



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

CASE NUMBER: GP/01/2020

In the case between:

SPECIAL INVESTIGATING UNIT

APPLICANT

and

RYBAK PROPERTIES (PTY) LTD

FIRST RESPONDENT

**SOUTH AFRICAN BROADCASTING
CORPORATION SOC LTD**

SECOND RESPONDENT

ORDER

The following order is granted:

The application is accordingly dismissed with costs, such costs to include those consequents upon the employment of two counsel where applicable.

JUDGMENT

K PILLAY J

Introduction

[1] This is an application involving the Special Investigating Unit (the applicant) and Rybak Properties (Pty) Ltd (the first respondent).¹ The application is opposed by the first respondent.

[2] The application has its genesis in a lease agreement involving property leased by the second respondent (the SABC), to house its offices in Mpumalanga, from the first respondent, who is the owner of the property. The following relief is sought:

- '1. That the written lease agreement entered between the South African Broadcasting Corporations Ltd ("SABC") and Rybak Properties Pty Ltd (Respondents) at Johannesburg, Gauteng Province, on the 11th day of December 2016 be reviewed and set aside,
2. That the Supply Chain Management Procedures Manual of the South African Broadcasting Corporation ("SABC") which came into effect on the 1st of June 2016 be reviewed and set aside,
3. That the respondent be ordered to pay the sum of **R6 775 449,16** (Six Million, Seven Hundred and Seventy-Five Thousand, Four Hundred and Forty-Nine Rand and Sixteen cents) for the period 1 November 2016 to 31 October 2018 plus interest at 10.25% a tempore morae,
4. That all monies paid to the first respondent in respect of the additional space which was never used, calculated from 31 October 2018 up to the date of the Court Order, be paid back to the SABC,
5. Costs of the application including the costs of employing two Counsels on attorney and client,
6. Further and/alternative relief.'

¹ The SABC was originally cited as the second applicant. The first respondent alleges that the SABC/state attorney was never mandated or authorised to bring the application on behalf of the SABC. A notice of withdrawal of the SABC as co-applicant was filed in June 2021. See pages 518-519 of the indexed bundle and paras 5-13 of the answering affidavit.

[3] No relief is sought against the SABC and it has filed a notice to abide the decision of the court.²

Founding affidavit

[4] Ms Madelein Jacobs (Ms Jacobs), a chief forensic investigator employed by the applicant, deposed to the founding affidavit. She relies on Proclamation R29 of 2017 (the Proclamation)³ as well as section 4(1)(a)-(c) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the Act) for authority to bring this application. She further relies on section 8(2) of the Act in support of the view that the Special Tribunal has jurisdiction to hear the application.

[5] Pursuant to investigations conducted by her, she established that:

(a) A lease agreement (the 2013 lease agreement) was concluded on 13 February 2013 between the SABC and the first respondent for a period of three years, commencing on 1 January 2013 and terminating on 31 December 2015.⁴

(b) The 2013 lease agreement was for 1 822 m² usable office and usable area, at R121.63 per m², totalling R252 642.24 (including 14% VAT). The escalation rate was 8% per annum.⁵

(c) The 2013 lease agreement could be renewed for a further three-year period, from 1 January 2016 to 31 December 2018.⁶

(d) On 3 October 2015, the first respondent submitted a proposal for the renewal of the 2013 lease agreement and additional space for the SABC. The proposal included, inter alia, the office layout and functional requirements, IT infrastructure and cabling requirements, and a CCTV security system.⁷

(e) A Due Diligence Report was submitted regarding the availability of alternative buildings in Mbombela to house the SABC that were more cost effective and appropriate than the current building. Six buildings were identified, however, the buildings did not meet all of the SABC's requirements.⁸

² See the notice to abide, page 521 of the indexed bundle.

³ Proc R29, GG 41086, 1 September 2017.

⁴ Para 13 of the founding affidavit.

⁵ Para 14 of the founding affidavit.

⁶ Para 16 of the founding affidavit and annexure 'A' to the 2013 lease agreement.

⁷ Paras 18 and 19 of the founding affidavit.

⁸ Paras 21, 23, 26 and 28 of the founding affidavit. See also the Due Diligence Report, annexure 'SIU6'.

- (f) Ultimately, the recommendation was made to renew the lease with the first respondent as the premises met most of the requirements and was more cost effective than the other buildings. The first respondent also offered the SABC office space in its newly built office block.⁹
- (g) The SABC required additional space, and certain other requirements needed to be met by the first respondent.¹⁰
- (h) The tenant installations in the additional accommodation would cost R13 559 710.¹¹
- (i) In terms of the Business Case Document, the SABC proposed various options for the payment of the fit-out costs, including a five-year rental contract. The first respondent would only bill the SABC for parking after it had been cordoned off, and water, electricity and other utilities would be budgeted separately.¹²
- (j) The renewal of the 2013 lease agreement was said to be in compliance with the Public Finance Management Act 1 of 1999 (PFMA) and the SABC Supply Chain Management and Preferential Procurement Policy (the SCM Policy).¹³
- (k) In terms of a further Business Case Document dated 4 February 2016, the SABC Board (the Board) was requested to approve the renewal of the 2013 lease agreement at an operational cost of R31 539 284.49 for a period of 60 months, with an additional amount of R9 543 807 for capital expenditure, and to grant the Group Executive: Corporate Affairs and the Head: Legal Services a mandate to sign the contract on behalf of the SABC.¹⁴ The lease agreement was extended from 36 months to 60 months.
- (l) The Business Case Document and round robin request for the approval by the Board of the lease agreement was sent out on 11 February 2016. The Board's approval was required in terms of the Delegation of Authority Framework (DAF), when entering into any agreement for lease/hire/rental of property where the cumulative value is above R25 million.¹⁵

⁹ Paras 29, 31 and 32 of the founding affidavit.

¹⁰ Paras 33-36 of the founding affidavit. See also the Business Case Document, annexure 'SIU8'.

¹¹ Para 37 of the founding affidavit.

¹² Para 38 of the founding affidavit.

¹³ Paras 39 and 40 of the founding affidavit.

¹⁴ Paras 42 and 43 of the founding affidavit. See also the Business Case Document dated 4 February 2016, annexure 'SIU 9'.

¹⁵ Paras 44 and 45 of the founding affidavit.

- (m) The Board approved the renewal of the lease agreement and the acquisition of additional space of 1 201.3 m² for a period of five years at a cost of R31 539 280, with effect from 1 January 2016 to 31 December 2020.¹⁶ An additional R9 543 807 was approved for the fitting of the premises.¹⁷
- (n) Following approval by the Board, requests were sent out for funding to start the process of relocation and fit-out of the additional accommodation. These requests were denied due to lack of funds.¹⁸
- (o) It is alleged that not all the terms of the renewed lease agreement were beneficial/favourable to the SABC; however, as the 2013 lease agreement had expired, the SABC was not in an advantageous position to negotiate.¹⁹
- (p) The current lease (the 2016 lease agreement) was signed during November 2016, and is for a period of five years.²⁰
- (q) The terms of the 2016 lease agreement include the following:
- (i) An annual escalation of 9% over the five-year period. The total lease, including the escalation, would amount to R28 054 376.35 at the end of the five-year period;
 - (ii) The SABC would occupy the first floor, upper level U19-U23, with a monthly rental of R172 240.25.²¹
- (r) Ms Jacobs submits that the SABC has been paying the full amount for the first floor, upper level U19-U23, even though it is incomplete and unoccupied.²²
- (s) Ms Jacobs visited the premises on 9 October 2018 and established that the first floor was still unoccupied.²³

¹⁶ Para 50 of the founding affidavit.

¹⁷ Para 51 of the founding affidavit.

¹⁸ Para 53 of the founding affidavit. See paras 108-113 of the first respondent's answering affidavit. The first respondent submits that the sole reason why the SABC has not been able to occupy the premises, specifically the upper floor, is because the SABC lacked funding to do the fit-out of the additional accommodation.

¹⁹ Paras 54 and 55 of the founding affidavit.

²⁰ Para 58 of the founding affidavit.

²¹ Paras 61 and 62 of the founding affidavit.

²² Para 63 of the founding affidavit. See also paras 44 and 45 of the applicant's replying affidavit where it is alleged that the first respondent has not denied that the additional space remained incomplete and unoccupied by the SABC, which proves that the statement by the first respondent that the SABC inspected the additional space and was satisfied, is misleading and incorrect.

²³ Para 64 of the founding affidavit.

- (t) A special board meeting of the SABC was held on 17 August 2017 where resolutions were taken to approve the application to review and set aside the 2016 lease agreement as it was unlawful.²⁴
- (u) The first respondent undertook to contribute R800 000 towards the tenant installation. This amount was never utilised as the tenant installation never commenced.²⁵
- (v) The regulatory framework governing the SCM Policy, requires the policy to provide for the procurement of goods and services above R2 000 000 by way of a competitive bidding process. As the value of the services in this matter exceeded this amount, the SCM Policy was intended to apply to the lease agreement.²⁶
- (w) Ms Jacobs submits that the Supply Chain Management Manual (the SCM Manual) was not drafted in accordance with statutory prescripts, and that paras 13.19.9 and 13.10 of the Supply Chain Management Manual of 2013 contradict statutory prescripts.²⁷
- (x) The SABC has been prejudiced by the conclusion of the renewal of the lease agreement,²⁸ and the first respondent has been unduly enriched.²⁹
- (y) The Board has failed to comply with the PFMA and did not take steps to prevent fruitless and wasteful expenditure.³⁰
- (z) In so far as the 2016 lease agreement infringes the prescribed procedures, it is submitted that it is unlawful and/or invalid and/or not enforceable.

Answering affidavit

[6] The answering affidavit was deposed to by Mr Sheldon Dennis Bakos, a director of the first respondent. The following evidence is set out therein:

²⁴ Para 66 of the founding affidavit.

²⁵ Paras 73 and 74 of the founding affidavit. See also para 12 of the applicant's replying affidavit which states:

'Furthermore, according to schedule 1 point 3.18 and 3.19 of the lease agreement, the respondent would contribute R 8 00 000-00 (Eight hundred thousand rand) towards the tenant installation within the period 1 November 2016 to 31 March 2017, I established that the said amount was not utilized due to tenant installation which never commenced. The cordoning of the parking area by the respondent as discussed in the Business Case document never materialized as the responsibility and cost were placed on the SABC as part of the agreement.'

See also para 45 of the applicant's heads of argument.

²⁶ Paras 82 and 83 of the founding affidavit.

²⁷ Paras 89-91 of the founding affidavit.

²⁸ Para 92 of the founding affidavit.

²⁹ Para 95 of the founding affidavit.

³⁰ Paras 94 and 95 of the founding affidavit. See also paras 98 and 99. However, see para 7, page 440 of annexure 'SIU9'.

- (a) Mr Bakos raises the issue of the SABC initially being cited as a co-applicant and the subsequent withdrawal of same by the SIU. He submits that the withdrawal is invalid.³¹ Given my ultimate conclusion, I deem it unnecessary to dwell on this issue.
- (b) He further submits that the application is meritless, and the primary relief sought falls outside the ambit of the Proclamation.³²
- (c) The SABC has leased office space for its operations in Mpumalanga for more than ten years. According to documents annexed to the founding affidavit, the SABC had a long-term plan to establish its own offices in Mpumalanga.³³
- (d) The first respondent purchased the property and took over the leases, of which 1 835m² had been leased to the SABC. The first respondent revamped the premises and continued to accommodate the SABC.³⁴
- (e) Towards the end of 2015, before the lapse of the initial lease period, the SABC approached the first respondent with a request for a proposal for a new lease in terms of which the 2013 lease agreement would be renewed and additional space acquired.³⁵
- (f) In terms of the renewed and extended lease agreement, the SABC would lease the existing space of 1 835 m² and a further 1 201.30 m².³⁶
- (g) The first respondent submitted a proposal (annexure 'SIU5'), at the SABC's request, on 3 October 2015. The proposal set out inter alia the SABC's requirements, fit-out costs, landlord contribution/tenant installation allowance, and two options from which the SABC could choose to effect payment for the required renovations.³⁷
- (h) The tenant installation quotation came to R13 559 710.51.³⁸
- (i) Certain conditions were recorded in the proposal.³⁹
- (j) A request was made on behalf of the SABC in November 2015 to extend the lease period from three years to five years.⁴⁰

³¹ Paras 5-13 of the answering affidavit.

³² Paras 14 and 18 of the answering affidavit.

³³ Para 27 of the answering affidavit.

³⁴ Para 28 of the answering affidavit.

³⁵ Para 31 of the answering affidavit.

³⁶ Para 32 of the answering affidavit.

³⁷ Paras 33, 36 and 37 of the answering affidavit. See also paras 194-197 and annexures 'AA13' and 'AA14' of the answering affidavit. These paragraphs allege that the SABC made the decision to do the fit-outs itself as opposed to the first respondent.

³⁸ Para 34 of the answering affidavit.

³⁹ Para 38 of the answering affidavit and para 7 of 'SIU5'.

⁴⁰ Para 40 of the answering affidavit.

(k) Mr Bakos submits that a Due Diligence Report was prepared (annexure 'SIU6').⁴¹ The purpose thereof, as set out in paragraph 1 of the report, was to '...outline the process that has been followed and the results thereof in determining whether there could be other facilities that might be cost effective and more appropriate than the current building in support of the business case of seek approval to renew lease agreement for SABC Mpumalanga'.

Having conducted its due diligence, the SABC concluded that none of the buildings profiled met the minimum requirements in terms of cost effective and compulsory specifications of office square metres and studio requirements, and that therefore it was prudent for the SABC Mpumalanga Region to consider renewing the existing lease, as cost wise, it will be 7.95% less. He submits that a round robin approval was obtained, given that the cumulative value of the lease agreement was above R27 million. The round robin resolution was ratified by the Board on 30 May 2016.

(l) He states that clause 7 of the 2016 lease agreement regulated the manner in which any tenant installation would be carried out. The guidelines for this are set out in annexure 'F' to the lease agreement.

(m) The 2016 lease agreement was concluded and signed by Mr Sizwe Vilakazi for the SABC and Mr Bakos for the first respondent.⁴²

(n) The tenant installation allowance was for the sum of R800 000, which was to be paid by the first respondent when the SABC decided to undertake tenant installations. Mr Bakos submits that this has not been done as yet.⁴³

(o) The first respondent offered to increase the tenant installation allowance (in January 2017) from R800 000 to R1 000 000.⁴⁴

(p) Following the conclusion of the 2016 lease agreement, the SABC continued to exercise possession of the initial premises and the additional premises. Such possession continued as at the date of hearing.

[7] In addition, the following submissions are made by the first respondent:

(a) The applicant has no locus standi to seek the relief in prayer 2. As such, the entire application falls to be dismissed.

⁴¹ Annexure 'SIU6' to the founding affidavit.

⁴² Paras 64 and 65 of the answering affidavit.

⁴³ Paras 72 and 73 of the answering affidavit.

⁴⁴ Para 74 of the answering affidavit.

- (b) If the applicant does have locus standi, there has been an unreasonable delay in instituting the application, and the Special Tribunal should decline to entertain the merits of the application.
- (c) There has been non-joinder, as other parties will be affected by the relief sought in prayer 2.
- (d) There is no admissible evidence to support the relief sought by the applicant.
- (e) No case for review has been made.
- (f) Even if a case has been made for review, the Special Tribunal should exercise its remedial discretionary powers and refuse to set aside the impugned acts, and further refuse to grant the remainder of the relief sought by the applicant.

[8] For expedience, I will set out the issues as follows:

1. Whether there was an unreasonable delay in launching these review proceedings.
2. Whether the affidavit of the deponent to the founding affidavit was properly commissioned.
3. Whether a case has been made out for the review and setting aside of the SABC's Supply Chain Management Manual.
4. Whether the 2016 lease agreement should be reviewed and set aside on the basis that it was unlawful.
5. Whether the SABC was liable for the unoccupied leased space for the period from 1 November 2016 to 31 October 2018, for the total sum of R6 775 449.16.
6. If the 2016 lease agreement is invalid, whether the first respondent must return the abovementioned amount to the SABC with interest, and any amount calculated up to the granting of the order.
7. Whether the Special Tribunal, even if a case has been made for review, should exercise its remedial discretionary powers and refuse to set aside the impugned acts, and further refuse to grant the remainder of the relief sought by the applicant.

Issue 1: undue delay

[9] I deal with the issues for determination ad seriatim. The first respondent specifically raised in its answering affidavit that the review application was not instituted without unreasonable delay. It is not in dispute that this application was instituted in March 2020. It appears that the applicant became involved in this matter

on the basis of the Proclamation issued on 1 September 2017. Paragraph 66 of the founding affidavit refers to a meeting of the special board of the SABC held on 17 August 2017, at which resolutions were taken to approve the application to review and set aside the Mpumalanga lease agreement on the basis of its unlawfulness. Despite this, the review was only instituted on 13 March 2020.

[10] Given that this is a legality review, the approach to undue delay was dealt with in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*.⁴⁵ The first question relates to the reasonableness of the delay, which must be assessed, inter alia, on the explanation offered for the delay. If 'the delay can be explained and justified, then it is reasonable. . .'.⁴⁶ The second question arises if the delay is found to be unreasonable. If 'there is no explanation for the delay, the delay will necessarily be unreasonable'.⁴⁷ Thus, if the delay is found to be unreasonable, the test is 'whether the interests of justice require an overlooking of that unreasonable delay'.⁴⁸

[11] While this court is alive to the difficulties implicit in investigating matters such as the one under consideration, it was expected of the applicant to set out succinctly in its founding affidavit why there was a delay in instituting the application. The founding affidavit is bereft of any indication of any difficulties that may have been encountered in the investigation. I am, however, prepared to condone the delay due to the complexity and volume of the evidence, documentary and otherwise, that was required to institute this application.

Issue 2: proper commissioning of the affidavit

[12] The first respondent challenged the proper commissioning of the founding affidavit of the applicant's deponent, Ms Jacobs. The first respondent submits that the affidavit does not comply with the Regulations Governing the Administering of an Oath or Affirmation,⁴⁹ in that it does not fully set out the date on which it was administered, as the year in which it was signed is omitted. In addition, the Commissioner of Oaths

⁴⁵ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC).

⁴⁶ *Ibid* para 52.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* para 50.

⁴⁹ Regulations Governing the Administering of an Oath or Affirmation, GNR 1258, GG 3619, 21 July 1972.

fails to set out his business address. It is submitted that this is in contravention of regulation 4(1) and (2).

[13] In response to this attack, the applicant simply states that the document was commissioned on 26 February 2021. This cannot be correct, as the notice of motion in this matter was *signed on 4 March 2020* and issued by the Special Tribunal on *13 March 2020* (emphasis provided).

[14] Given the applicant's supine approach to this point in limine, and its response only being contained in its heads of argument, which response clearly contradicts the date on which the notice of motion was issued, as it cannot be correct that the affidavit was signed in 2021 when the notice of motion was issued in 2020, I should be reluctant to exercise my discretion in favour of the applicant, and should find that there is no evidence presented by the applicant upon which the relief sought in the notice of motion is based.

[15] However, it has been held that the regulations relating to the administering of an oath are directory, and not peremptory, and that non-compliance can be condoned if there was substantial compliance with the regulations. Whether or not there has been substantial compliance is to be determined on the facts of each case.

[16] *FirstRand Bank Ltd v Briedenhann*⁵⁰ contains a comprehensive summary of the various authorities, and makes the following finding:

'The authorities referred to earlier make it plain that the Regulations, save where couched in negative terms, are directory. Accordingly, where those regulations have not been followed and adhered to, a court has a discretion whether or not to admit the affidavit. In such circumstances the court will determine whether there has been substantial compliance with the regulations. That determination is one of fact, having regard to the circumstances of the case.' (Footnote omitted.)

[17] In this case, it is clear that the affidavit was commissioned by a captain in the South African Police Service. It is unfortunate that he has not set out the place where he signed it, though his full names appear thereon. A date stamp would have

⁵⁰ *FirstRand Bank Ltd v Briedenhann* 2022 (5) SA 215 (ECGq) para 48.

contained all the required details. In exercising my discretion, I find that the omission of the year appears to be an oversight. I am prepared to condone the oversight in this case.

Issue 3: setting aside of the SABC's Group Supply Chain Management Manual

[18] The SABC has an SCM Manual and an SCM Policy, which have been drafted inter alia with the goal to:

‘...ensure sound, sustainable and accountable procurement within the SABC, whilst promoting broad-based black economic empowerment as a priority in terms of the goals and objectives of the SABC, which include general principles for achieving the following socio-economic objectives:

2.1.3.1 To stimulate and promote local economic development in a targeted and focused manner.

2.1.3.2 To facilitate the creation of employment and business opportunities in the provinces.

2.1.3.3 To promote the competitiveness of local enterprises.

2.1.3.4 To increase participation by EME's and QSE's.

2.1.3.5 To promote joint venture partnerships.’⁵¹

In terms of paragraph 2.2 of the SCM Manual, the purpose of the SCM Manual is to ensure delivery of significant value to the businesses of the SABC, for its customers and shareholders, through:

- ‘(a) an optimised, leveraged and responsive supplier base
- (b) efficient, effective and reliable procurement processes
- (c) improving customer service
- (d) balancing cost savings with procurement risk
- (e) compliance with regulatory framework
- (f) delivery of the SABC's Board Based Black Economic Empowerment objectives.’

It is also responsible for the procurement processes of sourcing and purchasing. When procuring goods and services, Supply Chain Management will focus on the following value outputs:

- ‘(a) right price
- (b) right quality
- (c) right time
- (d) appropriate level of technology

⁵¹ SCM Policy para 2.1.3, indexed page 311.

- (e) preferential procurement
- (g) and continuity of supply.⁵²

[19] The applicant asserts that the SCM Manual was not drafted in accordance with statutory prescripts, as paragraph 13.19.9 of the SCM Manual 2013, dealing with the deviation process, is contrary to statutory prescripts, specifically section 51(1)(a)(iii) of the PFMA which provides that:

- '(1) An accounting authority for a public entity—
- (a) must ensure that that public entity has and maintains—
- . . .
- (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective'.

[20] This section of the PFMA, it is submitted, is not inimical to section 217 of the Constitution which provides that:

'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

[21] The applicant further asserts that paragraph 13.10 of the SCM Manual also contradicts statutory prescripts.

[22] The SCM Manual was drafted for the SABC and its subsidiaries. The Group Exco is the approver of the manual and the SABC's Chief Financial Officer is the overall accountable custodian. All procurement processes relating to sourcing and purchasing fall under the responsibility of Supply Chain Management.

[23] The Bid Adjudication Committee is a cross functional committee, constituted by the Group Exco, with the view to review and ratify/approve or reject supplier selection recommendations made by the Bid Evaluation Committee. All procurement activities are required to be performed in accordance with the SCM Policy and the SCM Manual.

⁵² SCM Manual para 2.2, indexed page 98.

[24] The applicant contends that paragraph 12 of the SCM Manual sets out the deviation process to be followed should it be impractical to invite competitive bids for specific requirements.

[25] Paragraph 12(1) provides that:

‘Should it be impractical to invite competitive bids for specific requirements, the corporation may dispense with official procurement process and procure the required goods, services, works or content by other means such as price quotations or negotiations. Matters relating to procurement for the board or resolutions from the Board that are of a strategic nature shall be dealt with as a deviation unless otherwise advised by the CFO.

Incidences where it will be impractical to invite competitive bids for specific requirements include, among others:

...

In case of sole supplier;

...’

In the above-mentioned incidences, the relevant Group Executive or his delegate must fully motivate the deviation to the Head of the SCM, who will in turn submit the deviation request to the appropriate level for approval as per the DAF.

[26] It is contended that the first respondent was clearly advantaged, and that the SABC was prejudiced with the conclusion of the 2016 lease agreement, as no written submissions for any deviations were recorded and routed through the SCM division for approval in terms of DAF. It is clear that the applicant conflates paragraphs of the SCM Policy with the SCM Manual, as paragraphs 13.19.9 and 13.10 appear in the SCM Policy and *not* in the SCM Manual. (My emphasis.)

[27] The first respondent also submits that to the extent that the SABC procured services after the SCM Manual became effective and pursuant thereto, the relief sought by the applicant, if granted, would render all contracts concluded by the SABC unlawful. It is submitted that the affected parties should have been joined and that their non-joinder is fatal to the application. It is not necessary for me to deal with the joinder issue because, in my view, the applicant has not succinctly made out a case for the relief sought on this ground.

[28] Deviations are only warranted when competitive bids are impractical and restricted to the instances aforementioned. In this case, there was, on the evidence present, no competition. The first respondent was a sole supplier. My view is that the applicant has failed to clearly and succinctly set out its case for the declaration of invalidity of the SCM Manual.

Issue 4, 5 and 6: the validity of the 2016 lease agreement

[29] In relation to whether or not the 2016 lease agreement should be reviewed and set aside, the starting point to this determination are the terms of the Proclamation, in terms whereof, the applicant was mandated to investigate serious malpractices or maladministration in respect of the affairs of the SABC during the period from 1 November 2011 to 1 September 2019, more specifically the following:

- ‘(a) serious maladministration in connection with the affairs of the SABC;
- (b) improper or unlawful conduct by board members, officials or employees of the SABC (hereinafter referred to as “the personnel of the SABC”);
- (c) unlawful appropriation or expenditure of public money or property;
- (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- (e) intentional or negligent loss of public money or damage to public property;
- (f) offence referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), and which offences were committed in connection with the affairs of the SABC; or
- (g) unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof,

which took place between 1 November 2011 and the date of publication of this Proclamation or which took place prior to 1 November 2011 or after the date of publication of this Proclamation but is relevant to, connected with, incidental or ancillary to the matters mentioned in the Schedule or involve the same persons entities or contracts investigated under authority of this Proclamation and to exercise or perform all the functions and powers assigned to or conferred upon the said Special Investigating Unit by the Act, including the recovery of any losses suffered by the SABC or the State, in relation to the said matters in the Schedule.’

[30] In its heads of argument, counsel for the applicant appeared to suggest that the findings of Ms Jacobs suggest that there was maladministration in the manner in which

the lease was entered into. Instructively, Ms Jacobs's affidavit is devoid of any act or acts that suggest that there was any malfeasance/malpractice as defined above. The first respondent raised the issue that the relief sought by the applicant does not fall within the ambit of the Proclamation. There might be some validity to this argument, as the applicant has not specified the exact paragraph in the Schedule to the Proclamation in which the relief it seeks is grounded. However, owing to the findings which I will ultimately make in this judgment, this issue need not detain us further.

[31] Neither the PFMA nor the Act contains a definition for 'maladministration' or for 'malpractice'. The Act merely states as follows in the preamble:

'To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions; to provide for the revenue and expenditure of Special Investigating Units; to provide for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto.'

The Compact Oxford English Dictionary for Students⁵³ contains the following definitions:

(a) Maladministration:

'dishonest or inefficient management or administration';

(b) Malpractice:

'illegal, corrupt, or negligent professional behaviour'.

[32] In *Special Investigating Unit v MEC for Health for the Province of the Eastern Cape and others*⁵⁴ the following was stated:

'[32] Whilst corruption clearly constitutes criminal conduct, malpractice and maladministration are less damning concepts but, assuming them to be of serious proportion, cause the same harm to the democratic state.

[33] Neither concept is defined in the Act but imply linguistically the opposite of regular practice or administration in the conduct of the affairs of state institutions. Regular practice or

⁵³ Compact Oxford English Dictionary for Students (2006).

⁵⁴ *Special Investigating Unit v MEC for Health for the Province of the Eastern Cape and others* [2021] ZAECMHC 32 paras 32-33.

administration would be consistent with the proper exercise of public powers within the bounds of the Constitution.’

[33] With reference to malpractices in terms of section 106 of the Local Government: Municipal Systems Act 32 of 2000, which allows for an investigation into malpractices and maladministration, the court in *Democratic Alliance Western Cape and others v Minister of Local Government, Western Cape, and another*⁵⁵ held as follows:

‘As to the meaning to be ascribed to the phrase “other serious malpractice”, *The Concise Oxford English Dictionary* defines malpractice as “improper, illegal or negligent professional activity or treatment”. It is a wrongdoing committed in a professional capacity in the performance of a professional activity. The definition in the context of s 106 is suggestive of a wrongdoing by a person holding a position in the municipality, which wrongdoing pertains to the performance of the functions in the municipality to which he or she is appointed.’ (Footnote omitted.)

[34] In respect of the 2016 lease agreement, the applicant asserts that the lease agreement is subversive of a credible tender procedure and deprived the public of the benefit of an open and competitive process. This is so, according to the submissions, because the regulatory framework governing the SABC’s SCM Policy requires the policy to provide for the procurement of goods and services above R2 million by way of a competitive bidding process. In this case, such a process was not followed. Therefore, it is submitted that it offends against sections 50 and 51 of the PFMA, and is therefore unlawful.

[35] Curiously, the applicant in its heads of argument contends that insofar as the SCM Policy divests the SABC of its constitutional executive powers, it is unlawful. Unlike in the case of the SCM Manual, the applicant has not asked for the SCM Policy to be reviewed and set aside.

[36] From an internal document of the SABC,⁵⁶ it appears that the SABC’s objectives were to have a physical presence in every province of South Africa. The

⁵⁵ *Democratic Alliance Western Cape and others v Minister of Local Government, Western Cape, and another* 2005 (3) SA 576 (C) para 37.

⁵⁶ Annexure ‘SIU8’.

SABC had a long term plan to establish its own offices in Mpumalanga. For ten years, the SABC leased premises for its operation in Mpumalanga.

[37] The following is instructive: towards the end of 2015, before the initial lease period of three years could lapse, the SABC approached the first respondent for a new lease agreement which would renew the 2013 lease agreement and also secure additional space of 1201.30 m² over and above the existing space of 1835 m². Thereafter, in November 2015, Mr Quinton Lenyal (Mr Lenyal) who was responsible for negotiating the lease on behalf of the SABC, requested an increase in the lease period from three years to five years.

[38] A proposal was then presented to the SABC where after a Due Diligence Report was compiled, after the SABC apparently assessed and analysed the property market in Mbombela to determine if it could find premises elsewhere.⁵⁷ The result of the assessment is captured as follows:⁵⁸

'6 None of the facilities/buildings profiled meet the minimum requirement in terms of cost effective and compulsory specifications of office square meters, studio requirements ... It is therefore prudent for the SABC Mpumalanga Region to consider renewing the current lease as it will be cost effective as it is 7.95% lesser than the above building profiled which is closer in terms of requirement as well as it has all the studio requirements and is a national Key Point Compliant.'

[39] A Business Case Document prepared internally within SABC⁵⁹ recorded that if the lease was not reviewed, broadcasting operations of source stations would have to be relocated and broadcast from either Tshwane or Auckland Park but this would require substantial capital investment to build alternative technical facilities before 31 December 2015 which would not be possible.

[40] The SCM Policy on 'Deviation from the Building Process' is as follows:

'13.19.1 The SABC shall use limited bidding only in the following exceptional circumstances, in case of urgency where unforeseen early delivery and urgent business

⁵⁷ Section 1 of Due Diligence Report, annexure 'SIU6'.

⁵⁸ Annexure 'SIU6'.

⁵⁹ Annexure 'SIU8'.

continuity is of critical importance and the standard procurement process is impossible or impractical.

13.19.2 Urgent cases are cases where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical however does not include cases where planning was not done in time.

13.19.3 In cases of emergency which are defined as serious, unexpected and potentially dangerous circumstances requiring immediate rectification such as a threat or interruption in the SABC's ability to execute its mandate or an immediate threat to the environment or human safety.

13.19.4 Multiple sources bidding where there is proven limited competition in the market and there is good reason to restrict it to only those few bidders such as in the case of standardisation on a certain brand product.

13.19.5 Single source bidding where, after a thorough analysis, there is good and justifiable reason to restrict the process to only one bidder such as where you enter into a maintenance contract with only the bidder who supplied the product otherwise the product loses its guarantee.

13.19.6 Sole source bidding where no competition exists and it is proven that only one bidder exists.

13.19.7 The deviations may only be approved by the appropriate authority as per the Delegation of Authority Framework.

13.19.8 The Bid Adjudication Committee must sign off deviations from normal procurement processes depending on the threshold and recommend to Group Exco deviations that are above their level of authority as per DAF.

13.19.9 Letting and hiring, and acquisition and alienation of land and fixed property where the bidding process cannot be utilised.'

[41] Ms Jacobs found no irregularities in the operating costs charged by the first respondent. It emerged that the R800 000 which the first respondent agreed to contribute in terms of schedule 1, 3.18 and 3.19 of the 2016 lease agreement was not paid as the tenant installation had never commenced.

[42] There has been no suggestion that there was any recklessness or gross negligence of performance in their duties that led to the Board approving the lease. Neither has there been any evidence that the Board had abused their power in so doing.

[43] It is common cause that the first respondent agreed to contribute R800 000 towards tenant installation, which according to it, was to be paid whenever the SABC decided to undertake tenant installations. The SABC due to budgetary constraints, did not undertake the tenant installations to date.

[44] It appears that this is the reason that the first floor, upper level U19 to U23, as alleged by the applicant, was incomplete and unoccupied, and despite this, the SABC has confirmed paying the full amount for the leased space. The applicant contends that this constitutes fruitless and wasteful expenditure and claims the amount R6 775 449.16 for the period 1 November 2016 to 31 October 2018, together with all monies paid to the first respondent for the unused space calculated from 31 October 2018 to date of the court order.

[45] It is apparent that the SABC was aware of the condition of the leased premises before the lease was entered into, if regard is had to clause 5 of the 2016 lease agreement which provides:

‘The Lessee acknowledges that it has inspected the premises and the property on which the premises are located, and has approved them and conforms that it is fit for the purposes for which it is leased.’

[46] In this regard, the first respondent was contractually obliged to provide the premises as described in the agreement to the SABC. Failure to do so would amount to a breach of the 2016 lease agreement. I agree with the first respondent’s contention that it was the SABC who was responsible for the fruitless and wasteful expenditure and not the first respondent.

[47] Therefore, there is no merit in the applicant’s claim for the aforesaid amounts against the first respondent.

[48] A case similar in facts to the present one is *SIU v Phomella Property Investments (Pty) Ltd and others*.⁶⁰ Herein the Department of Public Works (DPW) entered into a lease agreement with Phomella Property Investments (Pty) Ltd for a

⁶⁰ *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and others* (GP) unreported case no 9839/2017 (2 December 2020).

building to accommodate the Department of Justice and Correctional Services. In concluding the lease agreement, an open bidding process was not utilised, and instead, a procedure for a negotiated lease was followed. However, the conclusion of the lease was subject to the condition that an assessment of the required space had to be conducted prior to signature. However, the lease was signed without this process having been followed.

[49] The court a quo found, inter alia, that there was no evidence to warrant a conclusion that the negotiation process had not been properly undertaken. On this basis it could not declare the lease unlawful. It found, however, that the assessment of the required space was not done prior to signature, as was agreed upon, and that this conduct accordingly failed to comply with the Supply Chain Management Policy of the DPW and was accordingly unlawful. The court, however, refused to order repayment of an amount of R103 880 357.65, as it found that the respondents were unaware of any irregularities in the conclusion of the lease, as the Department of Justice occupied the building for the duration of the lease and the rental charged was a market-related one.

[50] These findings were confirmed by the Supreme Court of Appeal in *SIU v Phomella Property Investment and others*.⁶¹ Given that the facts in the above case were similar to the one at hand, I requested the parties to furnish supplementary heads of argument, which they duly did and for which I am grateful.

[51] The applicant's counsel submitted that unlike in *Phomella*, the officials of the first respondent knew that the lease agreement was not concluded in accordance with prescribed procedures. This was because in terms of the lease agreement concluded on 10 November 2016, the SABC would occupy the first floor, upper level U19 to U23, at a monthly rental of R172 240.25, whereas the said floor was incomplete and unoccupied yet the SABC has been paying for the said space. Additionally, it is contended that as in *Phomella*, if it is found that a negotiated lease was competent,

⁶¹ *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and another* [2023] ZASCA 45 (*Phomella*).

then a failure to conduct a needs assessment prior to the conclusion of the lease agreement justifies a declaration of unlawfulness, as is the case in the current matter.

[52] The first respondent emphasises that the lease agreement herein was concluded in terms of the SABC's SCM Policy which makes provisions for a negotiated lease agreement. It contends that there is a similarity between *Phomella* and this matter. Therefore, the first respondent submitted that a 'failure to follow an open tender process by utilising a negotiation process cannot render the ensuing lease unlawful ... because the policy itself authorises such negotiation'.

[53] In addition, the first respondent asserts that the only difference between *Phomella* and this matter was that the approval of the lease in *Phomella* was subject to the condition that a needs assessment be conducted prior to signature, which was not done. In this matter, there were no pre-conditions. It points out that the applicant concedes that the conclusion of the lease was preceded by a Due Diligence Report and a Business Case Document.

[54] The Business Case Document sought to obtain the Board's approval for the renewal of the lease and the acquisition of additional space. It is common cause that this request resulted in the round robin resolution by the Board, as referred to by Ms Jacobs, and the subsequent ratification thereof. The submission records that approval was sought in terms of clause E17 of the DAF. The Board, as the SABC's accounting authority, exercised a decision making power.

[55] I am satisfied that there was substantial compliance with the requirements of the SCM Policy, in the approval of the extension of the lease agreement and the acquisition of the additional space. I find that there is no merit on issues 4, 5 and 6. In view of the above conclusion, issue 7 is academic.

Order

[56] The application is accordingly dismissed with costs, such costs to include those consequents upon the employment of two counsel where applicable.

A handwritten signature in black ink, appearing to read "Pillay", written in a cursive style.

JUDGE K. PILLAY
MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the Applicants: Sibuyi SC / Advocate Matlala

Attorney for the Applicants: State Attorney Pretoria

Counsel for the First Respondent: Advocate S Tshikila

Attorney for the First Respondent: Fairbridges Werthem Becker Attorneys

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be **13H30** on **09 October 2023**.