IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Case number no: 2025-071001

In the matter between:

KNYSNA MUNICIPALITY Applicant

and

GREY ELEPHANT INVESTMENTS (PTY) LTD Respondent

Coram : Nziweni, J
Heard : 26 November 2025 (virtually)
Delivered : 24 June 2026 (electronically)

Summary : Constitutional and administrative law – public procurement – deviation from procurement prescripts – legality review – self-review by organ of state – unreasonable delay – whether delay can be condoned – remedies – just and equitable relief under s 172(1)(b) of Constitution – order of payment to lessor affected by unlawful decision – evidence – proof of complicity – allegations of collusive or unlawful conduct requires more – suspicion and conjecture insufficient to establish complicity.

ORDER

1. The Municipal Council resolution dated 26 October 2023, to approve the conclusion of a lease agreement with the Respondent without undertaking a competitive and open tender process ("the impugned resolution") is declared unconstitutional, unlawful and invalid.
2. The conclusion of the lease agreement between the Applicant and the Respondent on 12 December 2023 and the resultant lease agreement ("the impugned lease agreement") is declared unconstitutional, unlawful and invalid.
3. The impugned resolution and the impugned lease agreement are reviewed and set aside.
4. It is just and equitable that the Applicant be ordered to pay unpaid rental amounts and consumption charges for its period of occupation commencing on 1 May 2024 and ceasing on 31 July 2025.
    4.1. The unpaid rental amounts are to be calculated on 1268 square metres, the actual space occupied by the Applicant during the period of its occupation. The exact quantum is to be calculated by the Respondent. Failing agreement between the parties on the final amount within 14 days of this order, the quantum shall be determined by an independent auditor or referee jointly appointed by the parties, or, failing such agreement on the appointment, by the Chairperson of the South African Institute of Chartered Accountants (SAICA), whose determination shall be final and binding, with the costs of such referee to be borne equally by the parties.

4.2. Consumption charges (water and electricity) are to be calculated on the Applicant's actual consumption during the period of its occupation. On this basis, the sum of the consumption charges is an amount calculated and proven by the Respondent.

4.3. Interest on the unpaid rental amounts and consumption charges shall be calculated at the rate prescribed in section 1 of the Prescribed Rate of Interest Act 55 of 1975 from date of judgment to the date of payment.

4.4. The Applicant sh*all pay* the unpaid tenant installation costs as calculated by the Respondent. Failing agreement between the parties on the final amount within 14 days of this order, the quantum shall be determined by an independent quantity surveyor jointly appointed by the parties, or, failing agreement on the appointment, by the President of the Association of South African Quantity Surveyors (ASAQS), whose determination shall be final and binding;

4.5. The Applicant to pay the costs of the application on scale C, which costs include the costs of two counsel, one of whom is senior counsel.

JUDGMENT DELIVERED ELECTRONICALLY

Nziweni, J

Introduction and factual background

[1] At the outset it should be stated that this case is deeply troubling. Particularly, for a nation that is built upon a rule of law and a Constitutional democracy. Regrettably, it

reflects a persistent systemic notable malady. Our case law spanning from the High Court to the Apex Court is replete with similar instances. Despite this established jurisprudence, self-correction reviews, more so, those initiated by municipalities, continue unabated. Judicial review cannot become a routine mechanism to clean up the administrative messes of government institutions. Organs of State and public officials must instead model the highest standards of ethics, accountability, and legal compliance in the execution of their duties.

[2] Be that as it may, this application has its genesis from a resolution by the applicant's Council, that approved a lease agreement between the applicant and the respondent. In doing so, the Council bypassed the mandatory procurement process.

[3] The application is instituted under the doctrine of legality, wherein the applicant ("the Municipality") seeks a corrective action, by way of self-review, in respect of resolution and an agreement. The respondent's ("Grey Elephant") opposition rests on two distinct strands yet interrelated. The first strand of opposition is on merits and the second one is on the time it took to bring this application.

[4] The Municipality seeks that the Municipal Council's resolution taken on 26 October 2023, to approve the conclusion of a lease agreement with Grey Elephant, without undertaking a competitive and open tender process ("the impugned resolution") be declared unconstitutional, unlawful and invalid.

[5] The Municipality also seeks that the conclusion of the lease agreement between the Municipality and Grey Elephant, on 12 December 2023 and the resultant lease

agreement ("the impugned lease agreement") be reviewed and set aside retrospectively.

[6] The impugned lease agreement relates to 3250m^2 of office space for a monthly rental of R546 000. 00, at a rate of R168/m^2, which compromises a base rental of R120/m^2 and a tenant installation cost of R48/m^2.

[7] The Municipality asserts that by bringing this application, it discharges and fulfils its constitutional duty to undo its own incorrect decisions and to vindicate the rule of law since the impugned decisions are unlawful. The Municipality also maintains that they are bringing the application in the interest of residents and ratepayers of Knysna, the public interest and its own interest.

[8] The legality of the impugned lease agreement is also the subject of an investigation by the office of the Public Protector. The complaint to the Public Protector was lodged by Ms Julie Seton, acting on behalf of Action SA, on 12 December 2023.

[9] Grey Elephant Investment is a private company with limited liability, with its principal place of business based in Knysna Mall.

[10] It is not in dispute that the services have been rendered by Grey Elephant by providing office space to the Municipality, in terms of the impugned lease agreement. It is common cause that the Municipality has not paid any rental to Grey Elephant. The Municipality asserts that; in terms of the Municipal Finance Management Act 56 of

2023 ("MFA"), they are not allowed to pay rental and other charges stemming from an unlawful lease agreement, as this would constitute an irregular expenditure.

[11] The Municipality vacated the leased premises [at Knysna Mall] on 31 July 2025.

[12] Following the delivery of the replying affidavit, Grey Elephant's director, Mr Lurie ("Lurie"), applied to file a supplementary affidavit. In their response to Grey Elephant's answering affidavit, the Municipality stated that they do not object to the admission of the supplementary affidavit. As the application was not opposed, the court has admitted these additional affidavits into the record.

[13] The lease period was to be a period of three years, starting on 01 March 2024 and terminating on 28 February 2027. The addendum to the lease agreement reflects the amended period of the lease as starting from 01 May 2024 and terminating on 30 April 2027. The monthly rental was to be an amount of R 546 000,00. The leased premises was to be office space in the Knysna Mall.

[14] The Municipality is seeking the review based on the following grounds:

a. the deviation procedure was not lawfully authorised;
b. the impugned decision violated the Constitution, the MFMA, the supply chain regulations and the SCM policy of the Municipality;
c. the approval by the municipal council of the conclusion of the lease with Grey Elephant is inconsistent with section 117 of the MFMA; and
d. irrationality.

[15] The issue in this review is whether the Municipality is entitled to the self-review that it is seeking. Put differently, whether the Municipality was strictly obliged to follow a competitive, open tender process, and whether its failure to timeously challenge its own deviation is fatal to this application. The statute and procurement points raised in *Chief Executive Officer of the South African Social Security Agency N.O. v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13 are almost identical to the structural failures in the instant case.

Factual Background

[16] It is necessary to sketch the events forming the background to the dispute. The background to the matter, in brief, is this:

a. Around 2019, the Municipality resolved to commence a competitive and open tender process to invite bids for the provision of office space;

b. The first tender was cancelled on 31 October 2019, on the recommendation of the Bid Adjudication Committee which found that no suitable office space was found;

c. On approximately 05 March 2020, a further open invitation for office space was advertised; this constituted the final open procurement process prior to the adoption of the impugned resolution;

d. During the evaluation of the bids that were received, the Municipality reconsidered its position and decided to purchase a building;

e. On 31 March 2021, the Municipality resolved to purchase Erf 9762 Knysna (the Wood Walk Building"). However, this decision was rescinded.

f. Around October 2022, the second tender was cancelled.

g. On 21 September 2023, a discussion between Lurie and a previous Municipal Manager, Mr Sebola took place regarding the impugned lease agreement.

h. On 11 October 2023, the Municipality received a lease proposal from Grey Elephant.

i. On 26 October 2023, the erstwhile Municipality Manager, Mr Sebola, tabled a report before the Municipal Council that sought the approval to conclude a lease agreement between the Municipality and Grey Elephant, without following a procurement process. On the very same day, two councillors serving in the Municipal Council proposed and seconded that an approval be given to enter into a lease agreement with Grey Elephant for a period of three years, from 01 January 2024 until December 2028.

j. Another proposal was also made by a councillor and was seconded. The second proposal proposed that a tender process be advertised for a period of 3 years, 5 years and 10 years. The first proposal received the majority votes from Council.

k. The Council then resolved that an approval be given to enter into a new lease agreement with Grey Elephant and that the Municipal Manager be authorised to approve a yearly deviation for the leasing of the office space for the 3 years.

l. On 12 December 2023, a lease agreement was then concluded and signed by the Municipal Manager, without him signing the deviation form.

m. The office of the Public Protector sent a letter dated 24 January 2024, to the Municipality informing them about an investigation related to the lease agreement. The Public Protector launched the investigation following a formal complaint lodged by Action SA.

n. On 26 February 2024, Municipal Manager responded to the Public Protector, justifying the deviation from the normal procurement process.

o. On 26 April 2024, the Municipal Manager, amended the lease agreement period. The Municipal Manager was the one who signed the amendment.

Municipal submissions

[17] The Municipality holds the view that Grey Elephant does not appreciate that the Municipality has a constitutional obligation to review and set aside the unlawful lease agreement.

[18] It is the Municipality's contention that in the proposal received from Grey Elephant, Grey Elephant was represented by Ms Human and Mr Lurie. It is further the Municipality's contention that Lurie was a representative of one of the bidders in the second tender process. The Municipality bases this contention on an email correspondence dated 10 December 2020, wherein Lurie, wrote to Freddie Kruger [the Manager of the Supply Chain Management Department of the Municipality], enquiring if there are any news on the tender.

[19] Based on this enquiry by Lurie, the Municipality concludes that the representatives of Grey Elephant were aware that any conclusion of the lease agreement with the Municipality had to be preceded by an open tender process. The Municipality further asserts that Lurie had already participated in one such open tender process in relation to the second tender. According to the Municipality, Lurie is the controlling mind of Grey Elephant.

[20] It is the Municipality's contention that Grey Elephant is not an innocent party as they were aware that the process was unlawful. The Municipality maintain that Grey Elephant was aware that an open and competitive tender process had to be undertaken. The Municipality contends that Lurie and Grey Elephant were complicit in the wrongdoing that led to the impugned decisions sought to be reviewed. As such, the Municipality contends that where a tenderer/ offeror/ bidder is not innocent but complicit in the wrongdoing, they are not only barred from making a profit from the unlawful agreement but they must suffer losses.

[21] The Municipality further asserts that Grey Elephant's debt, comprising millions of rands in unpaid rates and taxes, was controversially written off. As such, the Municipality launched this application seeking an order declaring the resolution taken by the Council on 26 October 2023, approving the conclusion of a lease agreement with Grey Elephant unconstitutional, unlawful and invalid.

[22] The Municipality further submits that in terms of the Municipality's Supply Chain Management Policy, and the National Treasury's standard general conditions of contract, no contract should be concluded with a bidder whose municipal rates, taxes and charges are in arrears.

[23] Additionally, the Municipality contends that Grey Elephant has no right to benefit from an unlawful agreement, whether it is an innocent party or a complicit party.

[24] It is the Municipality's assertion that due to the impugned lease agreement, any payment made under such agreement would constitute irregular expenditure.

[25] The Municipality further contends that one of their councillors, who knew Lurie, informed him that concluding the impugned lease agreement without an open tender process would be unlawful.

[26] The Municipality contends that it is in possession of an email that reveals that Lurie seemed to have had unfettered access to high-ranking municipal employees and has always been a party to attempts to lease office space at the Knysna Mall to the Municipality.

[27] The Municipality maintains that Lurie is not telling the truth when he states that he did not participate in the previous Municipal open tender processes.

[28] It is the Municipality's submission that Grey Elephant was at all times aware of the illegality of the impugned lease agreement.

[29] The Municipality asserts that Mr Sebola was not authorised by the council to enter into negotiations with Grey Elephant.

[30] The Municipality asserts that the report that was tabled by Mr Sebola sought to justify the use of deviation process. as contemplated in section 34(1) (a) (v) of the SCM Policy. According to the Municipality, the report stated that an exceptional case existed because it was impractical and impossible to follow a tender process in terms of the SCM Policy of the Municipality.

[31] The Municipality contends that the lease agreement and the amendment of the lease period, were signed without the involvement of the municipal's legal department that has the duty to advise and comment on the conclusion of the agreements by the Municipality with any third parties.

[32] Furthermore, the Municipality argues that the conclusion of the lease agreement, and the amendment of the lease period, did not follow the official route process for decision making within the municipality, that requires comments and inputs from relevant departmental heads, prior to a decision made by the Municipal Manager, that binds the Municipality.

[33] It is further the Municipality's submission that it was unlawful for the Municipality to enter into an agreement with Grey Elephant as they were in arrears in its municipal account.

[34] The Municipality further asserts that, even if the negotiations by the previous Municipal Manager were authorised by Council, such authorisation would still be unlawful since it would directly involve councillors in procurement matters by identifying and selecting a potential service provider.

[35] Ms Susan Campbell, a municipal councillor [in a municipal council of the Municipality], states in her confirmatory affidavit that she had known Lurie before the conclusion of the impugned lease agreement. She also avers that she repeatedly informed Lurie that any conclusion of the lease agreement between the Municipality and Grey Elephant that was not preceded by open and transparent tender process

would be unlawful. She denies the assertions by Lurie that she suggested that he [Lurie] should meet with the former Municipal Manager. The Municipality maintains that the resolution of 21 September 2023, refers to K2012 not Grey Elephant, and that the former is an entity that had in fact tendered and submitted the lowest bid in the second tender.

[36] At the time of the drafting of the founding affidavit [14 May 2025], the Municipality claimed that it was in the process of vacating the premises.

Submissions pertaining to undue delay

[37] The Municipality asserts that there was inordinate delay in the launching of this application since it was launched within six months from October 2024.

[38] The Municipality justified the delay by noting that it received a legal opinion on the illegality of the impugned decision in October 2024, and it was considered during February 2025, and the Municipal Manager was authorised to launch this review application.

[39] The Municipality submitted that the delay was not undue as it had acted with due expedience upon learning of the procurement process's unlawfulness. The Municipality asserts that the clock started ticking for them from when the Municipality was advised of the illegality. It is further the Municipality's contention that if the delay is calculated from October 2023, the delay would be approximately 18 months and seeks to justify this particular delay on the ground that it would be in the interest of

justice to grant condonation. Consequently, it requested that if this Court is of the view that clock started running from October 2023, the delay ought to be overlooked.

Grey Elephant submissions

[40] Grey Elephant submits that the Municipality has not made out a case for the condonation sought for the delayed launching of this application. According to Grey Elephant, there is no date mentioned by the Municipality, stating as to when they [the Municipality] received legal opinion regarding the unlawfulness of the lease agreement. Nor is there a date indicating as to when the Council resolved to institute these proceedings. In addition, Grey Elephant states that there is no explanation for the delay in instituting these proceedings.

[41] It is Grey Elephant's contention that, the Municipality's decision to enter a lease agreement through a policy deviation was not unprecedented, as they had previously cited 'exceptional circumstances' to bypass standard Supply Chain Management procedures.

[42] Grey Elephant asserts that they were approached by the Municipality seeking assistance with the replacement of a lease agreement that was expiring as they wanted to reduce rental costs.

[43] Lurie asserts in his supplementary affidavit that a Special Council Meeting was held on 21 September 2023, where the extension of the soon to expire lease was discussed. Lurie further avers that at this meeting, the Municipality council adopted a

resolution that inter alia, resolved that the Municipal Manager and the Director should negotiate with the property owner of K2012150042 South Africa for leasing of property for office accommodation.

[44] Lurie further contends that it is not in dispute that the Council are referring to and had in mind the Knysna Mall. Further, Mr Lurie asserts that given the fact that by that stage, Grey Elephant was the owner of Knysna Mall, the reference to K2012150042 South Africa, is clearly a reference to Grey Elephant.

[45] Grey Elephant denies that it did not comply with section 217 of the Constitution or was in contravention of any of the applicable statutory prescripts, when it concluded the impugned lease agreement with the Municipality.

[46] The deponent to Grey Elephant's opposing affidavit, Mr Lurie, denies any involvement in any of the previous tender processes for the leasing of the premises to the Municipality. Mr Lurie further submits that he insisted that the erstwhile Municipal Manager obtain the necessary confirmation from the Council that he was duly authorised to conclude the lease agreement.

[47] According to Grey Elephant, they contracted with the Municipality in good faith and were therefore entitled to assume that the Municipality had complied with its internal arrangement and the necessary legal formalities. Grey Elephant maintains that the Municipality is in breach of the lease agreement.

[48] It is asserted on Grey Elephant's behalf that in the circumstances of this case, it would not be just and equitable for this Court to set aside the decisions sought to be reviewed, alternatively the appropriate just and equitable remedy in this instance would be for this Court to direct that the Municipality compensate Grey Elephant for its loss.

[49] Grey Elephant asserts that despite their substantial investment of over R14 million into the leased property, the Municipality has failed to pay any rental since the lease's inception on 01 May 2024.

[50] It is argued on Grey Elephant's behalf that the Municipality failed to disclose in these proceedings that it is currently in arrears in respect of the lease agreement. According to Grey Elephant, the Municipality also failed to disclose pending litigation between them.

[51] It is Grey Elephant's submission that the reason for the institution of the current litigation is to avoid payment of the overdue rental and tenant installation charges. Furthermore, Grey Elephant argues that the actions of the Municipality is an attempt to avoid paying. Grey Elephant further maintains that the Municipality is not motivated by fiscal responsibility in seeking to set aside the lease with them.

[52] Lurie denies that Grey Elephant submitted a bid in respect of the second tender. He also maintains that he was not a director of K2012. According to Lurie, Grey Elephant purchased Knysna Mall from K2012, and when he [Lurie] wrote the email of

September 2020, to the Municipality, it was part of pre-transfer investigation by Grey Elephant in anticipation of Grey Elephant's purchase of the Knysna Mall.

[53] Lurie vehemently denies that he was intimately involved in the tender process. Lurie further asserts that he did not bid for any of the two tenders.

[54] Concerning the exchange of emails between Lurie and the Municipality, he [Lurie], maintains that there is nothing untoward about a party making a request for information to an Organ of State, nor is there anything untoward about an employee of an organ of State advising an interested party that a tender is being evaluated. He characterises the exchange of emails as appropriate exchange of information.

[55] Lurie asserts that if it is the Municipality's assertion that an unanswered email to its manager constitutes unfettered access, that would amount to a meritless allegation that is at best, legally untenable.

The emails exchanges

[56] It is necessary at this point to set out and say a little more about the email exchanges between Lurie and various Municipality officials.

[57] On 17 January 2018, Lurie, wrote the following email:

> "Hi Kam
> I wish you all the best for 2018 and hope that it is prosperous year for you and your family.

I have heard via the Knysna grape-vine that there is a requirement for a substantial amount of office space for the Knysna Municipality. Whilst I may not be personally interested in the enquiry my partners Old Mutual, copied herein may. Please could you let me know when the tender will be open so that they can decided (sic) on whether to submit or not, if you are not the party responsible for this procurement please will you redirect this to the correct party and copy me herein. . ."

[58] On 28 August 2019, Lurie wrote to Johny Douglas:

"Dear Sir
It has been bought (sic) to my attention, yesterday in fact, that the Knysna Municipality is out to tender on an office requirement, attached.
Please see email below to the previous MM Kam Chetty expressing my interest in such an enquiry. We are trying to complete the necessary information to submit our bid but have been severely restricted by time.
We are the most significant commercial owners of developed lettable real estate in Knysna and believe that given the opportunity our offer on price and BEE status would be unmatchable. This is a significant enquiry which could have a significant financial impact on the municipality. This begs the question as to why we have not been informed personally about this. It is clear and obvious that portions of the vacant mall are perfect fit for your requirements and it is not as if Knysna is such a big town/ city that this opportunity could have been missed.
Please let me know urgently what to do, the tender closes at 12 noon. . ."

[59] On 28 August 2019, at 12: 11, Susan Campbell, a municipal councillor wrote:
"Douglas is not the MM."

[60] On 28 August 2019, 12:20 Mr Lurie wrote to Susan Campbell"
"Yes I know but it's the same email address!!"

[61] On 28 August 2019, Susan Campbell wrote:
"Did you tender?"

[62] Lurie wrote on 28 August 2019, to Susan Campbell at 12:44, the following:

"No it just wasn't possible we had to submit a 35 page document with a lot of info on all of our directors with tax certificates for all of them, BEE certificates etc etc, I just could not get it all together in 1,5 days.
It really annoys me, not that we missed out but that they don't apply their minds to making sure that the process is though (sic) and fair (sic)"

[63] The Municipality asserts that there were events that led to the deviation from the normal tender processes. First, on 02 September 2020, Mr Lurie, wrote an email to Louis Scheepers of the Municipality stating the following:

"Dear Mr Scheepers
I refer to the email below. Our calculations reveal that the saving to KM, just for the 2,100m^2 that we tendered for will be in excess of R4 million over the three-year period of the lease, this does not take into account the operation savings which would be realised from operating from the mall.
It would be good to know that in these difficult times where budgets are being cut and the economy is shrinking that we are all playing our part to try and save costs.
Please feel free to discuss anything with us that could make this decision easier, such as amortising the cost of moving into rental, example.
I look forward to hearing the outcome of the evaluation committee decision."

[64] On 09 October 2020, Lurie wrote an email to a Municipal official and stated that:

"Good morning has there been any progress on this tender?"

[65] On the same day, the Manager of the Supply Chain Management responded as follows"

"Good morning Mr Lurie,
The evaluation committee sat again on the matter and will finalize their report next week Tuesday. Soon thereafter the BAC will sit and consider the matter. We anticipate to have the bid committee matters finalized on this matter by end of next week.
Regards,"

[66] The Municipality maintains that Mr Lurie, wrote an email on 10 December 2020, to Mr Kruger, the manager of supply chain management, that stated the following:

"Any news on the tender?"

[67] On 14 December 2020, Mr Kruger replied to the email of Mr Lurie, by stating the following:

"Hi Mr Lurie,
We have a meeting scheduled again this week, but I cannot promise anything. Due to the value of the rental it must be carefully considered. The "hidden" costs of moving offices and changing the space to something that will work for the municipality is also under consideration with all the spaces.
Regards"

[68] On 23 February 2021, Lurie wrote the following email to Louis Scheepers from the Municipality. The email in part reads as follows:

"Dear Mr Adonis
I refer to the email below.
We have not had a response from the municipality and did not receive any feedback on the tender at all.
I have been following the correspondence circulated by yourself with regards to the commencement of a process to identify a suitable building/s and commence a process to procure same. . ."

[69] Another email from Lurie was written to the Municipal personnel on 26 September 2023, stating the following:

"Dear Sir
Our meeting last week on Thursday has reference. We are able to accommodate the Knysna Municipal offices as follows: . . .
I would like to have more time to put a comprehensive document together for you but if you are able to get support on approving our premises I'm certain that we could flesh out a lot more detail especially on your required layouts and the costing thereof. To this end I will make our architect available to you to help with this process at no cost to yourselves.

I look forward to hearing from you."

[70] I turn first to the aspect of delay. Obviously, a delay in launching a self-review application may have prejudicial effects.

Evaluation

a. The delay

[71] In Khumalo v Member of the Executive Council for Education, KwaZulu Natal [2013] ZACC 49; 2014 (5) SA 579 (CC) *("Khumalo")*, the following was stated regarding delay in legality reviews.

> "But what do we make of the Legislature's decision to remove these time limits? Does this mean that litigants are not constrained by any requirement to act timeously? In my view, the Legislature's decision to remove the 12- month prescription period opens the actions of public functionaries in terms of the PSA to ongoing scrutiny and transparency. Bearing in mind the purpose of the Repealing Act, 29 the repeal of section 39 allows that an applicant cannot automatically be non-suited on the basis of a delay. Nevertheless, it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.
>
> In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia by seeking the redress of their departments' unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution

has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay."

[72] It must always be remembered that undue delay in launching a judicial review application is highly detrimental to good administration because public bodies require certainty, finality, and efficiency to govern effectively. When an affected party waits too long to challenge an administrative action, it paralyses the machinery of governance and compromises the rule of law. In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at para 28, the following was stated:

"In a sense, therefore, the effect of the delay is to 'validate' what would otherwise be a nullity. See *Oudekraal Estates (Pty) Ltd*, supra, para 27 at 242E-F. In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its raison d'être was said by Brand JA in Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) at para 46 to be twofold: 'First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.' Under the rubric of the second I would add considerations of pragmatism and practicality."

[73] In *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA) para 30; the following was stated:

"Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, **the fullness of the explanation,** the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other."

[74] The assertions made by Grey Elephant requires this Court to establish as to whether there was delay in launching this review application. On the onset, I would like to state that it is now well settled that a legality challenge affords the courts a wider discretion when evaluating undue delay, compared to the traditional approach under section 7 of PAJA.

[75] Notwithstanding that this is not an easy point to resolve, the delay needs to be viewed objectively. The authorities, including precedents from the Constitutional Court, state that in legality reviews the courts have a broad discretion that needs to be exercised with regard to the interest of justice.

[76] The first question to be posed in this matter is, whether or not the Municipality delayed in launching this review application and if so, the next question would be whether the delay in prosecuting the review application was unreasonable. See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (16 April 2019.

[77] In the *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* ("NICS") (121/2020) [2021] ZASCA 34; [2021] 2 All SA 700 (SCA); 2021 (4) SA 436 (SCA) (7 April 2021), provides critical guidance on delays in self-correction reviews and establishing legal principles and factors for assessing delays. In *NICS* the Supreme Court of Appeal ("SCA") advanced this jurisprudence by synthesising previous authorities, rendering its analysis highly instructive.

[78] In doing so, the SCA developed decisional law concerning the issue of delay in such cases. Hence, I find it necessary to quote extensively from *NICS* below. The

SCA, stated the following in respect of delay bringing a review. Paragraphs 34, 35, 39-46 reveal the following:

"34. It is now firmly established that self-review by organs of state are not reviews in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), but rather are legality reviews. Unlike the control period of 180 days provided for in PAJA and a court's discretion in extending that period, where the interest of justice so requires, a court dealing with a legality review has no such fixed period within which an application must be brought. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*, the Constitutional Court, with reference to prior decisions, and comparing the discretion under PAJA to the discretion to be exercised in a legality review, said the following in relation to when the time period starts to run:

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

(Emphasis added.)

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

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

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

'Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That

basis must be gleaned from the facts made available or objectively available factors.' Footnote omitted.

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

'The approach to overlooking a delay in a legality review is flexible. In Tasima I, Khampepe J made reference to the "factual, multi-factor, context-sensitive framework" expounded in Khumalo. This entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this court's power to grant a just and equitable remedy and this ought to be taken into account.'

[38] . . .

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

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

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

'[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'

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

[41] Finally, with reference to its decision in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*, where it was held that even where there was no basis to overlook an unreasonable delay, the court is nevertheless compelled to declare the State's conduct unlawful, because s 172 (1)*(a)* of the Constitution

enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution, the Constitutional Court in *Asla* recognised the tension between the delay rules and the injunction to declare conduct unlawful that conflicts with the Constitution. The Constitutional Court in *Asla* reflected on a long line of cases that held that the State must apply timeously to courts and the implication in *Gijima* that time hurdles must yield to that injunction. On this aspect the Constitutional Court in *Asla* said the following:

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

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

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

[43] The minority judgment in *Asla* (Cameron J and Froneman J with Khampepe J concurring) chose another route, reaching the same practical result. The minority considered that although the cases in which a public authority's delay in bringing self-review is so prodigiously and lamentably inexcusable are rare, they exist, and thought the case before them was one such instance. The minority postulated that in such a case there was no public interest or constitutional necessity for pronouncing on the validity of what was being challenged. The minority pointed to academic criticism against *Gijima* for having selected legality as the pathway for public authority self-review. The minority took the view that drawing a distinction between PAJA and legality self-review promoted bifurcation. They considered that *Gijima* warranted re-consideration because it departed from earlier decisions. It accepted that the case

before it was not the case to do so, not least of all because it did not have the benefit of submissions in that regard.

[44] The minority in *Asla* recognised the tension created by prior decisions, where despite not overlooking delay they had sought to 'impose a square on [a] circle' by nevertheless inquiring into the legality of the conduct by the public authority and granting a deserving subject just and equitable relief, as was done by the majority. They noted that where there was no delay a declaration of unlawfulness should invariably be made – it was the default position that accords with the principle of legality. It was an affirmation that the State was complying with its duty to correct suspected unlawful decisions, expeditiously and diligently. The minority described this as a win-win for the rule of law.

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

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

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

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

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

'When determining the unreasonableness of the delay and exercising its discretion whether to allow consideration of the review, the court must balance the seriousness of the possible illegality with the extent and unreasonableness of the delay. In the

> circumstances of this case, the delay is sufficiently more inexcusable than the possible illegality is egregious, and the balance tips against this Court's intervention.'
>
> The minority agreed that it would be 'grossly unjust' to deprive the respondent in that case of its contractual bargain and to leave it to an enrichment claim, that the municipality in that case had submitted must suffice. I pause to note that the same claim was made by the GMM in the present case."

[79] It is clear from the authorities that the court maintains the discretion to refuse the substantive relief sought on the grounds of undue delay. It may do so [refuse to grant] if it finds that granting the relief would likely cause substantial hardship, prejudice the rights of any person, or prove detrimental to good administration. It is pertinent to note, as was stated in *Khumalo,* that an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. Skweyiya J observed in *Khumalo* (supra) that this requires analysing the impugned decision and evaluating the merits of the underlying legal challenge.

[80] It is also settled that a review based on the principle of legality is not bound by a rigid or fixed timeframe and no condonation application is necessary, the court simply considers the delay.

[81] In this matter, the Municipal Council passed a resolution authorising the agreement, whereas the complaint subsequently lodged with the Public Protector originated from an outside political party. In the instant case, the Municipality asserts that it was only alerted to the unlawfulness of the impugned decision during October 2024, and that within six months from then, the Municipal Manager obtained authorisation to launch this review. It is trite that a legality review must be brought

within a reasonable time. This raises the critical question of whether the Municipality is deemed to have known about the illegality at the exact time the impugned decision was made, or only when it received external legal advice.

Was the Municipality supposed to have known about the illegality at the exact time the impugned decision was made or when the unlawful contract was concluded? [the delay]

[82] In the *Asla* matter, at para 49, the Constitutional Court confirmed that the standard for assessing delay under both PAJA and legality is whether the delay (if any) was unreasonable, with the timeframe commencing from the date the applicant became aware, or reasonably ought to have become aware, of the impugned action.

[83] The first question to determine is whether the Municipality ought to have known about the unlawfulness of the impugned decision by October 2024. Put differently, when did the proverbial clock begin to run? Crucially, a litigant cannot self-select the date on which time starts ticking. Instead, the objective facts of the case dictate exactly when the timeline was triggered.

[84] The fact that the Municipality purports to have discovered the unlawfulness of the decision only upon receipt of a legal opinion is legally irrelevant to the commencement of the delay period. The clock for launching a review is triggered by objective facts and constructive knowledge, not by the subjective date on which the Municipality chose to obtain legal counsel.

[85] In *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122 (5 October 2020), the following was stated:

> "[22] It was incumbent on the City to provide a full explanation covering the entire period of the delay. The explanation, such as it is, for the most part, is superficial and unconvincing. . .
> The procurement process commenced during September 2014. Many of the City's key personnel, who had been involved in the tender process and the conclusion of the agreements, remained in the employ of the City after the August 2016 Municipal elections. They were thus in a position (and ought) to have provided explanations for the delay.
>
> The City does not rely on a cover-up or contend that documents or information was destroyed or concealed by officials loyal to the previous administration. There is no evidence of what steps, if any, were taken in order to obtain the necessary information; on what dates and by whom such steps were taken; what sources were accessed or why any of these attempts proved unsuccessful. Nor, when, how and who allegedly did not co-operate. The City chose not to ask officials such as Mr Ngobeni or Mr Otumile to assist with their investigation. It says that it decided not to ask them for any information because the investigation was 'sensitive' and consulting with them 'may well compromise the investigation'. Those two individuals, who deposed to confirmatory affidavits in support of the appellants' case, said that they were available and willing to assist the City, but were never contacted.
>
> [24] The core contention advanced by the City is that the delay is justified because the DA only won control of the City in August 2016 and thereafter required time to investigate the alleged irregularities perpetrated under the previous ANC-controlled administration. That contention appears to have found favour with Baqwa J...
>
> [25] I cannot agree with the learned judge.
>
> [71] The objective of state self-review should be to promote open, responsive and accountable government. The conduct of the City 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, accountability and rationality and that is not legally and constitutionally unconscionable. Here, the delay is stark and the egregious conduct on the part of the City, even starker. The City has a 'higher duty to respect the law'."

[86] The *City of Tshwane* case, supra, demonstrates that that a municipality cannot use political regime change or internal administrative dysfunction to justify unreasonable delays in launching review applications. The judgment emphasises that an organ of state must provide a detailed, "full and convincing" explanation for the entire period of delay, as failure to do so, especially when institutional memory is available, violates the rule of law.

[87] On the facts of this case, it is not difficult to find that the Municipality ought to have known that the impugned decision was unlawful long before it sought legal counsel. In this matter, the illegality was born on the day the Municipal Council passed the impugned resolution.

[88] As mentioned previously and as demonstrated by the authorities cited above, our courts have repeatedly held that a much higher standard of accountability is required of organs of state. It is well-established that an organ of state may only in truly exceptional circumstances plead ignorance of an illegality arising directly from its highest decision-making structures. In this matter, the Municipality's claim of ignorance is entirely unsustainable. The patent nature of the illegality in this matter, is demonstrated by the fact that a political party immediately appreciated the unlawfulness of the decision and promptly referred the matter to the Public Protector.

[89] The apt question that then arises is whether the delay is undue and if so whether it can be overlooked. This question is relevant here because an unreasonable delay can legally validate an otherwise invalid act.

Is the delay adequately explained?

[90] The authorities are clear that once the court finds that a delay exists, the question that arises is whether: (1) the delay was adequately explained; (2) the explanation covers the entirety of the delay; and (3) it is justified. If these three questions are answered in the affirmative, then the delay is deemed reasonable, allowing this Court to consider the merits of the review.

[91] In this matter, the Municipality has proffered no explanation for the delay spanning from 2023, the date upon which it objectively ought to have known of the illegality. Consequently, this Court lacks the necessary factual foundation to find that the delay was reasonable.

[92] A reasonable organ of state in the Municipality's position, exercising standard diligence would have discovered the illegality as far back as 2023. For that matter, it is now well settled that a municipality cannot claim timely ignorance of the facts where a decision was taken by its own functionaries.

[93] In *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC), the Constitutional Court rejected the notion that an organ of state can claim timely ignorance of decisions taken by its own functionaries, affirming that a municipality cannot separate itself into different factions to escape the consequences of its internal actions.

[94] Council decisions are primarily shaped or driven by immediate political agendas rather than an impartial application of professional expertise, resulting in actions motivated by political expediency instead of strict adherence to legal or institutional precedent. Consequently, because these decisions may reflect subjective political agendas rather than objective technical proficiency, they do not warrant a heightened degree of deference on review.

[95] Flowing from this principle, a subsequent change in the political control of the Council or a turnover of Municipal Managers does not excuse or reset the period of delay. The applicant before this Court remains the Municipality as a continuous legal entity; consequently, shifting political administrations or administrative personnel cannot be used to bypass the strict requirements of finality and certainty in administrative law.

[96] Furthermore, the Municipality's own assertions serve to implicate it directly to the illegality of the agreement and destroy **any remaining basis for condonation**. The Municipality contends that the representatives of Grey Elephant were fully aware that an open tender process was a mandatory prerequisite for the lease agreement. See paragraph 17 of this judgment. Of course, this begs the question of, if this legal requirement was so glaringly obvious to an external private party, it must, a fortiori, have been immediately apparent to the Municipality itself. By its own admissions, the Municipality did not require an extended period or a forensic investigation to discover the illegality; it was a patent defect from the outset. Its failure to act timeously from 2023 onwards, in the face of an illegality it objectively [and likely subjectively] knew of,

constitutes the very type of supine inaction and egregious conduct that disentitles an organ of state from judicial condonation.

[97] Similarly, Lurie's email dated 26 September 2023, referencing a direct meeting between the parties; in my mind, conclusively establishes that the Municipality was actively seized with this matter in 2023. By initiating these negotiations and maintaining continuous custody of the entire Supply Chain Management paper trail, the Municipality objectively possessed full knowledge of the material facts at that time. Its absolute failure to provide an adequate, all-inclusive explanation for its delay from September 2023 onwards remains fatal to its application for condonation.

[98] In *Aurecon,* the Constitutional Court stated the following in respect of the City seeking to claim timely ignorance of the decision taken by its functionaries at paras 41-43:

> "[41] On a textual level, the City's contention confuses two discrete concepts: *reasons* and *irregularities*. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.
> [42] On a purposive level, the City's interpretation would give rise to undesirable outcomes. As the SCA pointed out, the City's interpretation would—
>
> "automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to [Aurecon] and the public interest in the finality of administrative decisions and the exercise of administrative functions.

> [43] In my view, the City cannot suggest that it "was not aware of the reasons for the decision prior to receipt of the [Ernst & Young] report". The decision was taken by the BAC which approved the BEC's report without qualification. The resolution of the BAC records that it awarded the tender to Aurecon "for the reasons set out in the [BEC's] report". Since the BEC's report served before the BAC, the BAC must have been aware of those reasons when it made its decision."

[99] Back to the instant case, section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. To this end, where an organ of state fails to provide a full and satisfactory explanation for its delay, it is exceptionally difficult for a court to overlook it. The delay spans from 26 October 2023 to October 2024, when the Municipality received legal opinion.

[100] Grey Elephant asserts that the Municipality failed to provide explanation for the delay catering for the entire period. Regarding the explanation for the delay the Municipality chose to limit themselves to the period of October 2024.

[101] Accordingly, the Municipality has failed to explain the delay between 26 October 2023 to October 2024, in launching these proceedings. This is because, while the Municipality claims it only became aware of the illegality upon obtaining a legal opinion, the objective evidence establishes that the Municipality ought to have had knowledge of the illegality from the moment the decision was taken. Consequently, there is a total vacuum in explaining why the Municipality remained blissfully unaware of the illegality of its own decision between 26 October2023 and October 2024. In this regard, the Constitutional Court in *Khumalo* (supra) at para 51 dealt with a failure to proffer an explanation. In *Khumalo* the Constitutional Court emphasised that when an organ of state fails to account for an unreasonable delay, it suggests a lack of valid

reasons. The Constitutional Court noted that such unexplained, serious delay is particularly unacceptable given the state's constitutional obligation to act expeditiously and its access to resources for identifying unlawful decisions.as follows:

[102] As it was stated in *Asla* [referred to in *NICS* supra], surely, the Municipality cannot escape the requirement of launching a self-review application within a reasonable time by claiming it only discovered the illegality after consulting legal counsel. It cannot, however, escape observation that a much higher standard is required of organs of state. Hence, the authorities clearly indicate that organs of state cannot hide behind legal advice in trying to avoid a finding of delay in prosecuting a review.

[103] In order for the court to determine the existence of undue delay; the common-law approach to the undue delay rule requires a two-prong analysis. The first stage is whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be overlooked [condoned].

[104] On the facts of the instant case, however, I am in no doubt whatsoever that an unreasonable delay in the prosecution of this review occurred.

[105] The question that remains for determination is whether, in the specific circumstances of this matter, the Municipality's unreasonable delay ought to be overlooked in the interests of justice.

Did the Municipality unreasonably delay in launching the application?

[106] It is undisputed that before passing the resolution and concluding the lease agreement, the Municipality had already undergone two procurement processes for office space.

[107] In this matter, it is common cause that the Municipal Council passed a resolution to enter into the impugned lease agreement. It is further common cause that the Municipal Manager was authorised to approve a yearly deviation from the Municipality's Supply Chain Management Policy, based on the purported existence of 'exceptional circumstances' for the leasing of the office space for three years.

[108] It is undisputed that the Municipal Manager who oversaw and was serving at the time of the impugned resolution and the resultant lease agreement has since resigned. Furthermore, it is common cause that the impugned resolution was passed narrowly by 11 votes to 9, and that the impugned lease agreement was not an interim agreement, nor did it foreshadow any future competitive bidding process. As such, it stood as a stand-alone contract.

[109] In addition, the evidence shows that Lurie and the previous Municipal Manager, Mr. Sebola, met on 21 September 2023, where direct discussions took place relating to the leasing of Grey Elephant's office space to the Municipality. Despite these objective touchpoints, the Municipality failed to take immediate legal action.

[110] In *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC), the Constitutional Court grappled with the intersection of legality and certainty where an organ of state seeks to escape its own choices, stating:

> "[33] ...The Constitution provides that, when deciding a constitutional matter within its power, a court "must declare that any law or conduct that is inconsistent with [it] is invalid to the extent of its inconsistency"... [but] a court deciding a constitutional matter "may make any order that is just and equitable.
> [34] ...The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent...
> [41] The import of Oudekraal and Kirland was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings... Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside."

[111] As *Merafong* dictates, the government cannot simply dilly-dally when challenging a suspect decision. It must formally apply to a court to set aside the defective decision so that the judiciary can properly weigh the factual effects on those subject to it, alongside the state's delay in making the challenge.

[112] Consequently, the Municipality's conduct falls short of the "higher duty to respect the law" imposed upon organs of state. To overlook a delay so stark and inexcused would undermine the core principles of responsiveness, reliance, and accountability that govern public administration. I thus find that the delay by the Municipality was unreasonable.

Can the Unreasonable Delay be Overlooked in the Interests of Justice?

[113] Having found that the Municipality's delay is stark, egregious, and completely unexcused, the inquiry would ordinarily end, and the application would be dismissed without further consideration. However, the jurisprudence of the Constitutional Court, most notably articulated in *Asla*, dictates that a finding of unreasonable delay does not automatically cloister a potentially unlawful administrative act from judicial review. Under the second stage of the delay analysis, this Court retains a constitutional duty to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. I am therefore compelled to look at the merits of the review, not to vindicate the Municipality's tardy conduct, but to evaluate whether the underlying contract is so patently illegal that the interests of justice and the principle of legality require this Court to overlook the delay and address the merits. It is to that substantive inquiry concerning the legality of the Council resolution and the resultant lease agreement that I now turn.

[114] The core substantive issue in this review is whether the Municipality was constitutionally obliged to follow a competitive bidding process, or whether it was legally entitled to bypass those systems by executing a direct lease. Section 217(1) of the Constitution dictates that when an organ of state in the local sphere of government procures goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective.

[115] The statutory framework and procurement principles raised in *Chief Executive Officer of the South African Social Security Agency N.O. v Cash Paymaster Services* (Pty) Ltd [2011] ZASCA are directly applicable to the structural deviations in the instant case. In *Cash Paymaster*, the SCA clarified the strict boundaries governing an

accounting officer's power to dispense with competitive procurement processes, holding at paragraph 21:

> "The regulation permits an accounting officer or the chief executive officer to deviate from a competitive process subject to conditions... First, there must be rational reasons for the decision. That is a material requirement. Second, the reasons have to be recorded. That is a formal requirement. The basis for these requirements is obvious... The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process."

[116] Applying this standard to the common cause facts, the Municipality's departure from standard procurement protocols lacks the mandatory material foundation of rationality. It is undisputed that before passing the resolution and concluding the lease agreement, the Municipality had already undergone two separate competitive procurement processes for office space.

[117] Despite this, the Municipal Council passed a resolution authorising the Municipal Manager to approve a consecutive, three-year annual deviation from the Municipality's Supply Chain Management Policy, based on the purported existence of 'exceptional circumstances. The Municipal Manager who oversaw this resolution and executed the resulting standalone agreement has since resigned, and the resolution itself was passed by a narrow margin of 11 votes to 9. Furthermore, it is common cause that Lurie, and the previous Municipal Manager, Mr. Sebola, met privately on 21 September 2023 to discuss these office space requirements.

[118] According to the Municipality's own version, no rational or objective basis existed to justify a total deviation from a competitive tender process. In actual fact, the

Municipality now concedes that every step taken toward the conclusion of the impugned lease agreement was unlawful, procedurally flawed, and invalid.

[119] Grey Elephant does not seriously dispute that the Municipality lacked a rational basis to bypass a competitive tender. Instead, Grey Elephant raises a defence regarding motives and reliance. They contend that they contracted with the Municipality in good faith and was entitled to assume internal legal formalities were met. They further assert that the Municipality's pursuit of this self-review is a mere pretext to evade its ongoing rental obligations.

[120] A similar argument regarding an ulterior commercial motive was addressed in *Cash Paymaster* (at para 26), where the Court noted a "lingering impression" that the litigant's motive in challenging an agreement was driven by a desire to protect its own financial position rather than a bona fide concern for regulatory compliance.

[121] However, in a state self-review, a private party's commercial reliance cannot cure a patent, irrational subversion of Section 217 of the Constitution. Because the recorded reasons for the three-year deviation fail the material test of rationality established in *Cash Paymaster*. In the present matter, the Council resolution and the resultant lease agreement are objectively unlawful.

[122] This Court is aware, of course, that having found that the Council resolution and the subsequent lease agreement are substantively unlawful and invalid under Section 217 of the Constitution, this Court is bound by the mandatory injunction of Section 172(1)(a) to declare the conduct and the agreement invalid. This much was conceded

in the Municipality's heads of argument that once a ground of review is established, a court has no option but to declare the impugned action invalid.

[123] In the circumstances, it would not be in the interest of justice, to overlook the unreasonable delay.

The Remedy And Just and Equitable Relief

[124] The Constitutional Court clarified in *Merafong and AllPay*, that there is a clear distinction between a declaration of constitutional invalidity and the just and equitable remedy that must follow it. When a court encounters a situation of a clear illegal impugned decision, it is the duty of the trial judge to determine what fairness demands. Fortunately, the law is a pragmatic blend of logic and experience; it permits this Court to exercise broad remedial powers to ameliorate the harsh consequences of invalidity where factual certainty and fairness demand it.

The general principles emerging from the case law on the issue of what fairness demands have been summarised in a plethora of cases. I turn, in particular, to the principles stated in *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another 2023 (5) SA 601 (SCA). In Phomella*, the SCA clarified that a careful and contextual reading of AllPay shows that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract. This approach, allowing a party to retain payments, and thus to benefit under an unlawful contract, has been echoed in a number of matters. One such example is found in Buffalo City, where the majority in the Constitutional Court held:

> '...I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to [which] the respondent might have been entitled.

> It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.'

[125] In *Phomella*, the SCA emphasised that the contractor in *Buffalo City* had completed its performance under the agreement. As such, the Constitutional Court appropriately held that the contractor was entitled to receive payment for the work it had performed.

[126] One final point bears mentioning. It has been strenuously submitted on the Municipality's behalf that it has been demonstrated that Grey Elephant was not an innocent tenderer but complicit in wrongdoing. So, the argument continues, it follows from the principle enunciated by the SCA in *Central Energy Fund*, that Grey Elephant is not only precluded from profiting from the unlawful lease agreement but must also be required to suffer losses. This, of course, is a serious allegation, which if true is quite relevant to the determination of this Court.

[127] To my mind, this contention plainly overlooks the far-reaching effects of the conduct by the Municipality's own personnel including its most senior officials. The evidence in this matter evinces that when Lurie dealt with the Municipality's personnel he did not do so nicodemously. He was entirely transparent about his dealings and the meetings he attended. There was absolutely no attempt on his part to hide his communications with the Municipality's staff. This is plainly not the conduct of a party that acted in bad faith or one that can be held responsible for the resulting unlawfulness. The email exchanges present fairly, in all material respects, what Grey Elephant was discussing with the Municipality's officials.

[128] Beyond that, there is no other evidence save for the affidavit of Ms Campbell, stating that she repeatedly told Lurie that any conclusion of the lease agreement between the Municipality and Grey Elephant that was not preceded by an open and transparent tender process would be unlawful. This begs the question as to why Ms Campbell, a municipal official, would whisper warnings to Lurie rather than notifying the Municipality, where she holds a statutory obligation to do so. Furthermore, the circumstances surrounding these warnings remain entirely unclear. The email exchanges between Ms Campbell and Lurie do not bear out this point. Aside from the claim of warning there is nothing to create a distinct pattern of complicity. As such, it is difficult to find that Grey Elephant was complicit. Certainly, a mere suspicion and conjecture by a Court cannot suffice as proof.

[129] In the circumstances of this case, it is difficult to see on what basis the Municipality seriously avers that Lurie was complicit in the unlawful act committed on 26 October 2023. What is worse, a fair reading of the email exchange between Mr Lurie and the municipal staff compels the conclusion that Lurie was not an accomplice, but rather a victim of this illegality.

[130] In fact, it is a striking feature of this case that, at the time the Municipality was drafting the papers to launch this application, the Municipality had still not vacated the leased premises, and Grey Elephant had been forced to issue an application for arrear rental which remains unpaid. The Municipality's ongoing beneficial occupation of the property, paired with its refusal to pay rental under the guise of constitutional invalidity, is a material consideration that strongly influences the formulation of a just and equitable remedy.

[131] Having rendered complete performance while the Municipality enjoyed beneficial occupation of the premises, Grey Elephant cannot be deprived of its accrued rights. Fairness, and established precedent dictate that Grey Elephant is fundamentally entitled to financial repayment, including the immediate payment of all outstanding arrear rentals.

[132] In paragraph 3321-333 of the Answering Affidavit, it is asserted on Grey Elephant's behalf that:

> "Given the conduct of the Municipality . . . in the event that this Court finds that the lease was concluded unlawfully it would be just and equitable for the Court to grant an order:
> Declaring the lease and the resolution invalid:
> Directing that the order of invalidity operates prospectively only from the date of judgment; and
> Directing the Municipality to make payment of the following amounts in terms of the lease:
>
> - R11 461 152.55 in respect of unpaid rental together with interest at the rate of at 2 % (two percent) compounded per month or part thereof from due date of payment to date of final payment.
> - R14 348 091.44 in respect of unpaid tenant installation costs together with interest at the rate of at 2 % (two percent) compounded per month or part thereof from due date of payment to date of final payment."

[133] On the facts of the instant case, however, I am in no doubt whatsoever that the submissions made on behalf of Grey Elephant are to be preferred. The evidence also bears this finding. The contemporaneous correspondence conclusively demonstrated that Grey Elephant acted in good faith, repeatedly demanding open competitive bidding processes and relying entirely on the explicit assurances of senior Supply Chain Management officials.

[134] The Municipality's conduct is a critical factor for this Court to consider when exercising its discretion regarding a remedy. In fashioning this relief, the Court cannot ignore or overlook the Municipality's egregious, year-long delay and its unconscionable attempt to paint Grey Elephant as a mala fide, complicit actor. It is particularly egregious for a wrongdoer to shift blame onto an innocent party that is equally victimised by unlawful conduct originating from the Municipality's highest executive tier.

[135] It is, I think, worthwhile pausing at this point in order to examine the implications of the Municipality conduct. For the Municipality to permit a private entity to invest capital, allocate resources, and alter its commercial position based on an active Council resolution, only to attempt to escape its financial rental obligations years later thorough a self-review, is legally and constitutionally unconscionable. Grey Elephant has performed under the contract. Surely, Grey Elephant as an innocent lessor is entitled to payment for the performance done.

[136] The principle to be deduced from the authorities regarding the distinction between a party that is complicit and one that is innocent is succinctly stated by Schippers JA in *Central Energy Fund SOC Ltd and Another v Venus Rays Trade 220 (Pty) Ltd and Others* [2022] ZASCA 54; 2022 (5) SA 56 (SCA) at paras 41–42 as follows:

> "The second guiding principle is the 'no-profit-no-loss' principle which the Court articulated as follows:
> 'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.'
> [42] The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. The category into which a party falls has a significant impact on the

appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses. On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract."

Conclusion

[137] Regarding the unpaid rental amounts, consumption charges, and the applicable interest rates, the papers do not clearly reveal the precise amounts outstanding. Consequently, this Court cannot make a definitive determination on quantum without further evidence. In the circumstances, it would be just and equitable to make the following order.

[138] In the result, the following order is made:

1. The Municipal Council resolution dated 26 October 2023, to approve the conclusion of a lease agreement with the Respondent without undertaking a competitive and open tender process ("the impugned resolution") is declared unconstitutional, unlawful and invalid.
2. The conclusion of the lease agreement between the Applicant and the Respondent on 12 December 2023 and the resultant lease agreement ("the impugned lease agreement") is declared unconstitutional, unlawful and invalid.
3. The impugned resolution and the impugned lease agreement are reviewed and set aside.

4. It is just and equitable that the Applicant be ordered to pay unpaid rental amounts and consumption charges for its period of occupation commencing on 1 May 2024 and ceasing on 31 July 2025.

4.1 The unpaid rental amounts are to be calculated on 1268 square metres, the actual space occupied by the Applicant during the period of its occupation. The exact quantum is to be calculated by the Respondent. Failing agreement between the parties on the final amount within 14 days of this order, the quantum shall be determined by an independent auditor or referee jointly appointed by the parties, or, failing such agreement on the appointment, by the Chairperson of the South African Institute of Chartered Accountants (SAICA), whose determination shall be final and binding, with the costs of such referee to be borne equally by the parties.

4.2 Consumption charges (water and electricity) are to be calculated on the Applicant's actual consumption during the period of its occupation. On this basis, the sum of the consumption charges is an amount calculated and proven by the Respondent.

4.3 Interest on the unpaid rental amounts and consumption charges shall be calculated at the rate prescribed in section 1 of the Prescribed Rate of Interest Act 55 of 1975 from date of judgment to the date of payment.

4.4 The Applicant shall pay the unpaid tenant installation costs as calculated by the Respondent. Failing agreement between the parties on the final amount within 14 days of this order, the quantum shall be determined by an independent quantity surveyor jointly appointed by the parties, or, failing agreement on the appointment, by the President of the Association of South

African Quantity Surveyors (ASAQS), whose determination shall be final and binding;

4.5 The Applicant to pay the costs of the application on Scale C, which costs include the costs of two counsel, one of whom is senior counsel.

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JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicant	:	Advocate TG Madonsela SC
		Advocate M Nombewu
Instructed by	:	Noko Maimela Attorneys
		Mr N Maake
Counsel for Respondent	:	Advocate M Adhikari
		Advocate M Ebrahim
Instructed by	:	A Chimes van Wyk Inc.
		Mr D Curtis