IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, EAST LONDON

Case No: EL 614/2025

In the matter between:

EASTERN CAPE DEVELOPMENT CORPORATION	Applicant
and	
MANDLA MPIKASHE	First Respondent
MBABANE & SOKUTU INCORPORATED	
(Registration Number: 2013/097644/21)	Second Respondent
SIMPHIWE MKHULULU MBABANE	Third Respondent
MTUMELELO MKOSANA	Fourth Respondent
BAYETHE MASWAZI	Fifth Respondent

JUDGMENT

APPELS AJ:

Introduction

[1] The Eastern Cape Development Corporation ("the ECDC") is a public entity as contemplated by section 3(1)(b) read with schedule 3 of the Public Finance

Management Act 1 of 1999 ("the PFMA") and is an organ of state as defined in section 239 the Constitution of the Republic of South Africa, 1996 ("the Constitution").

[2] This application is an opposed self-review application in which the ECDC seeks orders setting aside certain decisions taken and agreements concluded on its behalf by the first respondent, its former employee, who was employed at all relevant times as its Executive Manager: Legal Compliance and Governance.

[3] More particularly, the ECDC seeks an order (*inter alia*) reviewing and setting aside:

a) A Debt Collection Service Level Agreement ("the First Debt Collection SLA"), concluded by the first respondent on behalf of the ECDC, in terms of which the second respondent was appointed as a debt collector to recover money that was due and payable to the ECDC from an entity known as ARWA Retirement Fund ("ARWA").

b) A Debt Collection Service Level Agreement ("the Second Debt Collection SLA"), concluded by the first respondent on behalf of the ECDC, in terms of which the second respondent was appointed as the debt collector to recover money that was due and payable to the ECDC from an entity known as Express Builders CC ("Express Builders").

c) An agreement concluded by the first respondent on behalf of ECDC, in terms of which the second respondent was appointed to review certain lease agreements of the ECDC.

[4] The ECDC contends that the impugned agreements should be reviewed and set aside on the basis of the principle of legality in that they are in breach of the constitutional and statutory framework governing procurement by an organ of state. It is alleged that the aforesaid decisions and agreements were concluded in terms of processes that were non-compliant with the provisions of section 217 of the Constitution and ought to be declared unlawful and set aside in terms of Section 172(1)(a) and (b) of the Constitution.

[5] The application is opposed by all the respondents mainly on the following bases:

a) Firstly, the following points *in limine* are raised:

i. Mootness;

ii. Misjoinder; and

iii. The "*once and for all rule*" and/or *lis pendens.*

b) Secondly, it is alleged that there has been undue delay in the bringing of this application and the court should accordingly not entertain the merits of the review.

c) Thirdly, it is contended that the first respondent had the necessary authority to conclude the impugned agreements on behalf of the ECDC by virtue of a Delegation of Authority issued by the former CEO of the ECDC.

d) Finally, it is contended that the first respondent had the authority to vary and amend existing agreements, and the Debt Collection SLAs were variations of an existing agreement between the parties.

[6] Notably, on the merits of the review, it was not contended by any of the respondents that the Debt Collection SLAs were concluded following a lawful procurement process. Instead, the grounds upon which the respondents rely premised on the first respondent's purported authority in terms of the Delegation of Authority and his authority to vary the terms and conditions of existing agreements.

[7] The ECDC filed its replying affidavit outside of the time periods provided for in the Uniform Rules of Court and accordingly, it also brought a condonation application in which it sought condonation for the late filing thereof. The condonation application was initially opposed by the second to fifth respondents.

[8] During the hearing, while the ECDC's counsel, Mr. Cole SC, was addressing the court in argument in respect of the condonation application, Mr Sishuba, on behalf of the second to fifth respondents, stood up and informed the court that his clients were no longer opposing the condonation application and only sought an

order for costs. Condonation for the late filing of the ECDC's replying to affidavit will therefore be granted as part of the order that the court issues in this matter.

[9] The only remaining issue in respect of the condonation application which the court was required to determine is who should be ordered to pay the cost of the application for condonation.

The Facts

[10] The first respondent is an admitted attorney. As indicated above, he was previously employed by the ECDC. He resigned from his employment with the ECDC effective from 1 February 2024, while he was on paid suspension and during the course of pending disciplinary proceedings related to his involvement in the conclusion of the impugned agreements.

[11] The second respondent is a law firm, duly registered as a personal liability company as contemplated by Section 8 of the Companies Act 71 of 2008 ("the Companies Act"). The third, fourth and fifth respondents are legal practitioners who at all relevant times were practicing as attorneys and directors of the second respondent. They were cited in their capacities as current and former directors of the second respondent and as interested parties only. No substantive relief was sought against them. Costs were only sought against them in the event that they opposed the application.

[12] On 1 October 2012, the ECDC's then CEO, Mr. S Masi, issued a delegation of authority, entitled "*Delegation of Authority to Sign Legal Agreements by the Manager: Legal and Compliance Unit*" ("the 2012 Delegation"), which authorised the Manager: Legal and Compliance Unit to conclude and sign all legal agreements with legal service providers falling within the Legal and Compliance Unit, to vet or review and recommend all legal agreements concluded by the various ECDC Business Units and to vary, and approve deviations from the terms and conditions emanating from the aforementioned legal agreements. It is on this delegation of authority that the respondents rely for the contention that the Debt Collection SLAs were lawfully concluded.

[13] The ECDC approved supply chain management policies ("SCM policies") during March 2015 ("the 2015 SCM Policy") and April 2018 ("the 2018 SCM policy") respectively. The aim of the SCM policies was to provide an appropriate procurement system that is fair equitable, transparent competitive and cost effective.

[14] During or about July 2015, the erstwhile CEO of the ECDC approved and signed a delegation of authority ("the 2015 Delegation") which authorised its CEO and other functionaries to sign SLAs with service providers whose services have been procured in terms of the ECDC's approved procurement policy, subject to such SLA's being recommended for signature by the Manager: Legal Services.

[15] The first respondent, as Manager of Legal Services, was permitted in terms of the 2015 Delegation to make recommendations in respect of the conclusion of agreements to certain executive managers and functionaries mentioned in the delegation. However, the authority of those functionaries was limited in the sense that they could only exercise such authority if the relevant services had been procured in terms of the ECDC's approved procurement policy.

The First Debt Collection SLA

[16] On or about 22 August 2014 the first respondent, purportedly acting on behalf of the ECDC, concluded the first Debt Collection SLA with the second respondent in respect of the recovery of money due and payable to the ECDC by ARWA.

[17] The ECDC's claim for recovery against ARWA emanated from a written agreement between an investment company, Interneuron (Pty) Ltd ("Interneuron"), which was mandated to manage certain of the ECDC's investments. An investigation report revealed that Interneuron, in order to conceal losses caused by it and in breach of its investment mandate, unlawfully transferred to ARWA the sum of R8 918 397.61 from the ECDC's portfolio of assets.

[18] The material terms and conditions of the first Debt Collection SLA included the following:

a) The ECDC required the services of "*Debt* Collectors" to assist with the recovery of money due and payable to it.

b) The ECDC appointed the second respondent to recover from ARWA all money which included but was not limited to capital and interest due and payable by the latter to the ECDC.

c) The second respondent would be entitled to payment of commission on all money successfully recovered from ARWA calculated at 30% of the amount recovered.

[19] It is common cause that the first Debt Collection SLA was concluded without following any competitive bidding process or any other lawful procurement process which complied with the prescribed statutory framework.

[20] Moreover, when the First Debt Collection SLA was concluded, the ECDC had an established and lawfully procured panel of Debt Collectors that were mandated to perform debt collection services of the kind stipulated therein. The second respondent was not on the ECDC's panel of Debt Collectors.

[21] Debt collection services in terms of lawfully procured debt collection SLAs, are provided by service providers who are on the panel of Debt Collectors, on a no collection no fee basis. Where success is achieved, they are entitled to a commission of 30% of the amount recovered. The commission earned is substantial, to offset the risk in providing services on a no collection no fee basis.

[22] It is also common cause that there was at the time an existing Legal Services SLA between the ECDC and the second respondent, in the form of a 2013 Legal Services SLA, which provided for legal services to be provided and remunerated at an hourly rate, without a substantial commission percentage fee in the event of success as provided for in the first Debt Collection SLA.

[23] In fact, prior to the ECDC concluding the first Debt Collection SLA, it had already instituted action against Interneuron. The second respondent acted on behalf of the ECDC in the action against Interneuron in terms of the existing 2013 Legal Services SLA and at the agreed hourly fee stipulated therein. At some point during

the course of the legal proceedings against Interneuron, the third respondent advised the ECDC that ARWA should be joined as a defendant in the action against Interneuron.

[24] It is important to note that doing the necessary to join ARWA as a defendant in the action against Interneuron was a service the second respondent was obliged to perform upon instruction from the ECDC in terms of the 2013 Legal Services SLA and at the agreed hourly fee stipulated therein. However, instead of instructing the second respondent to do what was necessary to join ARWA as a defendant in the action against Interneuron, the first respondent decided to conclude the first Debt Collection SLA in terms of which the second respondent was appointed to recover the money owed by ARWA to the ECDC at a commission of 30% of the total sum recovered.

[25] Upon the institution of legal action, ARWA tendered the first of a series of settlement proposals, which eventually, during or about January 2019, culminated in a settlement agreement between and the ECDC and ARWA, in terms of which ARWA undertook to pay to the ECDC an amount of R6 000 000.00 in full and final settlement of its claim.

[26] The amount of R6 000 000.00 was recovered and received by the second respondent, purportedly in terms of the first Debt Collection SLA. From the amount of R6 000 000.00, it deducted a 30% collection fee in the amount of R2 070 000.00 (including VAT) and paid over an amount of R3 030 000.00 to the ECDC.

[27] Had the second respondent been instructed to recover the ARWA debt in respect of the existing 2013 Legal Services SLA, the ECDC would have recovered the sum of R6 000 000.00, being the full settlement amount, less only the second respondent's usual attorney and client fee at the agreed hourly rate.

The Legal Services SLA

[28] On 2 March 2016, pursuant to a lawful and competitive bidding process as contemplated by the 2015 SCM policy, the ECDC Bid Adjudication Committee approved sixteen service providers for appointment to the ECDC's Legal Services Panel ("the LSP") for a period of three years from March 2016 to June 2019. The

second respondent was one of the successful service providers appointed to the LSP.

[29] Pursuant to the Bid Adjudication Committee's decision, the second respondent and the ECDC, concluded a written service level agreement ("the Legal Services SLA"). In addition, three service providers were appointed to a separate panel for debt collection services on a no collection no fee basis. Importantly, the second respondent was not appointed to the debt collection panel.

The Second Debt Collection SLA

[30] On 5 May 2017, the ECDC's Head: Development Finance and Business Support, Ms Rozani, instructed the first respondent to take steps to recover from Express Builders the amount of R2 898 857.49, which was due and payable to the ECDC in terms of a performance guarantee loan agreement.

[31] The relevant background to the aforementioned instruction is that Express Builders was awarded a contract with a gross contract value of R28 988 574.94 by OR Tambo District Municipality. In order to meet its obligations in terms of the contract, Express Builders applied for and obtained a loan from the ECDC. As a result, the ECDC disbursed in aggregate the amount of R22 480 407.81 into an ABSA Bank account held by Express Builders, inclusive of a performance guarantee loan in the amount of R2 898 857.49.

[32] Andile Seth Incorporated, was the debt collector from the ECDC's approved Debt Collection Panel who was initially appointed to recover the debit owing to the ECDC in respect of the loan. The recovery process was handled internally by Mr Meiring, formerly employed by the ECDC as its Manager: Debt Collections. A substantial sum of the funds owing to the ECDC was repaid by Express Builders. What was not repaid was the performance guarantee loan, which had been withheld by ABSA Bank. Andile Seth Incorporated failed to recover the amount in respect of the performance loan agreement, and that amount plus the interest that accrued on it was still outstanding as of 5 May 2017 when Ms Rozani issued the instruction to the first respondent.

[33] On 11 April 2017, approximately one month prior to the date on which the instruction was sent to the first respondent by Ms Rozani, the ECDC terminated the mandate of Andile Seth Incorporated. It appears that what led to the termination of the mandate was Mr Seth's insistence that the ECDC should accept a settlement offer which he had negotiated. The settlement offer was not acceptable to the ECDC. Instead, the ECDC wanted Andile Seth Incorporated to institute legal action to recover the full outstanding capital of the performance loan agreement, plus all accumulated interest thereon.

[34] The first respondent, upon receiving the instruction from Ms Rozani, decided that the second respondent should be appointed to recover the outstanding amount plus interest, from Express Builders.

[35] Notwithstanding the fact that the second respondent was not on the approved ECDC's approved panel of Debt Collectors, who were appointed after a lawful procurement process, the first respondent sent a letter of instruction to the second respondent on 8 May 2017, which contained (*inter alia*), the following paragraphs:

"*4.* *<u>Notwithstanding that your firm is in the ECDC panel of Attorneys, kindly be advised that your firm will be paid its commission in accordance with the attached debt collection agreement. Please note that the attached debt collection agreement will only be applicable to the abovementioned matter.</u>*

5. *This serves to confirm that your firm has undertaken to recover these monies on a risk basis in that the ECDC will be able to settle your firm's commission in the event that it successfully recovers the capital amount and interest accrued thereof. The ECDC will not be liable for any legal fees or costs incurred for the recovery of the aforementioned monies in the event of unsuccessful recovery of partly recovery.*

6. *You must always liaise with the Executive Manager: Legal, Compliance & Governance in regard to the conduct of this mater and should you need to procure the services of an Advocate, please consult the writer hereof before preparing a brief …* "

[36] On 9 May 2017 pursuant to the letter of instruction, the first respondent, purportedly acting on behalf of the ECDC, concluded the second Debt Collection SLA with the second respondent.[1] The material and express terms of the second Debt Collection SLA were the same as the terms and conditions of the first Debt Collection SLA referred to above. In addition, both SLA's contained the same terms and conditions as the standard Debt collection SLAs which were concluded between the ECDC and Debt Collectors who were appointed to the Debt Collectors Panel pursuant to a competitive and lawful bidding processes as explained above.

[37] The second Debt Collection SLA was concluded with the second respondent, notwithstanding the fact that:

a) Besides Andile Seth Incorporated, there were two other service providers that were appointed to the ECDC's panel of Debt Collectors following the conclusion of the procurement process;

b) The second respondent was not appointed to the ECDC's panel of Debt Collectors; and

c) The scope of services the second respondent was appointed to deliver with respect to the recovery of the performance loan agreement fell within the scope of work that it was supposed to perform in terms of the existing Legal Services SLA it had concluded with the ECDC.

[38] In November 2017, approximately five months after the conclusion of the second Debt Collection SLA, the second respondent collected the amount of R6 238 959.19 in respect of the Express Builders matter, from which it deducted 30% collection fee in the amount of R2 133 724.05 and paid over R4 105 235.14 to the ECDC.

[39] It is common cause that like the first Debt Collection SLA, the second Debt Collection SLA was also not concluded pursuant to a competitive bidding process.

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[1] According to the forensic investigation report by SVZ Consulting (Pty) Ltd, although the agreement is dated May 2017, it was in fact sent by email to the second respondent for the first time in November 2017.

The Agreements to Review Lease Agreements

[40] It is common cause that the Legal Services SLA terminated by effluxion of time on 14 June 2019 after which the second respondent was no longer entitled to receive any new instructions from the ECDC. On 31 May 2019, the ECDC's former CEO, Mr N Dlulane, addressed a letter to the second respondent recording that the Legal Services SLA was due to expire on 14 June 2019 and that thereafter, no new legal matters should be accepted by the second respondent nor handled on behalf of the ECDC under the Legal Services SLA. Legal matters in respect of which instructions were placed before the contract expiry date which were still pending could be dealt with until finalisation.

[41] During or about November 2019, the ECDC's erstwhile acting Head of Properties, Ms van Dyk, requested the first respondent to review certain lease agreements. At the time, the Legal Services SLA had already terminated. Notwithstanding the termination of the Legal Services SLA, the first respondent instructed the second respondent to review these lease agreements. Pursuant to this instruction, the second respondent allegedly reviewed the lease agreements and issued invoices dated 13 December 2019 and 4 March 2020 respectively to the ECDC. As a consequence, the ECDC paid to the second respondent a total amount of R248 745.00 during or about December 2019 and March 2020 respectively.

The Detection of the Illegality

[42] During 2019, the irregularities in respect of the Debt Collection SLAs were detected by Mr Norman Trimalley ("Mr Trimalley"), an official employed by the ECDC as its Manager: Internal Audit. He reported the irregularities to the then CEO of the ECDC, who summoned the first respondent to his office. The first respondent, relying on the 2012 Delegation, managed to persuade the CEO that Mr. Trimalley was wrong and that the Debt Collection SLAs were lawfully concluded.

[43] On 21 June 2022 a complaint was conveyed to the incumbent CEO by the ECDC's Fraud and Ethics Hotline. The purpose of the Hotline is to allow members of the public to report unlawful conduct on the part of the ECDC and its employees. The complaint concerned the circumstances surrounding the recovery of funds owed to the ECDC by Express Builders and more particularly, whether or not the legal fees

incurred in recovery these funds were paid to the relevant service providers pursuant to a valid procurement process.

[44] On 22 June 2022, the CEO instructed the CDC's internal audit unit (“Internal Audit”) to investigate the complaint in order to assess whether there was possible merit which warranted the initiation of an independent and external investigation. A month later, on 22 July 2022, the CEO received a report compiled by Mr Trimalley. The report revealed that *inter alia*, the second Debt Collection SLA was not concluded pursuant to an approved procurement process as required by the ECDC's SCM policy. As a result of the findings of the report, the first respondent was placed on special leave on 11 August 2022, pending the outcome of an independent forensic investigation.

[45] On 6 September 2022, the ECDC appointed SVZ Consulting (Pty) Ltd (“SVZ”) to conduct an external forensic investigation into the complaint. The report of SVZ was received by the ECDC on 17 October 2022 and contained detailed findings following comprehensive forensic investigative work into both the first and second Debt Collection SLAs as well as the instructions to review the lease agreements.

[46] The first respondent was placed on paid suspension during December 2022, and in February 2023, the ECDC issued a notice to him to attend a disciplinary hearing together with a charge sheet. The disciplinary hearing commenced and proceeded sporadically throughout 2023, but was delayed because the first respondent submitted medical certificates which suggested that he was unable to attend the proceedings. On 31 December 2023, while the disciplinary proceedings were still pending, the first respondent tendered his resignation and as a result the ECDC terminated the disciplinary proceedings.

Analysis

Points in Limine

[47] It is necessary to deal with the points *in limine* raised by the respondents before dealing with the undue delay and the merits of the review.

[48] The second to fifth respondents raised mootness as a point *in limine*. It is contended that the impugned agreements have expired and both parties have discharged their obligations in terms thereof.

[49] The matter is however far from moot. There is still a separate pending legal action that has been instituted against the respondents by the ECDC, emanating from the impugned agreements. Incidentally, the respondents have raised the failure to review the impugned agreements in the pending legal action. The validity of the impugned agreements is therefore still a live dispute between the parties which requires determination.

[50] A point of misjoinder has also been raised. In this regard, it should be noted that third to fifth respondents have been cited as former directors of the second respondent, by virtue of being jointly and severally liable together with the second respondent for any debts and liabilities of the second respondent in terms of section 19(3) of the Companies Act. They contend however that because the present proceedings are not for the recovery of debts as contemplated in section 19(3) of the Companies Act, they have been misjoined.

[51] It is trite that an interested party who has a direct and substantial legal interest in the subject matter of the proceedings and whose rights might be detrimentally affected by the order that the court might make, must be joined. No court may make any findings adverse to a person's interest unless that person is joined in the proceedings.[2]

[52] Whilst it is correct that no relief is sought against the second to fifth respondents in terms of section 19(3), granting the orders sought by the ECDC in this review application would undoubtedly adversely affect their interests.

[53] They have therefore been correctly joined in these proceedings, and the point of misjoinder cannot be sustained.

[54] Finally, the "*once and for all rule"*, alternatively *lis pendens* was also raised by the respondents. It is contended that there is already an action pending between

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[2] *Matjhabeng Local Municipality v Eskom Holdings* 2018 (1) SA 1 (CC) at para 92

the same parties in respect of the same subject matter. The respondents complain that the relief sought against them in this application should have been sought in the pending action instituted by the ECDC.

[55] The essence of the *once and for all rule* is that where damages result from a single cause of action, a plaintiff must claim damages once and for all in respect of all damages already sustained or expected in future.[3] The rule is not applicable in this matter because the ECDC is not seeking any damages in this review application.

[56] In this review application this court is required to rule on whether the impugned agreements should be declared invalid and reviewed and set aside in terms of Section 172(1)(a) and (b). In the civil action, the court would be required to give a judgment on what amount, if any, is recoverable by the ECDC from the respondents in respect of overreaching in the charging of legal fees. The cause of action in this review application and the cause of action in the civil action are therefore different and distinct.

[57] The once and for all rule does not apply where separate proceedings are instituted for separate causes of action, despite the fact that those causes of action may relate to the same factual circumstances.[4] Furthermore, a party wishing to raise *lis pendens* must allege and prove (*inter alia*) that there is pending litigation between the same parties based on the same cause of action in respect of the same subject matter.[5]

[58] Since the causes of action in the civil action and in this review application differ, the points *in limine* in respect of the *once and for all rule* and *lis pendens* cannot be sustained.

The Delay in bringing the self-review application

[59] Before dealing with the merits, it is necessary to consider the lengthy delay in bringing this application.

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[3] *Mmabasotho Christina Olesitse NO v Minister of Police* [2023] ZACC 35 at para 20

[4] *Mmabasotho Christina Olesitse NO v Minister of Police*, *supra* at paras 58-63

[5] *Nestle (SA) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA)

[60] The application was instituted in April 2024, ten years after the first Debt Collection SLA was concluded, seven years after the second Debt Collection SLA was concluded and five years after the instructions to review the lease agreements were issued. The ECDC contend that the delay is not unreasonable as the irregularity only became known in 2022 when it received the external investigation report compiled by SVZ and since then it had been pursuing various other remedies.

[61] Following the decision of the Constitutional Court in the matter of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd,* [6] it is now settled law that an organ of state seeking to review its own decision must do so under the principle of legality. The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") does not apply when an organ of state applies for the review of its own decision.[7]

[62] In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [8] ("*Asla*") the Constitutional Court provided an exposition of the principles applicable to delay in terms of PAJA, as well as in terms of legality reviews. In this regard it was confirmed that, unlike a review application in terms of PAJA which must be brought within 180 days of the applicant becoming aware of or ought reasonably to have become aware of the administrative actions, there is no fixed period in which an applicant is supposed to bring a review application.[9] The time period of the delay is therefore not calculated from the date on which the irregularity occurred, but rather from the date on which the organ of state became aware or ought reasonably have been aware of the irregularity.

[63] The distinction between the assessment of a delay in terms of PAJA and a delay in a legality review was first dealt with by the Supreme Court of Appeal in

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[6] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC)

[7] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ("Asla") at para 45. See also: *Valor IT v Premier, North West Province and Others 2021 (1) SA 42 (SCA)* at para at para 27

[8] *Asla, supra* at paras 46 - 59

[9] *Asla, supra* at para 48

Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd [10] in which it was held that Section 7 of PAJA creates a presumption that a delay of longer than 180 days is *per se* unreasonable.[11]

[64] The standard to be applied under both PAJA and legality for assessing delay is reasonableness, with the difference being that the fixed period of 180 days prescribed by PAJA creates a presumption of unreasonableness which requires a substantive application for condonation. No specific application for the condonation of an unreasonable delay is required in legality reviews.[12] However, an objection that the delay in bringing a legality review application is unreasonable is '*pre-eminently a point which the respondent or the Court should raise because the respondent and the Court are best able to judge whether, having regard to the respective spheres of influence of each, the lapse of time which has occurred merits the raising of an objection'*.[13]

[65] The court has a wide discretion when it comes to deciding whether the delay should be overlooked, but the court's discretion is not unfettered. In *Asla*, it was confirmed that the court should apply the two-step test applied in *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal*[14] to consider whether the delay was unreasonable and whether it should be overlooked.[15]

Was the delay unreasonable?

[66] Answering the question as to whether the delay is an unreasonable delay, is the first step of the *Khumalo* test.[16] In legality reviews that question is a factual issue

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[10] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA)

[11] *Asla, supra* at para 49.

[12] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 44. See also*: Asla, supra* at para 51

[13] *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1193B-C.

[14] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal, supra*

[15] *Asla, supra* at para 51

[16] Asla, *supra* at para 52

which requires making a value judgment.[17] The reasonableness of the delay is considered, amongst other factors, based on the explanation for the delay.

[67] The explanation for the delay provided by the ECDC in this matter, pinpoints 17 October 2022 as the date that it became aware of the irregularity. This is the date on which it received the external investigation report from SVZ. It is not uncommon for unlawful decisions of organs of state to go unchallenged for many years in circumstances where there is active involvement by officials within the organ of state.[18] This matter is no different since first respondent, who was an employee of the ECDC, was actively involved in the conclusion of the impugned contracts.

[68] Organs of state should have effective structures and mechanisms in place to ensure proper oversight and to detect and prevent the abuse of taxpayer's monies.[19] Therefore, an explanation that the organ of state was not aware of an irregularity until a whistleblower came forward, would not ordinarily suffice.[20]

[69] However, this matter is different in that the ECDC did have mechanisms in place to ensure compliance and to safeguard against irregularities. It has an internal audit unit and has implemented supply chain management policies in accordance with Regulation 16A of the Treasury Regulations. Furthermore, it has passed delegations to ensure that its executive managers do not conclude contracts until they are properly advised by a legally-qualified manager, responsible for its legal services. In fact, in 2019, when payment was made to the second respondent in terms of the first Debt Collection SLA, the irregularity was detected by the ECDC's internal auditor Mr Trimalley.

[70] However, the very official who ought to have advised the ECDC against concluding contracts which were unlawful, concluded contracts without following the prescribed supply chain management processes. Furthermore, when the irregularity was detected by Internal Audit and reported to the former CEO, it was on advice of

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[17] *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) para 31 - 35

[18] See for instance *Valor IT v Premier, North West Province and Others, supra* at para 34

[19] *Asla,* supra at para 81

[20] *Asla, supra* at para 78

the first respondent that the former CEO was persuaded that no illegality had occurred.

[71] However from at least 17 October 2022, the ECDC could have been in no doubt about the extent of the irregularities. Despite becoming aware of the full extent of the irregularities, a further eighteen months elapsed before this application was instituted in April 2024. That constitutes a lengthy period, which requires an explanation covering the entirety of the delay.[21] Where there is no explanation for the delay, the delay will necessarily be unreasonable.[22]

[72] The CEO was furnished with a full investigation report on 17 October 2022, setting out all the irregularities that occurred and he therefore had sufficient information at his disposal to prosecute the review proceedings. He chose not to do so. Instead, in the immediate aftermath of discovering the irregularities, the ECDC focused its efforts on prosecuting disciplinary proceedings against the first respondent. When it finally shifted its focus, it chose to pursue criminal investigations and civil recovery proceedings. Furthermore, it was advised by senior counsel in December 2023 that it ought to have instituted review proceedings, but it took a further four months until April 2024 before these proceedings were instituted. The further delay of four months between December 2023 and April 2024 after receiving this advice is not explained.

[73] In the circumstances, the explanation provided does not justify the delay in bringing the review application.

Should the Delay be Overlooked?

[74] Once it is established that there has been an unreasonable delay, the court has to enquire whether the unreasonable delay ought to be overlooked.[23] That enquiry involves considering a range of factors, including "*the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the*

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[21] *Asla, supra* at para 50

[22] *Alsa, supra* at para 52

[23] *Asla, supra* at para 53

explanation, the prospects of success on the merits".[24] In *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal,[25]* it was held that a court should be slow to allow procedural obstacles to prevent it from looking into the unlawfulness of the exercise of public power.

[75] Although the explanation provided by the ECDC does not provide sufficient basis for the court to overlook the delay, the explanation for the delay is only one of many factors the court ought to consider when it comes to exercising its discretion.

[76] The merits of the review could in some limited circumstances be an overriding factor. This is especially so in circumstances where the unlawfulness is clear and undisputed.[26] It is settled law that strong prospects on the merits, may compensate for an explanation that is wanting, if the interests of justice, in the light of its strong prospects of success, require condonation to be granted.[27]

[77] The assessment as to whether the delay should be overlooked is therefore not complete until the court assesses the strength of the merits of the review.

[78] One of the reasons why a review application should be brought within a reasonable time is "*because the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts*."[28] In this regard it has been held that a long delay could cause documents and evidence to get lost, undermining the ability of the review court to fully evaluate the merits of the review.[29]

[79] In this matter, the delay has not impeded the court's ability to scrutinise the merits of the allegations of illegality. The facts of this matter are clear and largely

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[24] *Valor IT v Premier, North West Province and Others*, *supra* at para 30

[25] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal, supra* at para 45

[26] *Asla, supra* at para 66

[27] *Valor IT v Premier, North West Province and Others*, *supra* at 39

[28] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal, supra* at para 48

[29] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal, supra* at para 48

undisputed. It is clear from analysis of the merits of the review set out below, that there is no merit in the defences raised by the respondents. The unlawfulness of the impugned agreements is manifest.

[80] The strength of the ECDC's prospects of success on the merits of the review in this matter is therefore sufficient to compensates for the unsatisfactory explanation provided by the ECDC.

[81] Besides the explanation for the delay and the merits, there is also the potential prejudice to affected parties to consider as well as the possible consequences of setting aside an impugned decision. In *Department of Transport v Tasima (Pty)Ltd*[30], the court explained the impact of prejudice in assessing a delay in bringing a review application as follows:

"*But what is the prejudice suffered by Tasima in overlooking the delay? Condoning the delay does not prevent them from enforcing the court orders that have been granted in their favour. In addition, the contract extension itself has already expired. Setting aside the extension at this point should not, therefore, impact negatively on Tasima going forward. It is also a factor that this Court may rely on its section 172(1)(b) powers to ameliorate the prejudice suffered. It bears repeating that Tasima has, in addition, benefitted greatly from the extension. In my view, the prejudice suffered is minimal, particularly in comparison to the prejudice to be suffered by the Department and the Corporation if the counter-application is not condoned. This is consonant with the dicta in Khumalo that, 'consequences and potential prejudice . . . ought not in general, favour the Court non-suiting an applicant in the face of the delay'*."

[82] It is clear from the *dictum* above that prejudice to all the parties should be considered, not only prejudice to the respondents. The court should weigh the potential prejudice suffered by the respondents against the potential prejudice suffered by the organ of state if the delay is not condoned.

[83] I have considered that the respondents are innocent third parties that will be prejudiced should the delay be overlooked. They are attorneys of this court, and they ought to have been aware of what lawful procurement by an organ of state entails. More importantly, they ought to have known that the ECDC as an organ of state may

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[30] *Department of Transport v Tasima (Pty)Ltd* 2017 (2) SA 622(CC) at para 170

not conclude agreements with a service provider for the provision of debt collection services without such agreement having been approved by the Bid Adjudication Committee following a competitive process. They were aware that the second respondent was not on the ECDC's Debt Collection Panel that was appointed in terms of a lawful bidding process. They ought to have known that the second respondent was not entitled to the lucrative collection commission fees in circumstances where it was obliged to render legal services to the ECDC in terms of the rates as agreed in accordance with the lawfully-procured Legal Services SLA.

[84] There is therefore no prejudice to the respondents in the circumstances of this case which would prevent the court from overlooking the delay and enquiring into the merits of the review.

[85] Accordingly, I find that it is in the interest of justice to overlook the delay.

The Merits of the Review

[86] Organs of state are bound by the provisions of section 217 of the Constitution which enjoins the state to procure goods or services "*in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*." In *Valor IT v Premier, North West Province and Others,*[31] the court held that section 217 of the Constitution is meant to "*prevent patronage and corruption, on the one hand, and to promote fairness and impartiality in the award of public procurement contracts, on the other*."

[87] In addition, Regulation 16A3.1 of the Treasury Regulations[32] compels the accounting authority of a public entity such as the ECDC to apply and develop an effective and efficient supply chain management system for the acquisition of goods and services. Procurement of goods and services that are compliant with the aforementioned imperative takes place through quotations or a competitive bidding system.

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[31] *Valor IT v Premier, North West Province and Others,* supra at *para 40*

[32] Treasury Regulations of March 2005, issued in terms of Section 76 of the Public Finance Management Act 1 of 1999

[88] Deviations from the prescribed procurement processes are permitted in limited circumstances only. Regulation 16A6.4 of the Treasury Regulations provides that if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded by the accounting officer or accounting authority.

[89] Both the first and second Debt collection SLAs were concluded without following a competitive bidding process. In fact, at all relevant times, the ECDC had already established a lawfully-procured panel of Debt Collectors that was mandated to provide the ECDC with debt collection services of the kind stipulated in the first and second Debt Collection SLAs.

[90] In respect of the merits, the first respondent offers various reasons in his answering affidavit as justification for why a competitive bidding process was not followed prior to the conclusion of the Debt Collection SLAs with the respondent. He asserts that ECDC received "*benefit and value for money*" following the conclusion of the Debt Collection SLAs. He also contends that the conclusion of the Debt Collection SLAs was required to off-set the element of risk associated with pursuing the recovery of the claims. None of the aforesaid assertions explain why the second respondent did not perform the services in terms of the existing legal services SLAs, nor does it explain why, if it was necessary to conclude a Debt Collection SLA to recover the outstanding amounts from ARWA and Express Builders, the ECDC did not conclude a Debt Collection SLA with one of the service providers who was on the panel of Debt Collectors that was appointed following a lawful tender process.

[91] In any event, none of the reasons now offered as justification by the first respondent were recorded and approved in writing as required by Regulation 16A.6.4 of the Treasury Regulations, nor is it contended that inviting competitive bids was impractical in the circumstances of this case as contemplated in Regulation 16A.6.4.

[92] It is clear from the common cause facts that any services which the second respondent was required to render in order to recover the amount owed by Express Builders and ARWA, fell within the scope of services in the Legal Services SLA and

at the fee and rates prescribed in that agreement. As a result of the conclusion of the Debt Collection SLAs, the second respondent charged lucrative collection fees, as opposed to the agreed legal fees it was entitled to in terms of the Legal Services SLA.

[93] The contention of the respondents that the Debt Collection SLAs were variations of the existing Legal Services SLA is also untenable. The respondents rely on clause 4.2 of the Legal Services SLA together with the 2012 Delegation for the contention that the first respondent was permitted to vary the terms of the existing Legal Services SLA. Clause 4.2 reads as follows:

"*Notwithstanding the fact that a description of the Services has been provided in Annexure A hereto, ECDC shall be entitled to request additional services related to the deliverables required and as may be required to ensure the successful completion of the Services set out in annexure A on such further terms and conditions as may be agreed to between the Parties in writing".*

[94] Firstly, the words "*as may be required to ensure the successful completion of the services...*" are instructive. It was simply not required to vary the terms of the Legal Services SLA in order to recover the amounts owed by ARWA and Express Builders to the ECDC. The second respondent ought to have simply provided the legal services it was obliged to perform in terms of the Legal Services SLA and at the agreed hourly rates stipulated therein.

[95] Secondly on the facts, both Debt Collection SLAs were clearly new agreements which were concluded based on a decision taken by the first respondent, without following the prescribed procurement processes. They were not variations of an existing agreement.

[96] Accordingly, on the merits of the review application, the decisions to conclude the Debt Collection SLAs are clearly inconsistent with the Constitution. The Debt Collection SLAs are therefore unlawful and ought to be reviewed and set aside.

[97] As with the Debt Collection SLAs, the agreements to review the lease agreement were concluded without complying with the statutory and policy framework applicable to the procurement of goods and services by the State. The

ECDC had an established LSP that was mandated to perform the legal services which the first respondent instructed the second respondent to perform. The second respondent was at all relevant times not on the ECDC's LSP as the Legal Services SLA had terminated by effluxion of time on 14 June 2019.

[98] The second respondent was therefore not lawfully entitled to receive the instructions from the ECDC to render the services to the ECDC. As is the case with the Debt Collection SLAs, the instructions to review the lease agreements breached the principles of legality.

[99] The contention by the respondents that the first respondent was authorised to conclude the impugned agreements with the second respondent on behalf of the ECDC on the basis of the 2012 Delegation cannot be sustained. The delegations cannot override the constitutional imperatives applicable to procurement of goods and services by organs of state. The 2015 Delegation makes it clear that not even the CEO has the authority to conclude agreements with service providers unless there has been a lawful procurement process. It is inconceivable that any of the respondents, who are legally qualified attorneys of this Court, could have laboured under the misapprehension that the first respondent possessed such authority.

[100] As justification for continuing to issue and accept instructions to review lease agreements even after the Legal Services SLA expired, the respondents made bald assertions that the instructions were received prior to the expiry thereof. No documentary evidence was provided regarding the alleged prior instructions. Bald assertions do not constitute evidence in motion proceedings.[33]

[101] In contrast, it is clear from the documentary evidence provided by the ECDC that the instructions to review the lease agreements emanated from a written request sent by Ms van Dyk to the first respondent to review specified lease agreements in November 2019 after the Legal Services SLA had already terminated. These instructions related to new lease agreements in respect of which the respondents had not previously receive any instructions. A copy of the written request of Ms van Dyk was attached to the ECDC's papers. It clearly shows that the instruction to

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[33] *Huelse-Reutte v Godde* 2001(4)SA 1336 (SCA) at para 14

review the lease agreements was a new instruction, issued in November 2019 after the Legal Services SLA had already terminated.

[102] What makes the conduct of the respondents in respect of the lease agreement instructions particularly egregious, is that the ECDC sent a letter to the second respondent prior to the expiry of the Legal Services SLA, drawing its attention to the fact that the Legal Services SLA would expire on 14 June 2019 and that they should not accept any further instructions issued to them after that particular date.

Conclusion

[103] It is in the interest of justice to overlook the unreasonable delay in bringing this application. The unlawfulness of the impugned agreements is clear.

[104] The court is therefore enjoined by Section 172 (1)(a) and (b) of the Constitution to declare the impugned agreements unlawful and set it aside.

Costs

Costs of the Review Application

[105] In the Notice of Motion, the ECDC only requested costs against those respondents who opposed the application. All the respondents opposed the application. Their opposition was unsuccessful. There is no reason to deviate from the general rule and costs ought to follow the result. Since costs were only sought in the event of opposition, the respondents should pay the applicant's costs occasioned by their opposition of the application.

Costs in the Condonation Application

[106] In normal circumstances, condonation is an indulgence and the party seeking condonation should pay all the costs occasioned by the application, including the costs of opposition thereto, if the opposition was reasonable.[34]

[107] However, in this matter, opposition to the condonation application was not reasonable and was abandoned at the very last minute. In this regard, I consider that the ECDC's legal representatives sought an extension from the respondents prior to the late filing of the replying affidavit. The request for an extension was reasonable given the fact that the ECDC had to respond to two lengthy answering affidavits filed by the respondents in this matter. In addition, there was no real merit or good reason for the objection to the late filing of the replying affidavit.

[108] In the circumstances, the ECDC should not be ordered to pay the costs of the opposition to the condonation application, and each party should pay their own costs.

Order

[109] Accordingly, it is hereby ordered that:

[1] Condonation is granted for the late filing of the applicant's replying affidavit and each party in the condonation application should pay its own costs.

[2] The decision on or about 22 August 2014, by the first respondent, purportedly acting on behalf of the applicant to conclude a Debt Collection Service Level Agreement ("the first Debt Collection SLA") in terms of which the second respondent was appointed as a debt collector to recover money from an entity known as ARWA Retirement Fund, is hereby reviewed and set aside.

[3] The first Debt Collection SLA, marked "AW1" to the founding affidavit, is hereby reviewed and set aside.

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[34] *Myers v Abramson* 1951 (3) SA 438 (C) at p451

[4] The decision on or about 8 and 9 May 2017, by the first respondent purportedly acting on behalf of the applicant, to conclude a Debt Collection Service Level Agreement ("the second Debt Collection SLA") in which the second respondent was appointed to recover money from an entity known as Express Builders CC, is hereby reviewed and set aside.

[5] The second Debt Collection SLA, marked "AW2" to the founding affidavit, is hereby reviewed and set aside.

[6] The decision on or about 28 November 2019 taken by the first respondent to instruct the second respondent to review certain lease agreements of the applicant ("the lease agreements instructions") is hereby reviewed and set aside.

[7] The agreement concluded pursuant to the lease agreement instructions is hereby reviewed and set aside.

[8] The first to fifth respondents, jointly and severally, the one paying the others to be absolved, are to pay the costs incurred by reason of their opposition to the application, such costs to include the costs of two Counsel, on Scale C.

G APPELS

ACTING JUDGE OF THE HIGH COURT

Heard: 24 July 2025

Delivered: 11 November 2025

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