REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2023/096157

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

10 June 2026 [redacted]
DATE SIGNATURE

In the matter between:

BLOEMFONTEIN CORRECTIONAL CONTRACTS (PTY) LTD	**APPLICANT**
AND	
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**FIRST RESPONDENT**
NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES	**SECOND RESPONDENT**
G4S CORRECTIONAL SERVICES (BLOEMFONTEIN) (RF) (PTY) LTD	**THIRD RESPONDENT**

JUDGMENT

HINRICHSEN AJ

Introduction

[1] This is an application to review and set aside the decision taken by the National Commissioner of the Department of Correctional Services ("*the National Commissioner*") on 30 March 2023 to invoke section 112 of the Correctional Services Act[1] ("*the Act*") and to appoint a temporary manager as the head of the Mangaung Correctional Centre, outside Bloemfontein ("*the prison*") ("*the section 112 decision*").

[2] The review is brought under the Promotion of Administrative Justice Act[2] ("*PAJA*"). In addition to the setting aside of the section 112 decision, the applicant seeks consequential just and equitable relief under section 8 of PAJA, in particular repayment of amounts credited to the National Commissioner, under protest, in respect of costs said to have been incurred by the Department of Correctional Services ("*the Department*") in consequence of the section 112 decision.

[3] The application is supported, on substantially the same grounds, by the third respondent, G4S Correctional Services (Bloemfontein) (RF) (Pty) Ltd ("*G4S*"). G4S has been the applicant's operating subcontractor of the prison since the prison commenced operations in 2000, and is responsible for the day-to-day management and the employment of custodial personnel. G4S has filed an answering affidavit in support of the review, delivered its own heads of argument, and was represented at the hearing by two counsel.

[4] The first and second respondents (collectively "*the respondents*") oppose the review. They contend, first, that the section 112 decision was not administrative action within the meaning of PAJA but the exercise of a contractual power under clause 55 of the Concession Agreement. Alternatively, they contend that, if the decision was administrative action, it was either procedurally fair or amounted to a reasonable and justifiable departure from the requirements of sections 3 and 4 of PAJA. The respondents also raise five points *in limine* and seek condonation for the late filing of their answering affidavit.

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1 Act 111 of 1998

2 Act 3 of 2000

The parties

[5] The applicant is a South African company incorporated in 2000 for the specific purpose of entering into a public-private partnership with the Republic of South Africa under which the prison would be designed, constructed, financed and operated. On 24 March 2000 the applicant and the Republic entered into a written Concession Agreement, a contract as contemplated by section 103 of the Act.

[6] The first respondent is the Minister of Justice and Correctional Services ("*the Minister*"). The second respondent is the National Commissioner of the Department of Correctional Services. The Act assigns the concessioning power to the Minister and the emergency power at a public-private partnership correctional centre to the National Commissioner. It is the National Commissioner who deposed to the respondents' answering affidavit.

[7] The third respondent, G4S, is the operating subcontractor to which the applicant has, since 2000, subcontracted its operational obligations at the prison. The prison is staffed by more than 500 G4S employees and holds approximately 3 000 inmates. G4S has also concluded a direct agreement with the Minister and the applicant under which G4S warranted to the Minister that it would comply with the subcontract. G4S supports the relief sought.

Background and common cause facts

[8] The background to the application, and the facts on which it falls to be determined, are largely common cause or have not been properly placed in dispute. They are these.

[9] The prison is a large public-private partnership correctional centre operated under a concession contract sanctioned by the Act. On 3 May 2022 G4S reported to the Department that the occupant of a single cell at the prison, Mr Thabo Bester ("*Mr Bester*"), had died by suicide by setting fire to his cell. The South African Police Service ("*SAPS*") attended the scene, removed the badly

burned corpse from the locked cell and opened an inquest docket. The death was initially treated as a suicide.

[10] The post-mortem conducted the next day, on 4 May 2022, concluded that the cause of death was blunt force trauma to the head, including a skull fracture, and that the corpse showed no signs of smoke inhalation in the lungs. During May and June 2022 the SAPS converted the inquest docket to a homicide docket on the strength of the post-mortem findings, and on 6 June 2022 G4S informed the controller of the conversion. On 1 July 2022 DNA testing revealed no match between the corpse and Mr Bester's biological mother. It was then clear that the corpse was not that of Mr Bester, and that he had escaped, in all probability by contriving to have another body substituted for his own.

[11] These facts were known to the Department, to the controller at the prison and to the National Commissioner from July 2022. Between May and November 2022 the controller conducted an inquiry into the escape, culminating in a written controller's investigation report dated 22 November 2022. The report concluded that Mr Bester had escaped and that the applicant had breached the Concession Agreement, and recommended the imposition of contractual penalties under Schedule M of the Concession Agreement. The applicant paid the Schedule M penalty in respect of the escape, in the amount of R876 637.14. That fact is common cause.

[12] During November/December 2022 a report of the Judicial Inspectorate for Correctional Services ("*JICS*"), indicating that Mr Bester had not died but had escaped, was leaked to the national media. The National Commissioner took no steps under section 112 of the Act at that time, nor upon completion of the controller's investigation report in November 2022.

[13] On 12 January 2023 the Department for the first time reported the matter to the SAPS as an escape rather than a suicide. As the Public Protector observed:

> *"Although the Department was informed of the escape by the SAPS during the June 2022 meeting and by JICS in August 2022,*

it took no less than six months for the Department to report the case as one of escape. Furthermore, it took the Department approximately 55 calendar days post its investigation report dated 18 June 2022 to report the matter to the SAPS on 12 January 2023."

[14] During February and March 2023 the escape became the subject of extensive media attention. On 28 March 2023 the National Commissioner prepared a memorandum to the Minister (annexure SA-1 to the supplementary founding affidavit) ("*the memorandum*"), headed: "*Update the Honourable Minister on continuous work in relation to the recommendations of the investigation report of the escape of offender Thabo Bester*".

[15] On 30 March 2023 the National Commissioner took the section 112 decision and issued the section 112 notice appointing Mr Mashabathaga Pas as temporary manager to take operational control of the prison from the applicant and G4S as operator. The notice reads:

"1. This serves as a notice to appoint Mr Mashabathaga Pas as the temporary manager at Mangaung Correctional Centre to act as the head of the Correctional Centre in terms of section 112 of the Correctional Services Act 111 of 1998, as amended ("CSA") from 30 March 2023 until further notice, because the Director has lost effective control of the Public-Private Partnership Correctional Centre and it is necessary in the interest of safety and security to take control of the Correctional Centre.

2. During the period of appointment above, Mr Mashabathaga will be performing the functions of the Director of the Mangaung Correctional Centre as provided for in section 112(c)(i) of the CSA.

3. The contractor is reminded that the provisions of section 112(c)(ii) of the CSA will apply."

[16] It is common cause that neither the applicant nor G4S was given prior notice of the proposed invocation of section 112, or any opportunity to make representations, before the section 112 decision was taken.

[17] Simultaneously the National Commissioner issued a media statement that included the following: "*I have decided to invoke section 112 of the Correctional Services Act, read with clause 55 of the concession contract. This is a necessary remedy following this embarrassing incident which has undermined the authority of the state*."

[18] From 28 March 2023 the Department demanded that the applicant credit amounts said to represent the costs of the section 112 intervention. The applicant issued those credits under protest and without admission of liability. The total of the credits for the period 28 March 2023 to 31 July 2023 is R1 716 479.07.

[19] Since 30 March 2023 the temporary manager has been in position at the prison together with three assistants. The protocols governing the running of the prison have not been changed. Day-to-day operations are undertaken by G4S personnel under the supervision of the temporary manager. More than two and a half years later, the temporary manager remains in place.

Operation of the prison

[20] Certain further facts concerning the operational state of the prison are common cause and bear emphasis, since they form part of the factual record on which the rationality of the section 112 decision must be tested.

[21] From the commencement of operations in 2000 to 3 May 2022 there had been only one prison escape from the prison: a 2002 incident attributable to a flaw in the design of the prison, in which three of the five escapees were apprehended on site, one was rearrested and one was killed by the SAPS. The incident bears no similarity to the Bester escape. By comparison, the Department reported the

escape of 515 inmates from Department-run prisons over the period 2013 to 2023.

[22] In 2021/2022 the JICS rated the prison "*GOOD*". This is the highest available rating, accorded to only seven of the 39 prisons evaluated. The Department conducted regular inspections of the prison. In the years preceding 30 March 2023 none of the controller, the Commissioner or the Department raised any concern regarding the director's loss of effective control or any necessity, in the interest of safety and security, to take control.

[23] During the period from 3 May 2022[3] to 30 March 2023[4] the prison continued to function. The Department's own written representation to the Parliamentary Portfolio Committee, dated 4 April 2023, records that no significant difference in security incidents had been registered over the period 2017 to 2023; that the statistics on assaults from 2022 were lower than those of the previous five years; and that the "*damage to property*" was showing a downward trend.

[24] The Department conducted a routine inspection at the prison from 9 to 20 May 2022, the Monday following the Bester escape, and that inspection did not result in the invocation of section 112. No unrest was recorded among the inmates; no imminent threat of further escape was identified; the inmates were settled.

[25] G4S, for its part, conducted an internal investigation following the discovery of the burnt corpse, dismissed nine employees implicated in the escape, and implemented a series of operational measures, including revised laptop protocols, new and upgraded camera systems, new staff rotation protocols, lifestyle audits, the locking of the CCR door, and a number of other initiatives.

[26] After the appointment of the temporary manager on 30 March 2023, the day-to-day operations of the prison continued as before. The temporary manager

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[3] The date of the Bester escape

[4] The date of the Section 112 decision

did not alter the policies, the protocols or the operational regime of the prison. The respondents annexed to their answering affidavit a table of changes said to have been effected after 30 March 2023. A line-by-line consideration of that table shows that the majority of the entries are continuations of policies and practices already in place under G4S, and that the remainder represents steps taken by the Department to fulfil its own pre-existing obligations under the Concession Agreement.

[27] On the record before this court the temporary manager has not made the prison safer, brought greater control to its management, or effected any operational change of substance.

Issues for determination

[28] The issues that fall for determination are:

a. whether the respondents' application for condonation of the late filing of their answering affidavit should be granted and, if so, on what basis as to costs;

b. whether the five points in limine raised by the respondents, namely: the applicant's failure to request reasons under section 5 of PAJA; the applicant's failure to utilise the Promotion of Access to Information Act[5] ("*PAIA*"); the applicant's non-compliance with the 180-day limit in section 7(1) of PAJA; the applicant's non-exhaustion of the internal remedies under section 7(2) of PAJA; and the applicant's misjoinder of G4S should be upheld;

c. whether the section 112 decision constituted administrative action for the purposes of PAJA, or, as the respondents contend, the exercise of a contractual power under clause 55 of the Concession Agreement;

[5] Act 2 of 2000

d. whether the jurisdictional facts prescribed by section 112(1) of the Act were present at the time the National Commissioner exercised the power;

e. whether the National Commissioner afforded the applicant and G4S procedurally fair treatment under sections 3 and 4 of PAJA, or, alternatively, whether any departure from those requirements was reasonable and justifiable within the meaning of sections 3(4) and 4(4);

f. whether the section 112 decision was taken for a purpose not authorised by the Act, on the basis of irrelevant considerations or the exclusion of relevant considerations, or for an ulterior purpose;

g. whether the decision was rationally connected to the purpose of the empowering provision, to the information before the Commissioner, or to the reasons given; and

h. whether, if the decision falls to be reviewed and set aside, the court should order restitution of the R1 716 479.07 credited under protest, and costs, and on what scale.

The statutory framework

[29] The statutory framework that bears on the dispute is as follows:

a. Section 103 of the Act empowers the Minister to enter into a contract with any party to design, construct, finance and operate any correctional centre established in terms of section 5 of the Act. The Concession Agreement is such an agreement.

b. Section 104 provides that the contractor must contribute to a just, peaceful and safe society by enforcing the sentences of the courts, detaining sentenced offenders in safe custody while ensuring their

human dignity, and promoting their social responsibility and human development.

c. Under section 105 the National Commissioner must appoint a controller for every public-private partnership correctional centre. The controller is an employee of the Department. Under section 106 the controller monitors the daily operations of the centre and reports to the National Commissioner.

d. Section 107 obliges the contractor, with the prior approval of the National Commissioner, to appoint a director to serve as the head of the centre. Section 108 places operational responsibilities on the director, who has (subject to statute and the Concession Agreement) the powers, duties and functions of the head of a correctional centre.

e. Section 109 empowers the contractor to appoint custody officials to perform custodial duties. They have the powers and duties of correctional officers, save as restricted by the Act, regulations or the Concession Agreement.

f. Section 112, which lies at the heart of this review, empowers the National Commissioner, in consultation with the Minister, in certain circumstances to appoint a temporary manager to act as the head of the centre and to replace custody officials with correctional officials. The provision is set out in full below.

The respondents' condonation application

[30] The application was issued on 22 September 2023. The respondents served a notice of intention to oppose on 16 October 2023, filed the record under Rule 53 on 2 November 2023, and the applicant filed the supplementary affidavit under Rule 53(4) on 16 November 2023. G4S filed its answering affidavit in support of the application on 21 December 2023.

[31] By 27 February 2024 the applicant had not received the respondents' answering affidavit and set the application down for hearing on 14 August 2024 on an unopposed basis. On 14 August 2024 the application served before Matsemela J. It was postponed *sine die* and the respondents were ordered to pay the wasted costs occasioned by the postponement. On 18 November 2024 the respondents filed their answering affidavit, 307 days after it was due on 16 January 2024.

[32] The approach to condonation is trite. In *Uitenhage Transitional Local Council v South African Revenue Services*[6] the Supreme Court of Appeal emphasised that an applicant for condonation must furnish a full, detailed and accurate account of the causes of the delay and their effects, so that the court is placed in a position to assess the conduct and motives of the applicant.

[33] The Constitutional Court in *Baron v Claytile (Pty) Ltd*[7] confirmed that it may be in the interest of justice to condone the late filing of an answering affidavit, having regard to the extent of the delay, the explanation and effect of the delay, and the importance of the issues to be raised.

[34] Measured against those criteria the respondents' case for condonation is weak. The delay of some 307 court days is extraordinary. The respondents' explanation, stripped bare, is confined to a few short paragraphs that advert in general terms to the need to consult officials, the reallocation of the matter between State Attorneys, and the inevitable difficulty of assembling the record. The explanation is inadequate. The prospects of success, to which I turn in detail below, are against the respondents. Ordinarily the cumulative weight of a lengthy and inadequately explained delay, and weak prospects on the merits, would count decisively against the grant of condonation.

[35] Against those factors, however, weigh the public importance of the matter, the substantial public law issues it raises, and the consideration that the Minister

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6 2004 (1) SA 292 (SCA)

7 2017 (5) SA 329 (CC)

and the National Commissioner ought, so far as reasonably possible, to be heard on the merits. In a matter of this importance it is in the interest of justice that the court has before it the respondents' full version and considers all the facts. Balancing all the relevant considerations, condonation is granted and the answering affidavit is received and considered.

[36] The respondents' remissness has, however, imposed unnecessary costs on the applicant and G4S in the bringing of the condonation application itself. Those costs must be borne by the first and second respondents.

Points in limine

The failure to request reasons under section 5 of PAJA

[37] The respondents contend that the applicant and G4S did not request written reasons for the section 112 decision under section 5 of PAJA, and that the review is, for that reason, incompetent or premature. Section 5(1) provides:

> *"Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date upon which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action."*

[38] The legislature's use of the word "*may*" is decisive. Section 5 confers a right; it does not impose an obligation, and does not erect a precondition to the institution of review proceedings. A litigant aggrieved by administrative action is entitled to elect whether to invoke section 5, or to proceed directly to review under section 6.

[39] That construction is settled. In *Body Corporate of Argyle Green v Appeal Authority, City of Johannesburg and Others*[8] the court held that, although reasons are fundamental to administrative justice and an important component of procedural fairness, the requesting and giving of reasons does not constitute an internal remedy *per se*, because the provision of reasons does nothing to diminish the effect of the decision for which they are sought.

[40] The court in *Seruoe v Speaker, Free State Provincial Legislature*[9] reached the same conclusion, holding that section 5 is permissive and that "*requesting reasons for the impugned decision is not a prerequisite for judicial review proceedings*".[10]

[41] In any event, the reasons are to be found in the Department's internal memorandum which was included in the Rule 53 record. The applicant and G4S have engaged with those reasons. The absence of a formal section 5 request has caused no prejudice and does not deprive this court of jurisdiction. The point fails.

The alleged failure to utilise PAIA

[42] The respondents next contend that the applicant ought to have utilised PAIA to obtain the record before launching review proceedings. The contention is misconceived. Rule 53 of the Uniform Rules of Court provides its own mechanism for the production of the record of proceedings under review. PAIA is not a precondition to Rule 53 relief, nor a substitute for it. The applicant invoked Rule 53 and the record was furnished in response. The point fails.

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8 2024 JDR 4089 (GJ)

9 2023 JDR 3632 (FB)

10 Seruoe at para 9

Section 7(1) of PAJA — the 180-day period

[43] The respondents contend that the application was brought outside the 180 days prescribed by section 7(1)(b) of PAJA, calculated from the date upon which the applicant became aware of the section 112 decision[11] to the launch of the application on or about 22 September 2023. The chronology is decisive: the application was served on 22 September 2023, and the 180-day period came to an end on 26 September 2023. The point is factually unsustainable and must be dismissed.

Section 7(2) of PAJA — non-exhaustion of internal remedies

[44] The respondents contend that there exist internal remedies under the Concession Agreement which the applicant ought to have exhausted before launching review proceedings, in breach of section 7(2) of PAJA. The provisions of the Concession Agreement to which the respondents point are in truth dispute resolution mechanisms. These are expert determination, mediation and arbitration and are all directed at disputes under the contract. They are not "*internal remedies*" against administrative decisions of the National Commissioner under section 112 of the Act, and the Act itself contains no administrative appeal or internal review mechanism.

[45] The point fails on a more fundamental ground. An "*internal remedy*" within the meaning of section 7(2)(a) of PAJA is, by definition, an administrative appeal or review *extra-curial* in character and domestic to the administrative hierarchy from which the impugned decision emerged.[12] To qualify, the remedy must be capable, as a matter of law, of providing effective relief, that is, it must be capable of disturbing or reversing the impugned decision.[13]

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[11] 30 March 2023

[12] *Read and others v Master of the High Court of South Africa and others* 2005 JDR 0538 (E) para 25 and 26

[13] *Read* at para 20

[46] The contractual dispute resolution mechanisms upon which the respondents rely fail both limbs of the test. They are neither *extra-curial* appeals within the administrative hierarchy, nor capable of setting aside an administrative decision. Only a court can do that.[14] A clause requiring expert determination, mediation or arbitration of contractual disputes does not, and could not, confer on those private *fora* the power to set aside the statutory exercise of an emergency power under section 112 of the Act. The point fails.

Misjoinder of G4S

[47] The fifth point *in limine* is the misjoinder of G4S. The respondents advance it on the following grounds: first, that there is no enforceable right between G4S and the Department under the Concession Agreement; secondly, that on the doctrine of privity of contract, parties not privy to a contract cannot sue or be sued on it, and G4S, not being privy to the Concession Agreement, is not entitled to *locus standi*; and thirdly, that this court, per Kubushi J in earlier proceedings between the applicant and the first and second respondents, has already determined that G4S has no legal standing in the dispute.

[48] The respondents rely on *Medihelp Medical Scheme v Minister of Finance NO*[15] and on the test of direct and substantial interest. The common premise of all three grounds is that the second respondent exercised a contractual right under clause 55 of the Concession Agreement, and did not take an administrative decision under section 112 of the Act.

[49] That premise cannot stand. Section 1 of PAJA defines administrative action as any decision taken by an organ of state when exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person and has a direct, external legal effect.

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[14] *NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality and Another* 2026 (2) SA 426 (SCA)

[15] 2020 JDR 0546 (SCA)

[50] In *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works*[16] the Supreme Court of Appeal held that whether particular conduct constitutes administrative action depends primarily on the nature of the power being exercised, rather than the identity of the person exercising it and that administrative action is, in general terms, "*the conduct of the bureaucracy … in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals*".[17]

[51] Applied to the present matter, the section 112 decision satisfies that standard. The notice of appointment expressly invokes section 112 of the Act, not clause 55 of the Concession Agreement; the memorandum, although it quotes clause 55, does not identify clause 55 as the source of the power; and the public law character of the power is not altered by the contractor's undertaking, in clause 55, to comply with a section 112 decision once taken. The section 112 decision was administrative action within the meaning of PAJA.

[52] The standing of G4S therefore falls to be assessed on public law principles. Section 38(a) of the Constitution affords standing to anyone acting in their own interests where a right in the Bill of Rights is infringed or threatened. Section 3(1) of PAJA provides that "*administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair*". The legislature's choice of the words "*any person*" is significant: procedural fairness is owed not only to the addressee of the decision but to any person whose rights or legitimate expectations are materially and adversely affected.

[53] The Constitutional Court in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*[18] settled the framework. An own-interest litigant need not show the sufficient, personal and direct interest the common law requires, but must show that the contested decision directly affects its rights or interests, or its potential

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[16] 2005 (6) SA 313 (SCA)

[17] Greys Marine at para 24

[18] 2012 JDR 2298 (CC)

rights or interests. The requirement is to be generously and broadly interpreted and the interests must be real, not hypothetical or academic.

[54] On those criteria, G4S plainly has standing. The section 112 decision installs a temporary manager, appointed by the National Commissioner to perform the functions of the director of the prison. The director is, on the common cause facts, a G4S employee. The decision authorises the replacement of custody officials, also G4S employees, with correctional officials. G4S has, in addition, concluded a direct agreement with the Minister and the applicant, under which it warranted to the Minister that it would comply with the subcontract.

[55] The contractual structure, and the operational role at the prison upon which it rests, are directly and immediately engaged by the decision. The relief sought operates upon G4S's interests in a tangible and practical way: if the section 112 decision is set aside, the temporary manager falls away, and G4S is able once again to install its director and to resume the day-to-day operational management of the prison. That is an interest "*directly affected*" within the meaning of *Giant Concerts*[19].

[56] The doctrine of privity of contract has no application. The applicant's challenge is brought under section 6 of PAJA against an administrative decision under section 112 of the Act; it is not a contractual claim. The proposition that only a party to a contract may sue on it does not engage the question whether a third party whose rights or interests are directly affected by an administrative decision has *locus standi* to review that decision.

[57] As to the judgment of Kubushi J, the dispute there concerned the cancellation of the Concession Agreement as between the applicant and the first and second respondents. It did not concern the administrative decision of the National Commissioner under section 112 of the Act, and it did not address the standing of a third party affected by such a decision. The principle of *stare decisis*, as between judges of the same Division, requires that a judge sitting

[19] At para 42 and 43

alone follow the decision of another judge of that Division unless convinced that it is clearly wrong.

[58] For the reasons set out above, and being respectfully convinced that the reasoning of Kubushi J does not govern a review under PAJA of a decision taken under section 112 of the Act, I decline to follow it in the present, distinct context. The fifth point *in limine* fails.

[59] None of the points *in limine* has merit. All five are dismissed.

Section 112 of the Correctional Services Act
The text of the provision

[60] The National Commissioner's emergency powers at public-private partnership correctional centres are conferred by section 112 of the Act, headed "*Commissioner's powers in an emergency at public-private partnership correctional centres*". The section provides that

> *(a) If, in the opinion of the National Commissioner in consultation with the Minister-*
>
> *(i) the Director has lost, or is likely to lose, effective control of a public-private partnership correctional centre or any part of it; and*
>
> *(ii) (ii) it is necessary, in the interest of safety and security to take control of such correctional centre or part of it,*
>
> *he or she may appoint a Temporary Manager to act as the head of that correctional centre and may replace custody officials with correctional officials to the extent necessary.*
>
> *(b) The appointment referred to in paragraph (a) starts at the time specified in the Temporary Manager's written notice of appointment and ends on written notice to that effect.*

(c) During the period of appointment referred to in paragraph (b)-

(i) the Temporary Manager performs the functions of the Director; and

(ii) the Contractor and any subcontractor, must do all that is possible to facilitate the performance by the Temporary Manager of those functions.

(d) As soon as practicable after making or terminating the appointment of a Temporary Manager, the National Commissioner must give notice of such action to the Contractor, the Director and the Controller.

The jurisdictional facts

[61] Stripped to its essentials, the National Commissioner is empowered to appoint a temporary manager and to replace custody officials only if:

a. an *emergency* has arisen at the correctional centre;

b. the National Commissioner holds the opinion that such emergency has arisen, and that opinion has been formulated in *consultation* with the Minister;

c. the director has lost, or is likely to lose, *effective control* of the centre; and

d. it is necessary, in the interests of the *safety and security* of the centre, the prisoners, the custody officials or members of the public, to take control of the centre.

[62] The substantive preconditions are that the Director has lost, or is likely to lose, effective control, and that the taking of control is necessary in the interest of safety and security; the opinion formed in consultation with the Minister is the

gateway through which those matters fall to be assessed. The emergency to which the heading refers is not a discrete precondition but the character of the power, confirmed by the heading and inherent in the requirement that the takeover be necessary.

[63] These preconditions are jurisdictional. The section frames them as the objects of an opinion. It is "*in the opinion of the National Commissioner in consultation with the Minister*" that the director must have lost, or be likely to lose, effective control, and that it must be necessary in the interest of safety and security to take control. The legislature has thus entrusted the evaluation of those matters, in the first instance, to the National Commissioner, and it is not for this court to substitute its own assessment of conditions at the prison for his. But a power conditioned upon the formation of an opinion is not thereby placed beyond review.

[64] In *Walele v City of Cape Town and Others*[20] the Constitutional Court held, of a statutory power likewise conditioned upon a subjective precondition, that a decision-maker's *ipse dixit* no longer suffices. Where the opinion relied upon for the exercise of public power is challenged on the basis that the subjective precondition did not exist, the decision-maker must show that the opinion was based on reasonable grounds.[21] The existence of reasonable grounds falls, moreover, to be assessed with reference only to the material that was before the decision-maker at the time the opinion was formed. Knowledge held elsewhere within the institution, but not placed before him, cannot supply the grounds after the event.[22] An opinion not shown to have been based on reasonable grounds is not the opinion the section contemplates, and the jurisdictional precondition to the exercise of the power is then absent. They are preconditions, not rhetorical descriptors of the Commissioner's decision.

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[20] 2008 (6) SA 129 (CC)

[21] *Walele* para at 60

[22] *Walele* paras at 61–63

[65] Applying *Walele*, two enquiries arise: what material was before the National Commissioner when the opinion was formed; and whether that material could reasonably have satisfied him of the matters section 112 prescribes.

[66] As to the first, the respondents have elected to stand on the memorandum of 28 March 2023. The memorandum indicates that the Controllers investigation report, the Concession Agreement and the Act formed the basis for the section 112 decision. As to the second, the Controllers investigation report, the Concession Agreement and the Act could not reasonably have satisfied him that the director had lost, or was likely to lose, effective control of the prison, or that it was necessary in the interest of safety and security to take control of it. It must be remembered that the Controllers report recommended the imposition of contractual penalties under Schedule M of the Concession Agreement and that these penalties had been paid. The memorandum does not identify a present threat to the safety and security of the centre, its inmates, its officials or the public. The National Commissioner only concludes that the director has lost control of the prison.

[67] The assertion in the answering papers that the National Commissioner was nonetheless satisfied is the very *ipse dixit* that *Walele* holds to be insufficient once the opinion is challenged. And whatever knowledge the Department at large may have possessed cannot assist the respondents. The reasonableness of the opinion falls to be assessed with reference only to the material that was before the decision-maker at the time. The opinion relied upon for the exercise of the section 112 power was not based on reasonable grounds, and the jurisdictional precondition to the exercise of the power was therefore absent.

The meaning of "emergency"

[68] The Act does not define "*emergency*". It must therefore be accorded its ordinary meaning, informed by the text and apparent purpose of the provision. The approach to interpretation has been authoritatively restated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni*

Municipality[23] and applied in numerous subsequent decisions. Although the word appears in the heading to the section, the emergency character it signals is in any event inherent in the operative requirement that the taking of control be necessary in the interest of safety and security.

[69] The Oxford English Dictionary defines "*emergency*" as "*a serious, unexpected, and often dangerous situation requiring immediate action*". The essential features of the ordinary meaning are that the situation must be serious, unexpected or unforeseen, and one that requires immediate action.

[70] That understanding aligns with the statutory context. Section 112 is an extraordinary power. It authorises the National Commissioner to take control of a facility whose operations have been entrusted, by a Concession Agreement sanctioned by statute, to a private contractor. It vests in the National Commissioner the right to substitute the director with a temporary manager and to replace custody officials with correctional officials. Such a power is not to be exercised as a matter of course, or as a substitute for ordinary contractual remedies, or in response to stale and historical events that can be addressed by the ordinary machinery of the Act and the Concession Agreement.

[71] It is an emergency power, to be invoked sparingly and only where the jurisdictional preconditions are met. The court is bound to give effect to the ordinary meaning of "*emergency*" in the provision, and to construe the power strictly, consistent with the principle of legality and the constitutional requirement that public power be exercised only in the manner and within the limits in which it has been conferred.

In consultation with the Minister

[72] Section 112 requires that the opinion of the National Commissioner be formed in consultation with the Minister. The phrase "*in consultation with*", imposes a substantive obligation upon the National Commissioner and not a mere

[23] 2012 (4) SA 593 SCA

formality. Consultation, properly understood, requires a genuine, deliberative exchange. The Minister must be presented with the relevant information, must have an opportunity to consider it, and must be able to express a view[24].

[73] The internal memorandum speaks for itself. Paragraph 6.3 records: "*I therefore submit my opinion to consult the Minister as required by the CSA.*" That language, on its face, discloses a fundamental misunderstanding of the consultation requirement. The National Commissioner did not consult the Minister; he submitted an opinion he had already formed to the Minister for signature. The distinction is not semantic. The Minister signed the document on the same day. There is no evidence of any deliberation, discussion, modification, or back and forth between the National Commissioner and the Minister.

[74] The engagement the section requires must precede the formation of the opinion. It is the opinion itself that must be formed "*in consultation with*" the Minister, and an opinion formed unilaterally and thereafter presented for endorsement is not an opinion so formed. If the section requires consultation, a signature appended, on the same day, to an opinion already formed and submitted for signature, without any indication that the Minister was placed in possession of the relevant material and brought an independent judgment to bear upon it, is not the consultation the section contemplates.

Effective control of the prison

[75] The operative phrase is not "*control*" simpliciter but "*effective control*". This distinction is textually and legally significant. Individual operational failures, isolated security incidents, or specific contractual breaches do not per se constitute a loss of "*effective control*" of the facility. "*Effective control*" refers to the director's ability to manage and operate the facility as a functioning correctional centre. That is to direct custody officials, to maintain security and

[24] *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC)

good order, and to give effect to the sentences of the courts. The director must have lost (or be likely to lose) this broad managerial capacity.

[76] As at 30 March 2023, on the version of both the applicant and G4S, the facility was stable, all observation notices had been resolved, and the prison was operating normally. The National Commissioner's own memorandum does not identify any current state of dysfunction, instability or loss of operational capacity at the facility. The National Commissioner reasons backwards from events that occurred in April and May of 2022, 10 months before the decision.

The meaning of "safety and security"

[77] The Act uses the concepts of "*safety*" and "*security*" consistently throughout. Section 4(2)(a) records the Department's duty to ensure the safe custody of every inmate and to maintain security and good order in every correctional centre. Section 26 protects inmates' rights subject to limitations "*reasonably necessary to ensure the security of the community, the safety of correctional officials, and safe custody of all inmates*". Section 33(3)(b) authorises the use of non-lethal devices where "*the security of the correctional centre or safety of inmates or others is threatened*", and section 34(3)(d) authorises the use of firearms in similar circumstances. Section 102 authorises force against persons who "*disrupt or threaten to disrupt the operation of a correctional centre*".

[78] A consistent legislative usage emerges. "*Safety*" refers to the physical well-being and bodily integrity of inmates, officials and the public. "*Security*" refers to the secure custody of inmates, the integrity of the perimeter, the prevention of escapes, and the ordinary functioning of the centre. Both concepts, as used throughout the Act, are forward-looking and present-tense assessments. They describe threats that exist at the time of the exercise of the relevant power, not historical events.

[79] The same construction must apply in section 112. The "*interests of safety and security*" upon which a takeover under section 112 is to be founded are the present and operational interests of the centre, not historical events to be

remedied retrospectively. The question is precise: as at 30 March 2023, was there a present or imminent threat to the safety of inmates and officials, and to the security of the facility, such that taking control was necessary? The papers, and the National Commissioner's own memorandum, do not identify any such threat.

Administrative action or contractual power?

[80] The respondents' first substantive defence is that the section 112 decision was not administrative action at all, but the exercise of a contractual power under clause 55 of the Concession Agreement. If correct, PAJA would not apply.

[81] Clause 55 of the Concession Agreement, headed "*Intervention by the Minister under Section 112 of the Correctional Services Act, Number 111 of 1998 (Section 112)*", provides:

> *"55.1 The contractor shall comply with the provisions of Section 112.*
>
> *55.2 In the event that the Commissioner, in consultation with the Minister, shall appoint a temporary manager of the prison by virtue of his powers under Section 112, the contract shall continue in force, and all provisions of the contract shall, without prejudice to the Department's rights under clause 44 (Default) or 45 (Termination for contractor default), or the contractor's rights to terminate on a Department event of default under clause 47, continue to operate to save that the actions that would otherwise be exercisable by the director or the controller shall be exercised by the temporary manager.*
>
> *55.3 Any reasonable and necessary costs incurred by the Department as a result of the action being taken by virtue of Section 112 will be reimbursed to the Department by the*

contractor, unless such appointment is as a result of a Department event of default and the Department shall be entitled to set off all such amounts due to it against any other amounts due to the contractor from the Department hereunder, subject to the provisions of clause 43."

[82] None of these provisions modifies, expands or reduces the jurisdictional requirements of section 112. Their character is consistently consequential. They deal with what happens after a valid section 112 appointment has been made. Clause 55.1 imposes an obligation on the contractor to comply and creates no power for the Commissioner. Clause 55.2 regulates the contractual consequences of an appointment and presupposes that a valid section 112 appointment has been made "*by virtue of his powers under Section 112*"; it is not itself a source of power. Clause 55.3 deals with cost recovery and is again consequential upon a valid appointment.

[83] The source of the power remains exclusively statutory. No contractual provision can expand, modify or reduce the jurisdictional requirements for the exercise of a statutory power. Were it otherwise, any public authority could circumvent statutory limitations on its power simply by incorporating those powers into a contract with adjusted preconditions. This would be constitutionally impermissible.

[84] The section 112 notice expressly records that the appointment of the temporary manager is made in terms of section 112 of the Act. The Concession Agreement is not referenced. The memorandum quotes clause 55 of the Concession Agreement but the Commissioner makes no mention of it as the source of the power or the basis for his decision.

[85] The decision satisfies the seven elements of administrative action defined in section 1 of PAJA:[25] it is a decision of an administrative nature, by the National Commissioner as an organ of state, exercising a public power or function in

[25] *Minister of Defence and Military Veterans v. Motau* 2014 (5) SA 69 (CC).

terms of section 112 of the Act, the decision adversely affects the rights and interests of the applicant and G4S, it has a direct, external legal effect Lastly, and lastly the decision is not a listed exclusion.

[86] The section 112 decision is administrative action within the meaning of PAJA, and the applicant and G4S are entitled to impugn it on any of the grounds enumerated in section 6(2) of PAJA.

The memorandum as the record of the decision

[87] The memorandum is the record on which the respondents have chosen to stand. Its content matters because the respondents are bound by the reasons given and the factors that were considered at the time the section 112 decision was taken. The law does not permit an administrator to engage in *ex post facto* rationalisation.[26]

[88] The memorandum sets out a narrative of the escape, the subsequent investigation and the steps taken thereafter. It canvasses, at length, alleged breaches of the Concession Agreement and recommends that a section 112 notice be issued. It does so without any demonstration that the jurisdictional preconditions in section 112 are satisfied. The memorandum does not state that any emergency has arisen at the prison and nowhere does it describe a serious, unexpected and immediate situation.

[89] The events the memorandum describes are those that led up to the escape of Mr Bester on 3 May 2022. The relevant question is whether, as at 30 March 2023, there was a situation of such urgency, immediacy and severity at the prison that it constituted an emergency requiring the exercise of section 112. Having regard to the ten month period of the respondents' inaction after confirmed knowledge of the escape; the controller's recommendation of penalties, and not the invocation of section 112 in November 2022; the Directorate Contract Management's recommendation of observation notices,

[26] *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC)

and not the invocation of section 112 in March 2023; the visits by the Department subsequent to the escape that recorded that the prison was running smoothly; the resolution of all observation notices arising from the escape; and the prison's stable operation as at 30 March 2023, the answer can only be no.

[90] The memorandum does not engage with the fundamental question whether the events and breaches that led to Mr Bester's escape, or the escape itself, indicated a loss of effective control of the prison. It contains no statement that the director has lost, or is likely to lose, effective control, still less any supporting facts capable of sustaining such a conclusion. The "*loss of control*" was the Department's retrospective conclusion about specific events during April and May 2022 that had since been the subject of contractual remediation. The respondents reasoned backwards from historical events.

[91] The memorandum contains no statement that it is necessary, in the interests of safety and security of the centre, the prisoners, the custody officials or members of the public, for the National Commissioner to take control of the prison. It records only that "*it is necessary to appoint a temporary manager*" — a generic conclusion that omits the specific jurisdictional requirement.

[92] The Commissioner did not identify any specific, current safety or security threat, explain why the contractual mechanisms were insufficient to address any threat or explain why a takeover of the entire facility was necessary. Where a statute prescribes jurisdictional facts, and the contemporaneous record relied on as the reasons neither asserts those facts nor supplies any material from which they could rationally be inferred, the power has not been lawfully exercised.

The grounds of review
Section 6(2)(b) and (d)

[93] It follows from what has been said that the section 112 decision was not taken in compliance with the mandatory and material procedures and conditions prescribed by the empowering provision. None of the jurisdictional

preconditions was met, and none is recorded in the memorandum. The concept of an "*emergency*" requires seriousness, unforeseeability and the need for immediate action.

[94] By 30 March 2023, the escape had taken place ten months earlier; the controller had investigated it; the controller's report had been prepared and the Schedule M penalty had been paid; the corpse had been identified by DNA as not Mr Bester's; and the JICS report had been leaked. An event that had been investigated, quantified and penalised over the course of ten months cannot rationally be characterised as an emergency within the ordinary meaning of that word.

[95] As I have already held, the record discloses no evidence of a consultation with the Minister before the National Commissioner had formed the opinion that the pre-conditions of section 112 were present at the time the decision was taken on 30 March 2023. That deficiency is not cured by the Minister's subsequent support for the decision in the answering affidavit. The reasons for an administrative decision are those that in fact form the basis of it at the time it was taken. The *ex post facto* rationalisation in the answering affidavit is impermissible.

[96] Discrete operational failures or specific contractual breaches do not, without more, amount to a loss of effective control of the prison as a functioning correctional facility. The memorandum does not state that the director had lost or was likely to lose effective control. The section 112 notice recites the conclusion but is not supported by any contemporaneous reasons. In the ten months following the escape the prison continued to operate, no incident of loss of control is recorded, and the ordinary mechanisms of the Concession Agreement had functioned.

[97] Neither the memorandum nor the answering affidavit discloses a concrete threat to the safety or security of the prison, the prisoners, the custody officials or members of the public that could not have been addressed by the ordinary machinery of the Act and the Concession Agreement.

[98] The decision falls to be set aside under section 6(2)(b) of PAJA for non-compliance with the mandatory and material conditions prescribed by the empowering provision, and under section 6(2)(d) on the ground that the action was taken for reasons not authorised by the empowering provision.

Section 6(2)(c) — procedural fairness

[99] Section 6(2)(c) of PAJA empowers the courts to review administrative action that was procedurally unfair. Section 3(1) of PAJA, with which it must be read, provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Section 3(2) particularises the minimum content of that obligation. An administrator must give a person whose rights are affected adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any rights of review or internal appeal, where applicable; and adequate notice of the right to request reasons in terms of section 5 of PAJA.

[100] None of these requirements was met. The respondents concede that the applicant and G4S received no prior notice of the proposed invocation of section 112 and were given no opportunity to make representations. They were furnished with no advance statement of the proposed action, no notice of any right of review, and no notice of the right to request reasons. On the National Commissioner's own version, no procedurally fair mechanism was followed before the decision was taken.

[101] The significance of pre-decision procedural fairness is not formal. The Constitutional Court has emphasised[27] that observance of the rules of procedural fairness ensures that administrative functionaries have an open mind and a complete picture of the facts and circumstances within which the

[27] *Janse van Rensburg N.O. v Minister of Trade and Industry N.O*. 2001 (1) SA 29 (CC); *De Lange v Smuts N.O*. 1998 (3) SA 785 (CC)

administrative action is to be taken, so that the functionary is more likely to apply his or her mind to the matter in a fair and regular manner. The focus of the section 6(2)(c) inquiry is correspondingly not whether the decision was in fact correct, but whether the process by which the decision was reached satisfied PAJA's procedural standards.[28]

[102] The respondents seek to justify the failure on the strength of section 3(4), which permits an administrator to depart from the ordinary requirements of procedural fairness if it is reasonable and justifiable in the circumstances to do so. Section 3(4) does not license the wholesale abandonment of procedural fairness. As the Constitutional Court explained in *Department of Agriculture, Conservation and Environment, North West Provincial Government v HTF Developers (Pty) Ltd*[29], section 3(4) authorises a deviation from procedural requirements, a truncation of time periods, or a limitation on the opportunity to make representations in cases of urgency, and the purpose that the provisions serve dictates the extent of the procedural standards expected of the administrator.

[103] The section 3(4) defence cannot succeed on the facts. First, the premise upon which it rests, that the situation was an emergency, has, for the reasons already given, not been established. Secondly, the National Commissioner has been seized of the relevant material since at latest November 2022. The events relied upon had been investigated, quantified and, in the case of the Schedule M penalty, financially remedied. There was, on the record, no urgency at the time of the decision capable of dictating any deviation from the ordinary procedural standards. Thirdly, the answering affidavit does no more than recite the language of section 3(4)(b) without engaging with the objective factors that paragraph requires the administrator to weigh. The conclusion is asserted, not justified.

[104] In any event, the procedural unfairness is established even on the assumption, contrary to my findings, that a qualifying emergency existed. Section 3(4)

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[28] *Allpay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC)

[29] 2008 (2) SA 319

authorises a departure from, a truncation of, or a limitation upon the ordinary incidents of procedural fairness. It does not authorise their wholesale abandonment. What occurred here was not a curtailed procedure but the absence of any procedure at all. No notice of any kind, however abbreviated, and no opportunity of any kind, however brief, was afforded to the applicant or to G4S.

[105] The decision was procedurally unfair within the meaning of section 6(2)(c) of PAJA. No reasonable and justified departure has been demonstrated under section 3(4), and the decision falls to be reviewed and set aside.

Section 6(2)(e)(i), (ii) and (iii) — improper purpose, ulterior motive and irrelevant considerations

[106] The record contains several indications that the section 112 decision was taken for a purpose not authorised by section 112, and for an ulterior motive or purpose, within the meaning of section 6(2)(e)(i) and (ii) of PAJA.

[107] The settled test is that an administrator who has no honest belief that good reasons existed for the decision has acted with an ulterior motive.[30] The failure to take into account relevant considerations, or the taking into account of irrelevant ones, is a separate ground of review under section 6(2)(e)(iii).

[108] The media statement on 30 March 2023 describes the action as a response to "*this embarrassing incident which has undermined the authority of the state*". The humiliation of the State caused by the escape is a consideration that cannot lawfully be brought to bear on the exercise of the section 112 power, which is concerned with present operational emergencies at a correctional centre, not with historical reputational damage.

[109] The chronology fortifies the inference of improper purpose. The National Commissioner's own investigation team had concluded, by November 2022,

[30] *City of Cape Town v Premier Western Cape* 2008 (6) SA 345 (C)

that the Bester escape involved breaches of the Concession Agreement and recommended the imposition of contractual penalties. The team did not recommend the invocation of section 112. That assessment prevailed for some four months. It was overtaken in March 2023, against the backdrop of intensifying media scrutiny, by a decision in which the Department sought to be seen to be acting decisively.

[110] The memorandum, read as a whole, is directed principally at historical breaches of the concession contract and at laying the ground for termination. The section 112 notice was followed, a little more than a month later, by the termination notice of 2 May 2023.

[111] The use of an emergency administrative power as a response to alleged contractual breaches that were already remedied or remediable through the ordinary contractual machinery is not a permissible purpose under section 112 of the Act, and constitutes an ulterior purpose within the meaning of section 6(2)(e).

[112] Relevant considerations are not reflected in the memorandum. No recent escapes had occurred and the controller's statutory functions had been performed. The Schedule M penalty had been paid. G4S had conducted an internal investigation, dismissed nine implicated employees and implemented a series of operational measures, and less drastic contractual remedies had been identified and applied.

[113] None of these matters are engaged by the reasons in the memorandum. The respondents relegated paramount factors to insignificance and accorded irrelevant factors weight in excess of their value. The failure to apply its mind to the relevant considerations is itself reviewable under section 6(2)(e)(iii) of PAJA.

[114] The decision accordingly falls to be set aside on each of the three grounds under section 6(2)(e)(i), (ii) and (iii).

Section 6(2)(f)(ii) — rationality

[115] The rationality inquiry under section 6(2)(f)(ii) of PAJA asks whether the decision is rationally connected to the purpose of the empowering provision, to the information before the administrator, and to the reasons given for it.

[116] The Constitutional Court in *Democratic Alliance v President of the Republic of South Africa*[31] restated the inquiry in three steps. First, were relevant factors ignored? Secondly, if relevant factors were ignored, was the failure to consider them rationally connected to the purpose for which the power was granted? Thirdly, if there is no rational connection, did the failure to consider the ignored facts render the process leading to the decision irrational?

[117] Each of those questions is, on the findings already made, against the respondents. Relevant factors of the most material kind were ignored: the continuing operation of the prison; the JICS "*GOOD*" rating in 2021/2022; the absence of any further escape since 3 May 2022; the performance of the controller's statutory functions over the intervening ten months; the payment of the Schedule M penalty; G4S's investigation, the dismissal of the implicated employees and the operational measures it had implemented; and the existence of less drastic contractual remedies that had in fact been used and resolved.

[118] The failure to consider those factors had no rational connection to the purpose for which section 112 was conferred. The elimination of those factors from the deliberative process rendered the process leading to the decision irrational.

[119] On a separate analysis, there was no rational connection between the decision and the empowering provision itself. Section 112 authorises the National Commissioner, in consultation with the Minister, to take control of a public-private partnership correctional centre where the director has lost or is likely to lose effective control and it is necessary in the interest of safety and security to

[31] 2013 (1) SA 248 (CC)

do so. The decision was taken in the absence of any of the jurisdictional preconditions being met, and for purposes of addressing the media uproar that followed disclosure of the escape.

[120] There can be no rational connection between an emergency power, sparingly conferred and reserved for present threats to safety and security, and a decision to invoke that power for the management of reputational damage. The decision is not rationally connected to the purpose of the empowering provision, to the information that was before the Commissioner, or to the reasons given for it. The decision falls to be set aside under section 6(2)(f)(ii) of PAJA.

Section 6(2)(h) and (i)

[121] For the reasons already given, the decision is also one that no reasonable decision-maker could have taken on the material before the Commissioner. It is accordingly unreasonable within the meaning of section 6(2)(h) of PAJA, and unlawful as contemplated by section 6(2)(i).

Remedy

[122] The ordinary consequence of the findings I have made is a declaration of invalidity and an order setting the section 112 decision aside. Section 8(1) of PAJA empowers the court to grant an order that is just and equitable, including, in terms of paragraph (c)(ii), a declaration of the rights of the parties, the setting aside of the administrative action, remittal for reconsideration, or, in exceptional cases, substitution.

Restitution of R1 716 479.07: the framework

[123] The applicant seeks, under section 8(1)(c)(ii)(bb) of PAJA, an order directing the first and second respondents to repay the sum of R1 716 479.07. The amount represents the credits the applicant was required to issue to the Department in respect of the costs said to have been incurred by the

Department in consequence of the section 112 decision, for the period 28 March 2023 to 31 July 2023.

[124] It is common cause that the credits were issued under protest and without admission of liability. The basis on which they were demanded is clause 55.3 of the Concession Agreement, which renders the contractor liable for the costs of an intervention under section 112.

[125] Section 8(1) confers on the court a power to grant "*an order that is just and equitable*", including the orders particularised in paragraphs (a) to (f). The Constitutional Court has emphasised that the relief afforded by section 8(1) is exemplary rather than exhaustive, and that undue weight should not be accorded to the disjunctive framing of paragraphs (c)(i) and (c)(ii)(bb).[32] The principle of subsidiarity precludes the applicant from running, alongside the PAJA remedy, a freestanding common law claim for restitution. PAJA covers the field.[33]

[126] It does not follow, however, that the order must be confined to the rubric of "*compensation*" in paragraph (c)(ii)(bb). Being exemplary and not exhaustive, the power conferred by section 8(1) extends to the consequential and restitutionary relief necessary to give effect to the setting aside, and it is there that the present order is located.

[127] The repayment sought is, in substance, restitutionary rather than compensatory. The credits were exacted under clause 55.3 of the Concession Agreement, a provision whose operation is wholly consequential upon a valid appointment under section 112. Once that appointment is set aside the *causa* for the credits is extinguished, and the amounts were paid without cause. Relief of that character is located in the broad just and equitable power conferred by section 8(1), the orders listed in paragraphs (a) to (f) being, as already noted, no more than instances of it.

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[32] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC)

[33] *Esorfranki* supra

[128] The respondents might be understood to contend for a different construction, under which clause 55.3 allocates to the contractor the cost risk of any intervention purportedly taken under section 112, whether or not that intervention is afterwards found to have been lawful, as part of the bargain struck between commercial parties. That construction cannot be preferred. Clause 55.3 fastens liability upon costs incurred "*as a result of action being taken by virtue of Section 112*", and action taken "*by virtue of*" a statutory power is action that the power in truth authorises.

[129] An invocation that is reviewed and set aside as falling outside section 112 is not, in law, action taken by virtue of that section. To read the clause as imposing upon the contractor the cost burden of an unlawful invocation would be to attribute to the parties an intention to underwrite the very exercise of public power that the statute forbids, and to permit the Department to retain, on the strength of contract, the fruits of an administrative act that has been annulled. The risk-allocation reading presupposes the validity that the review has displaced, and does not survive the setting aside of the decision.

[130] It follows that, although the Concession Agreement and clause 55 themselves remain on foot, the setting aside of the section 112 decision removes the very foundation on which the credits were exacted. The survival of clause 55 is therefore immaterial, since the clause can authorise the retention of the credits only upon a valid exercise of the statutory power that has now been annulled. This accords with the approach in *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd*[34], where the restoration of sums received under transactions subsequently set aside was treated as a consequence of the setting aside rather than as an independent claim.

[131] The repayment is not relief sourced in the Concession Agreement. It is the direct and consequential restitution that flows, on the corrective principle

[34] *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* 2021 JDR 1626 (WCC) paras 336–337, where the restitution of the purchase price and storage fees received under the impugned transactions was treated as a legal consequence of their setting aside, given effect as part of the just and equitable remedy.

articulated by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others (No 2)*[35], from the setting aside of the impugned decision.

[132] Where an exercise of public power is set aside, the just and equitable jurisdiction conferred by section 8(1) of PAJA, read with section 172(1)(b) of the Constitution, extends to reversing the financial consequences of the invalidity, including the return of money taken under the decision now annulled. Consistent with the approach in *Venus Rays*, the restoration of sums received under the annulled transactions is to be treated as a consequence of the setting aside rather than as compensation, so that to order it is to give effect to the review, not to grant a contractual remedy under the guise of constitutional relief.[36]

[133] So characterised, the order need not be brought within the exceptional cases for which compensation under paragraph (c)(ii)(bb) is reserved. That paragraph is directed at making good a loss caused by the administrative action; the present order looks the other way, reversing a benefit conferred under a mechanism whose only foundation was the validity of the section 112 decision. *Steenkamp NO v Provincial Tender Board, Eastern Cape*[37] addresses the distinct question whether a claim lies for loss caused by invalid administrative action; and *Trustees of the Simcha Trust v De Jong*[38] confirms that the reference to exceptional cases concerns the choice of remedy, not the egregiousness of the decision. The threshold attaching to paragraph (c)(ii)(bb) is therefore not engaged.

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[35] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others (No 2)* 2014 (4) SA 179 (CC) para 30, where the corrective principle was treated as the logical consequence flowing from invalid and rescinded transactions and the law of unjustified enrichment generally.

[36] *Venus Rays* supra paras 337 and 501: at para 337 the restoration was characterised as a consequence of the setting aside rather than as compensation under PAJA, and at para 501 as relief that does not amount to the grant of a contractual remedy under the guise of constitutional relief.

[37] 2007 (3) SA 121 (CC)

[38] 2015 (4) SA 229 (SCA)

[134] To hold otherwise would be to accept that money taken from a person under an administrative act may be retained by the State notwithstanding the annulment of that act, save in exceptional cases, a proposition at odds with the just and equitable purpose section 8(1) exists to serve and with the principle that an invalid act can confer no entitlement to retain what has been obtained under it.

Application to the present case

[135] Each branch of the test is met. In setting aside the section 112 decision the court has found that the invocation was made for purposes ulterior to the empowering provision, and that none of the jurisdictional facts in section 112 was present. The record on which those findings rest is closed and complete.

[136] Remittal would therefore serve no purpose. The court has before it all the material that was before the National Commissioner and no specialised or technical exercise remains to be performed. On the same facts the only lawful conclusion is that the section 112 power was not engaged, so that a fresh decision could lawfully arrive at no different outcome. There has, moreover, been substantial delay since 30 March 2023, throughout which the applicant has performed under protest under the very mechanism now set aside.

[137] To require it to await a fresh decision, in respect of the same historical events, would prolong its loss to no purpose and would be neither fair to the applicant nor productive of any vindication of the public interest not already secured by the setting aside.

[138] Substitution under section 8(1)(c)(ii)(aa) was not pursued by the applicant, and is in any event not the appropriate exceptional remedy on the facts of this matter. The court is not asked to make an emergency takeover decision in the place of the National Commissioner. It is asked to undo a decision that should not have been taken at all.

[139] Setting aside, on its own, will not however suitably remedy the loss. The applicant has paid R1 716 479.07 to the Department under the very mechanism that has now been declared invalid. Without restitution, the applicant remains out of pocket on the strength of an unlawful decision, and the Department retains money paid to it under a predicate that has fallen away. Once the section 112 decision is set aside, no cost liability under clause 55.3 of the Concession Agreement can survive the invalidation of the decision that triggered it; the credits were paid without cause.

[140] The order does not enrich the applicant or impose any double burden on the public purse. It directs no more than the refund of a precise and undisputed sum paid under a statutory predicate that has fallen away, leaving the applicant no better off than had the unlawful decision never been taken.

[141] The causation is direct: but for the unlawful section 112 decision, no demand for repayment under clause 55.3 of the Concession Agreement would have been made, and no credit would have been issued under protest. It is just and equitable, within the meaning of section 8(1), to direct the first and second respondents, jointly and severally, to repay the sum of R1 716 479.07.

[142] As to interest, the obligation to make restitution arises upon the setting aside of the section 112 decision. In the exercise of the just and equitable discretion conferred by section 8(1) of PAJA, read with section 172(1)(b) of the Constitution, and in order to achieve full restitution, interest on the sum of R1 716 479.07 is directed to run from 31 July 2023, being the date by which that sum had been exacted in full and from which the Department has had the use of money paid to it without cause. The amounts credited or deducted after 1 August 2023 having been exacted progressively and remaining to be quantified, interest on those amounts is directed to run, more conservatively, from the date of this order. In each case interest is fixed at the prescribed rate.

Costs

[143] Costs follow the result. The matter is complex, raises important points of administrative law, and was the subject of substantial preparation and two-counsel representation. The employment of two counsel was justified. Costs on scale C are appropriate.

Order

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

a. The first and second respondents' application for condonation for the late filing of their answering affidavit is granted. The costs of the condonation application, including the costs of two counsel on scale C where so employed, shall be paid by the first and second respondents, jointly and severally.

b. The five points *in limine* raised by the first and second respondents are dismissed.

c. The second respondent's decision, taken on or about 30 March 2023, to invoke section 112 of the Correctional Services Act 111 of 1998, and to appoint a temporary manager at the Mangaung Correctional Centre, is reviewed, declared unlawful and set aside.

d. The section 112 notice issued by the second respondent on 30 March 2023 appointing Mr Mashabathaga Pas as temporary manager at Mangaung Correctional Centre is set aside.

e. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay to the applicant the sum of R1 716 479.07, together with interest thereon at the prescribed rate of interest calculated from 31 July 2023 to date of final payment.

f. It is declared that, the section 112 decision having been set aside, no liability under clause 55.3 of the Concession Agreement for the costs of the section 112 intervention survives. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to repay to the applicant all further amounts credited or deducted in respect of such costs from 1 August 2023 to the date of this order, together with interest thereon at the prescribed rate from the date of this order to date of final payment.

g. The first and second respondents are directed, jointly and severally, to pay the costs of the applicant and the third respondent in the review, such costs to include the costs of two counsel on scale C where so employed.

DH HINRICHSEN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

DATE OF THE HEARING: 19 MARCH 2026
DATE OF HANDING DOWN JUDGMENT: 10 June 2026

Appearances:

For the Applicant:	Adv WB Pye SC instructed by Fasken (Incorporated in South Africa a Bell Dewar Inc)
For the First and Second Respondents:	Adv G Shakoane SC with Adv MX Mpahlwa instructed by AM Vilakazi Tau Attorneys
For the Third Respondent	Adv B Leech SC with Adv L Choate instructed by Webber Wentzel Attorneys