bringing the review application for projects which commenced some years before the review application was brought. The parts of the answering affidavit which indicate that the Department spoke highly of the ESS system are unrefuted. And of course there is the arbitrator's finding against them.

Conclusion

[80] As was held by this Court in *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality*,[34] '[t]he objective of state self-review should be to promote open, responsive and accountable government. The conduct of [the Department] renders the delay so unreasonable that it cannot be condoned without turning a blind eye to its duty to act in a manner that promotes reliance,

[34] *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2021 (3) SA 25 (SCA).

accountability and rationality and that is not legally and constitutionally unconscionable'.[35]

[81] In light of the inordinate delay, which has not been sufficiently explained and which has been found to be unreasonable; the egregious conduct of the Department; the fact that the review application has no merit; and the prejudice to be suffered by other contracting parties, and taking into account that the challenges to the procurement process are flimsy, the delay should not be overlooked.

[82] We do not even get to the *Gijima* principle of whether the decisions to award the tenders and the service level agreement should nonetheless be set aside in terms of s 172(1)*(a)* of the Constitution, as no clear unlawfulness in the awarding of the tender and the contracts was shown on the facts. There is accordingly no reason to interfere with the order granted by the high court.

[83] In the result, the following order is made:
The appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

N P MABINDLA-BOQWANA
ACTING JUDGE OF APPEAL

[35] *Altech* para 71.

APPEARANCES

For the appellants:	C E Puckrin SC (with him H C Janse van Rensburg)
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For the respondent:	M C Maritz SC (with him S G Maritz and J F van der der Merwe)
Instructed by:	Van der Merwe & Associates, Pretoria
	Honey Attorneys, Bloemfontein