

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 34000/2022

1. REPORTABLE: YES
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED: YES

DATE: 25/07/2023

SIGNATURE OF JUDGE:

In the matter between:

ESKOM HOLDINGS SOC LTD

Applicant

and

SILICON SMELTERS (PTY) LTD

Respondent

JUDGMENT

L. Meintjes AJ:

Introduction

1. The applicant is a major public entity and an organ of state listed in schedule 2 of the Public Finance Management Act, No 1 of 1999 [“PFMA”]. It conducts its business under authority of licences granted to it by the National Electricity Regulator of South Africa [“NERSA”] in terms of the Electricity Regulation Act, No 4 of 2006 [“ERA”]¹.
2. The applicant’s main business and mandate is the generation, transmission and distribution of electricity in bulk within the Republic of South Africa as well as to the neighbouring countries. Its customers are classified as either large power users or small power users as well as pre-paid users.
3. The applicant, in turn, concludes Electricity Supply Agreements with its customers in terms of which the terms and conditions of supply of bulk electricity are set out².
4. In terms of a written Electricity Supply Agreement [“ESA”] signed by the respondent and the applicant on 3 November 2010 and 24 November 2010 respectively, the applicant supplies the respondent with electricity for its ferro-alloy smelter situated on the old Middleburg Road, Witbank³.
5. During 2018, the applicant introduced a programme called the Offer Sales Incentive Program [“OSIP”]. The object of the OSIP was to reward incremental consumption of electricity by customers based on achievement by them of certain gatekeeping requirements and in the process grow its business. In short, customers who became part of the OSIP were incentivised to consume more electricity⁴.

¹ CL003-7 [paragraph 8].

² CL003-7 [paragraph 11].

³ CL003-10 [paragraph 20] – the ESA replaced the original Electricity Supply Agreement dated 27 March 2000, reference number NS0104 [0003-131].

⁴ CL003-11 [paragraph 21] read with CL008-27 [paragraph 134].

6. The OSIP was governed by certain rules referred to as the Programme Rules [*“Programme Rules”*]. In a nutshell, the Programme Rules set out (i) the mechanism for the applicant to incentivise its customers to increase electricity consumption; (ii) the minimum incremental electricity growth required for a customer to participate; and (iii) to provide a structure with regard to how customers could benefit from cheaper electricity and increase production through incentivised electricity⁵.

7. The applicant invited its key customers who were willing, such as the respondent, to participate in the OSIP, and, subject to the Programme Rules. The respondent was one of the key customers who agreed to participate in the OSIP at the invitation of the applicant⁶. As a result, and during June 2018, the applicant and the respondent concluded a written Pilot Supplementary Agreement [*“PSA”*]. Clauses 2.2 to 2.6 of the PSA provides that (i) the PSA is supplemental to and amends the ESA; (ii) the applicant invited key customers to participate in the OSIP as an incentive to increase electricity consumption; (iii) the Programme Rules set out a mechanism to incentivise key customers to increase production and electricity consumption; (iv) the respondent complies with the minimum incremental electricity growth requirements and qualifying criteria for participation in the OSIP; and (v) the purpose of the PSA is to record the terms and conditions in respect of the respondent’s participation in the OSIP⁷. Of particular relevance is the provisions of clause 7.2.1 of the PSA that provides *verbatim* as follows:-

“Eskom shall adjust the Consumption Baseline in respect of the Customer’s participation in Supplemental Demand Response during this agreement period”.

8. Clause 4.1.15 of the PSA defines the concept of *“Demand Response Programme”* [*“DR Programme”*] as meaning a program where large electricity consumers participate and respond to requests to reduce electricity consumption to protect the technical integrity of the electricity network.

⁵ CL003-12 [paragraph 25].

⁶ CL003-13 [paragraphs 27 and 28] read with CL008-9 [paragraph 32].

⁷ CL003-70 [clause 2].

9. During August 2018, the applicant took a further decision to allow or permit the respondent to participate in the DR Programme. As a result, and during the same month, the applicant and the respondent also concluded a written Demand Response Agreement [*“DR Agreement”*]. In essence, the DR Agreement obliged the respondent on any day during the subsistence thereof, within 30 minutes of receiving an instruction from the applicant, to reduce its electricity consumption by the amounts agreed. In exchange for the applicant’s instructed reduction of electricity consumption, the applicant was obliged to pay (by way of crediting the electricity account) respondent’s electricity account at a rate of R1485.00 per megawatt hour⁸.
10. In a nutshell, the OSIP/PSA was a mechanism to incentivise the respondent to increase electricity consumption at its smelting facility in Emalahleni, while the DR Programme/DR Agreement operated contrarily to reduce electricity consumption at the applicant’s behest and for the applicant’s benefit of protecting the technical integrity of the electricity network⁹.
11. It is apparent from clause 7.2.1 of the PSA quoted *supra*, that the applicant is obliged to make the necessary performance adjustments to the respondent’s consumption baseline in respect of the respondent’s participation in the DR Programme. The applicant, however, avers that the reference in clause 7.2.1 to *“Consumption Baseline”* was an error. This is because clause 7.2.1 was intended to make reference to the *“Target Growth”* as opposed to *“Consumption Baseline”*. The concept of *“Growth Target”* is defined in clause 4.1.26 of the PSA as meaning the amount of electricity that the customer undertakes to consume over and above the consumption baseline, as described in Tables 1 and 2 of Annexure B thereto¹⁰.
12. According to the applicant, its decision to also allow the respondent to participate in the DR Programme results in a situation of making a double payment to the respondent and/or allowing the respondent to double dip. As

⁸ CL008-24 [paragraph 117].

⁹ CL008-7 [paragraph 26].

¹⁰ CL003-73.

revealed, the PSA provides in clause 7.2.1 thereof for the deduction of the DR energy from the baseline energy. The DR energy, and according to the applicant, must not be deducted from the baseline energy, but only from the targeted growth energy, because to do so would amount to double payment. According to the applicant, the respondent would be paid for DR energy reduced, as well as assumed growth that did not materialize¹¹.

13. The applicant's gripe is best explained utilizing calculation methodologies (in rounded off and assumed figures for purposes of illustration) that are common cause between the parties. In the regard:-

- 13.1 the first scenario is without any DR energy. If one assumes that a customer's baseline is 100GWh, the target growth is 50GWh and the actual consumption is 130GWh, then this will result in actual growth of 30GWh (130GWh actual energy minus 100GWh baseline energy), and which will be the incentivised energy. The customer will have the monetary benefit of 30GWh. In the second scenario, one will include 10GWh of DR energy. The baseline is still 100GWh, the target growth is lowered to 40GWh and the actual consumption of 120GWh (the planned 130GWh minus the DR energy of 10GWh). This will result in actual growth of 20GWh (120GWh actual energy minus 100GWh baseline energy), and which will be the incentivised energy. The customer will have the monetary benefit of 20GWh on the OSIP and 10GWh on the DR Programme, thus still a total benefit to the customer of 30GWh. According to this methodology, same ensures that the actual growth is incentivised in the OSIP and the respondent has the additional benefit of the DR energy at higher rates than the OSIP. The result of this methodology is that the incentivised energy between the two scenarios is the same (to wit, 30GWh). These calculations represent the stance of the applicant to the effect that the DR energy is to be deducted from the growth target and not the baseline energy;

¹¹ CL003-25 [paragraph 62.7.1].

13.2 according to the respondent's calculation methodology whereby the DR energy is to be deducted from the baseline and not the growth target, the first scenario is the same as that of the first scenario *supra*. This is without any DR energy. Again, we assume that the customer's baseline is 100GWh, the target growth is 50GWh and the actual consumption is 130GWh. This will result in actual growth of 30GWh (130GWh actual energy minus 10GWh baseline energy), and which will be the incentivised energy. The customer will have the monetary benefit of 30GWh. In the second scenario, we include 10GWh of DR energy. In this instance, the consumption baseline is lowered to 90GWh (100GWh baseline energy minus 10GWh DR energy), the target growth is lowered to 40GWh and the actual consumption is 120GWh (the planned 130GWh minus the DR energy of 10GWh). This will result in actual growth of 30GWh (120GWh actual energy minus 90GWh baseline energy), and which will be the incentivised energy. The customer will have the monetary benefit of 30GWh on the OSIP and 10GWh on the DR Programme. In this instance, there will accordingly be a total benefit to the customer of 40GWh. Put differently, and according to the applicant, the respondent is incentivised in the OSIP for growth that was not realised and therefore receiving a double benefit for the same block of energy. In addition, the respondent has the additional benefit of the DR energy at higher rates than the OSIP for the same energy¹².

14. Owing to the applicant's contention that clause 7.2.1 amounts to double-dipping and/or double payment that is contrary to the provisions of the PFMA, a dispute arose between the parties culminating therein that the respondent (i) terminated/cancelled the PSA on 30 April 2019¹³; and (ii) initiated arbitration proceedings against the applicant during October/November 2020¹⁴.

¹² CL003-29 to CL003-31 [paragraphs 63.3 to 63.9].

¹³ CL008-202 and CL008-203.

¹⁴ CL003-142.

15. In the arbitration, the respondent alleges three claims against the applicant. In this regard:-

15.1 in terms of Claim A, the respondent points to clause 6.3.1 of the Programme Rules that obliges the applicant to make the necessary performance adjustments to the respondent's consumption baseline for participation in the DR Programme as well as clause 5.4.1.1 thereof that again obliges the applicant to adjust the respondent's consumption baseline by adding the shifted load to the baseline. In addition, reliance is placed on clauses 7.2.1 and 9 of the PSA that obliges the applicant to adjust the respondent's consumption baseline for its participation in the DR Programme and that the applicant is obliged to credit the respondent's electricity account with the incentive adjustment. Consequently, and in addition to crediting the respondent's electricity account in terms of the DR Agreement, the respondent was also obliged to adjust the respondent's consumption baseline, which adjustment would result in the respondent's electricity account being credited with R0,16/kWh in accordance with the PSA and the Programme Rules. The respondent alleges further that the applicant rejected the respondent's request for a baseline adjustment on the basis that the Programme Rules did not allow for the applicant to add back the DR energy as the respondent was already compensated for it. Due to such rejection, it purportedly meant that the respondent's electricity account was billed off an incorrect baseline, resulting in the respondent allegedly being incorrectly denied credits in the aggregate amount of R1 774 347,84¹⁵. The respondent accordingly claims electricity account credits totalling R1 774 347,84 plus 10.25% interest thereon as well as costs of the arbitration¹⁶; and

15.2 both Claim B and Claim C concerns "*condonable events*" pursuant to the provisions of clause 7.2.2 of the PSA read with clause 6.3.2 of the Programme Rules and which events were rejected by the applicant and

¹⁵ CL003-134 to CL003-135 [paragraphs 19 - 28].

¹⁶ CL003-143.

which meant, according to the respondent, that its electricity account for the subsequent period was overcharged and also giving rise to an overcharging of interest. Accordingly, and in terms of Claim B, the respondent claims rebates totalling R634 880,00 plus 10.25% interest thereon as well as costs of the arbitration and in terms of Claim C, the respondent claims rebates totalling the amount of R4 019 097,60 plus 10.25% interest thereon as well as costs of the arbitration¹⁷.

16. On 7 May 2021, the applicant delivered its Amended Statement of Defence in the arbitration proceedings. In respect of the respondent's aforesaid Claim A, the following is of relevance:-

16.1 the applicant averred that the reference in clause 7.2.1 to "*Consumption Baseline*" was an error and that clause 7.2.1 was intended to make reference to the "*Target Growth*". The rebates and/or adjustments sought by the respondent will amount to one or more of the following: (i) unjustifiable rebates whose payment thereof cannot be justified; (ii) double compensation and/or or double-dipping; (iii) payment for energy that was not consumed; (iv) the payment thereof will be inconsistent with and outside the spirit and purport of the Programme Rules; (v) payment of rebates that are below the consumption baseline; and/or (vi) payment of rebates that are not part of the target growth. In other words, should the applicant adjust the baseline with the DR energy, the applicant would be paying the respondent for load reduction (at R1485/kWh) and for energy that the respondent did not consume, and which the applicant considers to be a double payment. As a result, the applicant seeks to have clause 7.2.1 of the PSA set aside, alternatively to be rectified so that the words "*Consumption Baseline*" in clause 7.2.1 are substituted with the words "*Growth Target*". Thereafter, and in paragraphs 10.12 and 10.13 the applicant sets out what informs its relief for rectification as well as alternative relief. This was expressed *verbatim* as follows:-

¹⁷ CL003-135 to CL003-142.

“10.12 The claim for rectification is informed, inter alia, by the fact that:

10.12.1 the defendant is a state owned entity bound by the Constitution and certain government prescripts in terms of managing its resources;

10.12.2 the Public Finance Management Act, 1999 (“PFMA”), requires on the part of the defendant, as a state owned entity, transparency, accountability, sound management of revenue, expenditure, assets and liabilities;

10.12.3 double payment by the defendant to the claimant as well as reduction of performance targets and rewarding the claimant for same would contravene the provisions of the PFMA as set out above, and

10.12.4 should the defendant accede to the demands of the claimant, it would be incurring fruitless and wasteful expenditure.

10.13 In the alternative to the claim for rectification, the defendant pleads that clause 7.2 of the PSA be set aside and that the parties be directed to renegotiate in good faith, alternatively, that these proceedings be kept in abeyance pending separate process setting aside the aforesaid contractual provisions”.¹⁸

17. Subsequently, the parties agreed that the scope of the arbitrator’s jurisdiction be extended to include a counterclaim for rectification. As a result, and on 28 June 2021, the applicant lodged a counterclaim in the arbitration seeking rectification of clause 7.2.1 of the PSA, alternatively rescission of the PSA. In essence, it is alleged therein that clause 7.2.1 of the PSA, unless rectified, results in unintended consequences in that the rebates and/or adjustments sought will amount to one or more of the following, namely (i) double compensation, which is contrary to the provisions of the PFMA in that the double payment would amount to fruitless and wasteful expenditure which is prohibited by the PFMA; (ii) payment for energy that was not consumed; (iii) the payment thereof will be inconsistent with and outside the spirit and purport of the Programme Rules; (iv) the payment of rebates that are below the consumption baseline; (v) the provisions of clause 7.2.1 are contrary to the objective(s) of the OSIP; and/or (vi) the provisions of clause 7.2.1 results in duplication of rewards and reduced performance standards, all of which was not the intention of the PSA , OSIP and/or the Programme Rules¹⁹.

¹⁸ CL003-153 to CL003-154.

¹⁹ CL003-168 to CL003-173.

18. On 19 July 2021, the respondent filed its defence to the applicant's counterclaim in the arbitration proceedings. In terms thereof, *inter alia*, it is denied that clause 7.2.1 is an error common to both parties, or that it is an error on the applicant's part, or that it has unintended results. It was further alleged that the counterclaim does not disclose any factual or legal basis for either rectification or rescission of the PSA and it was also denied that the claim for rebates amounts to double compensation²⁰.
19. On 21 February 2022, and on the first day of the hearing of the arbitration, the arbitrator refused to deal with the matter on the basis that he/she does not have jurisdiction to deal with the collateral challenge defence. The applicant was directed by the arbitrator to prosecute its collateral challenge of the PSA through an appropriate court within 15 (fifteen) days of that ruling. The 15 (fifteen) days fell due on 15 March 2022. The applicant failed to launch such application before then and only launched such contemplated application on 24 June 2022. It is that application that is currently before me²¹.
20. According to the applicant's Notice of Motion, the applicant seeks an order declaring the PSA unlawful, invalid and that it be set aside in its entirety, alternatively that clause 7.2.1 of the PSA be declared unlawful, invalid and be set aside. In addition, further alternative relief is also sought to the effect that clause 7.2.1 of the PSA be rectified by, in a nutshell, substituting the words "*Consumption Baseline*" in clause 7.2.1 of the PSA with the words "*Growth Target*".²².
21. The applicant's main contentions as to why the PSA and/or clause 7.2.1 of the PSA is unlawful and invalid are:-
 - 21.1 firstly, the applicant contends that the format and contents of the PSA was not approved by NERSA and accordingly there was no compliance with the provisions of section 14 of the ERA. It is further alleged that as

²⁰ CL003-231 to CL003-235.

²¹ CL003-50 [paragraph 118] read with CL008-45 [paragraph 224].

²² CL003-1 to CL003-2.

a licensee, the applicant may not make use of provisions in agreements other than that determined or approved by the regulator as part of its licensing conditions. Accordingly, it is concluded that there was no compliance with the aforesaid statutory requirement(s)²³; and

21.2 secondly, section 51(1)(b)(ii) of the PFMA provides that an accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity. According to the applicant, clause 7.2.1 of the PSA is unlawful because the respondent will be double-dipping, an outcome that is fruitless and wasteful expenditure in violation of section 51(1)(b)(ii) of the PFMA²⁴.

22. This court is called upon to adjudicate the following issues:-

22.1 firstly, the nature of the relief sought and/or proceedings instituted by the applicant. Is it a declarator or is it a review? If it is determined that it is a review, then this court will also be required to determine whether the delay in instituting the legality review is unreasonable and if so, whether such delay should nevertheless be condoned;

22.2 secondly, whether the dilatory special plea of *lis alibi pendens* alleged by the respondent should be upheld as, and according to the respondent, the relief sought by the applicant in these application proceedings overlap to a large extent the relief sought respectively by the parties in the arbitration proceedings²⁵; and

22.3 thirdly, and assuming for the moment my findings on the other issues above allow me to get here, whether the main contentions relied upon by the applicant for unlawfulness and invalidity of the PSA and/or clause 7.2.1 of the PSA should be upheld.

²³ CL003-13 [paragraph 29].

²⁴ CL003-19 [paragraphs 47 – 49].

²⁵ CL008-6 [paragraphs 17 – 20].

Nature of relief/proceedings

23. In *Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union* 2001 (4) SA 149 (SCA), the appellant therein sought an order declaring that an application made by the first respondent therein to the Regional Director of Manpower for KwaZulu-Natal for the establishment of a conciliation board was invalid for want of compliance with the provisions of section 35(2)(b) of the Labour Relations Act 28 of 1956. At paragraph 25 it was held:-

*"In my view, it is clear as counsel for the appellant conceded, that in essence the appellant's attack on the jurisdiction of the Industrial Court to determine the dispute between the parties amounted to a review, even though it had not been brought under Rule 53 of the Uniform Rules of Court. That being so, it follows that the rule that an applicant for review who fails to bring the application within a reasonable time may (unless the delay can be condoned) lose the right to complain of the irregularity in regard to which the review is brought applies in this case; see for example, *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) and *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA)".*
[my underlining]

24. In *Naptosa and Others v Minister of Education, WC* 2001 (2) SA 112 (CPD) it was held by Conradie J at 126F-G as follows:-

"I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the grant of a declaratory order. It is well established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the court, a declaratory order could serve as a review. A court, in exercising its discretion whether to grant a declaratory order should, accordingly, in an appropriate case weigh the same considerations of "justice or convenience" as it might do in the case of an interdict or a review". [my underlining]

25. I consider substance to trump form and accordingly find that the current application that serves before me and the relief sought is in essence nothing other than a self-review by an organ of state. As a review, I must accordingly also determine whether the applicant's delay is unreasonable and, if so,

whether the delay should nevertheless be condoned. I base my finding principally upon the following averments appearing in the applicant's own Founding Affidavit that illustrates the point vividly. These are, *inter alia*, the following:-

- “18. *In a nutshell, Eskom performs public function and exercises statutory functions. Its decisions constitute administrative actions. They are reviewable either under Promotion of Administrative Justice Act 3 of 2000 or, as it is in this case, under the principle of legality.*
57. *However, the arbitrator has since taken a view that it does not have jurisdiction over the rectification because it is a collateral challenge defence, hence these proceedings. If the issue of delay in instituting the present review proceedings arise, I will ask the court to consider that the parties themselves had thought that the arbitrator would be empowered to deal with the matter of rectification instead of bringing an application for review;*
60. *For these reasons, the Honourable Court is implored to grant an order declaring the PSA unlawful and to review and set aside same. Further, the Honourable Court is implored to declare the provisions of clause 7.2.1 of the PSA unlawful and to review and to set same aside”.*
118. *... It became clear to Eskom that there was a need to refer the matter to court when the arbitrator refused to deal with the matter on the basis that it does not have jurisdiction to deal with the collateral challenge defence. It became clear that the court ought to be approached for review”.* [my underlining]

Delay

26. It now becomes necessary to determine whether the delay in instituting the current self-review was both unreasonable and unexplained and, if so, whether it will be necessary to determine that such delay should nevertheless be overlooked. Before doing so, I find it necessary to firstly set out the facts in chronological order that informs this issue. These facts are²⁶:-

26.1 the applicant and the respondent concluded the PSA when the respondent signed same on 14 June 2018 and the applicant countersigned on 25 June 2018. In pursuance of the respondent's permitted participation in the DR Programme, and on 21 August 2018

²⁶ CL003-42 to CL003-50 [paragraphs 85 – 118], CL008-40 to CL008-45 [paragraphs 209 – 225] as well as the annexures referred to in these paragraphs.

and 24 August 2018, the applicant and the respondent respectively, signed the DR Agreement;

- 26.2 during September 2018, the applicant prepared calculations whereby it realised that the methodology for calculating the respondent's baseline concerning the DR Energy could be incorrect as it allegedly amounted to double-dipping. From thereon, the applicant's team held various meetings whereby they analysed the methodology that was used at the time with a view to better understand it. In such process, the applicant alleged that it considered if there could be a methodology for calculation that would not result in double-dipping. Apparently, there was none and it became clear to the applicant that the double-dipping or double compensation was brought about by the provisions of clause 7.2.1 of the PSA;
- 26.3 after having done the above, and on 23 October 2018, the applicant penned a letter to all its customers affected (including the respondent) wherein it pointed out the unintended consequences flowing from the PSA and that the PSA did not reflect the spirit of the OSIP and proposed an amendment thereto. The proposed amendment was attached. At that time, however, the proposed amendment had not yet been approved by the internal governance structure of the applicant;
- 26.4 subsequently, and from 23 October 2018 to 5 December 2018, a pro-forma amendment was prepared by the legal contracts management team of the applicant, whereafter the internal governance approval processes would follow. As a result, and on 6 December 2018, the applicant sent an email to the respondent to which was attached a proposed pro-forma amendment regarding the correction of clause 7.2.1 of the PSA. On the same date, the respondent indicated that it is in disagreement with the amendment;
- 26.5 upon receipt of the respondent's response to the proposed pro-forma amendment, the applicant developed a presentation for its Sales

Incentive Committee for their approval of the amendment to clause 7.2 of the PSA. The presentation was made to the committee on 14 December 2018 and the committee agreed with the amended methodology. The committee further recommended that a letter be issued to the respondent indicating the applicant's position;

- 26.6 on 18 December 2018, the applicant sent a letter to the respondent recording its stance regarding the adjustment of the consumption baseline and calculations. On 20 December 2018, the respondent replied whereby it persisted with its contrary stance regarding the adjustment to the baseline and its calculations;
- 26.7 between 20 December 2018 and 15 January 2019, meetings were held between the parties wherein the applicant sought to persuade the respondent to accede to the amendment of the PSA;
- 26.8 on 2 January 2019, the applicant by email sent the respondent an account to which the respondent responded on the same day disputing the correctness thereof;
- 26.9 on 21 January 2019, the applicant sent another letter via email to the respondent recording that the respondent is compensated for the DR energy and that this will constitute double-dipping. The email further refers to a clarification meeting that was held on 15 January 2019 and that when the respondent contracted with the applicant to participate in the "*offer sales incentive pilot programme*", the respondent selected uninterruptedly with no compensation;
- 26.10 on 6 February 2019, the respondent replied to the aforesaid correspondence and persisted with its disagreement. It was pointed out that same constituted a pilot programme and that it was the understanding that the applicant will use it as a learning exercise for future incentive programmes, but that the respondent cannot accept

that it gets penalised, as it looks like they are financing such pilot programme;

26.11 on 15 February 2019, the applicant continued to engage the respondent via email and explained that by adjusting the consumption baseline it would be paying for electricity that was not used and that such would amount to double-dipping something not within the rules and spirit of the OSIP. In addition, the respondent's request for "*condonable events*" was declined;

26.12 on 22 February 2019, the respondent wrote an email to the applicant essentially reiterating the respondent's position and went a step further to suggest a compromised calculation. It was further pointed out that the respondent is being penalised for assisting the applicant with its load curtailment;

26.13 on 1 April 2019, the applicant sent the respondent its report for quarter three (which had ended on 28 February 2019). On the same date, upon reviewing the report, it became apparent to the respondent that the applicant continued to use incorrect calculations as a result of which the respondent replied to the report by informing the applicant of the incorrect calculations. This led to a telephone call between the parties whereafter the applicant wrote an email to the respondent indicating that the adjustments in respect of the OSIP will be made in another invoice due later in the same month;

26.14 on 12 April 2019, the applicant sent the respondent a presentation containing an alternative calculation method for the OSIP. The respondent wrote back via email on the same day pointing out its concerns regarding aspects of the presentation. As far as the respondent was concerned, the applicant continued to use calculations that were not in accordance with the PSA. [On 12 April 2019 and 17 April 2019, the Incentive Committee of the applicant had meetings.

The minutes of these meetings are attached²⁷. These reveal that the applicant discussed the assumptions they had made about the OSIP and which had to be reconsidered as well as that the applicant intended to end the OSIP. It is also clear from item 6.1 thereof that the applicant was running a pilot, the results of which did not yield what the applicant was hoping for. The respondent further testifies that it had no knowledge of what assumptions formed the basis of the applicant's decision to run the pilot programme. In addition, the minutes also reveal that the OSIP was developed to solve the applicant's excess capacity it was able to generate at that stage];

26.15 unable to reach common ground regarding the correct calculations, and the end of the first year of the OSIP looming, the respondent opted to cancel the PSA and did so via notice of termination sent via email to the applicant on 30 April 2019;

26.16 on 9 May 2019, the applicant wrote a letter via email to the respondent recording that the parties have had numerous engagements regarding the matter and still explaining the basis for contending that it would be incorrect to add the DR energy back onto the consumption baseline as contended by the respondent;

26.17 according to the applicant, there were various engagements in the form of informal meetings between the parties regarding the matter and during July 2019 the parties resolved to invoke the provisions of clause 28 of the ESA which required the parties to start engaging in informal discussions with a view to resolve the matter between them. On 17 July 2019, the parties held an informal negotiation meeting as required by clause 28 of the ESA and notwithstanding same, the matter remained unresolved²⁸;

²⁷ CL014-397 to CL014-408 and CL008-159 to CL008-164.

²⁸ Clause 28.1 of the ESA states the following: "*The customer and Eskom shall endeavour to resolve by informal negotiation any dispute between them in connection with or arising from the construction, interpretation, performance or non-performance or termination of this agreement and any related or subsequent agreement or amendments thereto, but if agreement cannot be reached within 30 (thirty) days of the dispute arising, such dispute shall be finally resolved in terms of the Rules of the Arbitration Foundation of Southern Africa by an*

- 26.18 the applicant testifies further that it assumed that the issue/dispute would be sufficiently dealt with in terms of the arbitration clause contained in clause 28 of the ESA as it believed that the issue was more of a contractual nature;
- 26.19 on 29 October 2019, the respondent intimated that clause 28 of the ESA be invoked and the matter be referred to arbitration;
- 26.20 the respondent points out that it is fair to say that between December 2018 and October 2019, the applicant and respondent relentlessly tried to persuade each other regarding the proper application of the PSA, and from the beginning there was simply no compromise from either side;
- 26.21 the respondent initiated arbitration proceedings when its Statement of Claim was served upon and/or received by the applicant on 4 November 2020. In order to properly assert its rights, the applicant states that it had to procure the services of an external legal team to represent it in the arbitration proceedings. The external legal team drafted a request for an extension of time to prepare and file the applicant's Statement of Defence and which was sent to AFSA on 23 November 2020. On 24 November 2020, the request for an extension of time was granted by AFSA;
- 26.22 from 25 November 2020 to 14 December 2020, the applicant's external legal team and counsel consulted with the relevant officials of the applicant to prepare its Statement of Defence. The applicant's initial Statement of Defence was filed on 15 December 2020;
- 26.23 on 22 January 2021, the parties held a pre-arbitration hearing before the arbitrator and agreed to set down the arbitration for 5 - 8 July 2021. The pre-arbitration minute was discussed and after several

arbitrator formally appointed by the said foundation."

amendments, the pre-arbitration minute was signed on 9 February 2021;

26.24 from 10 February 2021 to 31 March 2021, several consultations were held with the applicant's external legal team and counsel regarding issues for arbitration, documents for the discovery affidavit and an amendment to its initial Statement of Defence;

26.25 from 1 April 2021 to 6 May 2021, the applicant's Discovery Affidavit in the arbitration was filed and further discussions regarding an amendment to its initial Statement of Defence were held with its external legal team and counsel. On 7 May 2021, the applicant filed its Amended Statement of Defence which included a prayer for rectification of the PSA and/or rescission/setting aside thereof and which was raised in relation to Claim A of the Statement of Claim. With the Amended Statement of Defence, the applicant for the first time raised the issue of illegality/invalidity pertaining to clause 7.2.1 of the PSA;

26.26 on 11 May 2021, the respondent contended that the arbitrator did not have jurisdiction to entertain the prayer and/or relief pertaining to rectification. On 31 May 2021, the applicant responded stating that it held a different view. Thereupon, and on the same day, the respondent advised that the arbitrator should hear the applicant's rectification at the same time as the respondent's other claims and that the applicant file a counterclaim for rectification in order for the respondent to plea thereto;

26.27 a pre-arbitration hearing was held on 8 June 2021. The arbitrator directed the applicant to file its counterclaim on 28 June 2021 and the respondent to file its response/plea thereto on 9 July 2021. The arbitration was then scheduled to take place on 4 - 8 October 2021;

- 26.28 on 28 June 2021, the applicant's counterclaim for rectification and/or rescission was filed and the respondent pleaded/replied thereto on 19 July 2021;
- 26.29 from 20 July 2021 to 28 September 2021, the applicants external legal team and counsel consulted with the applicant's relevant officials and engaged expert witnesses in preparation for the arbitration that was scheduled to commence on 4 October 2021;
- 26.30 on 27 September 2021, the respondent filed a Supplementary Discovery Affidavit in the arbitration proceedings. This prompted the applicant's attorney to write to the respondent's attorney on 29 September 2021, advising that the applicant was not served with the respondent's main Discovery Affidavit and that with the filing of the Supplementary Discovery Affidavits a mere 4 (four) days before commencement of the arbitration, means that the applicant will not be ready to proceed with the arbitration that was set down for 4 October 2021. The respondent required that the applicant bring a formal application for postponement, which the respondent would oppose;
- 26.31 on 30 September 2021, the applicant filed its application for postponement;
- 26.32 on 1 October 2021, a meeting was held between the parties and the arbitrator. The application for postponement was granted by the arbitrator at such meeting. The arbitration was then also scheduled for 21 - 25 February 2022; and
- 26.33 the applicant alleges further that in its mind it thought that the matter/issue/dispute could be resolved through the contractual provisions, especially the arbitration clause contained in the ESA. However, it became clear to the applicant on 21 February 2022 that the need arose to refer the matter to court when the arbitrator refused to deal with the matter on the basis that the arbitrator does not have

jurisdiction to deal with the collateral challenged defence. The arbitrator also directed the applicant to prosecute its collateral challenge of the PSA through an appropriate court within 15 (fifteen) days of such ruling. The 15 (fifteen) days fell due on 15 March 2022. The applicant failed to launch such application on or before 15 March 2022 and only did so on 24 June 2022.

27. Since the applicant is an organ of state and public entity in terms of Schedule 2 of the PFMA and seeks to review one of its own contracts concluded with a customer [to wit, the respondent], it is trite that the review falls to be dealt with under the principle of legality. Put differently, the review cannot be dealt with in terms of the Promotion of Administrative Justice Act, No 3 of 2000 [PAJA]²⁹. It follows further that because we are dealing with a legality review same is not subject to the time constraints prescribed by section 7(1) of PAJA³⁰.
28. Nevertheless, and even before the advent of our constitutional order and the enactment of PAJA, our courts had long held that reviews must, as a general rule, be instituted without undue delay. The rationale for this time-honoured requirement was explained in *Associated Institutions Pension Fund v Van Zyl*³¹ as follows:-

“It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would “validate” the invalid administrative action (see eg Oudekraal Estates (Pty) Ltd v City of Cape Town and Others [2004] 3 All SA 1 (SCA) 10b-d, para 27). The raison d’etre of the rule is set to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative decisions and the exercise of administrative functions (see eg Wolgroeiers Afslaaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41).

The scope and content of the rule has been the subject of investigation in two decisions of this court. They are the Wolgroeiers case and Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en ‘n ander 1986 (2) SA 57 (A). As appears from

²⁹ *State Information Technology Agency SOC Ltd v Gijima Holdings* 2018 (2) SA 23 (CC) at paragraph 41 and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

³⁰ *Minister of International Relations and Co-operation v Simeka Group (Pty) Ltd* [2023] ZASCA 98 (14 June 2023) at paragraph 64.

³¹ [2004] 4 All SA 133 (SCA) at paragraphs 46-48.

these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

- (a) Was there an unreasonable delay?
- (b) If so, should the delay in all the circumstances be condoned?
(See *Wolgroeiers* 39C-D)

The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg Setsokosana 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosana 86E-F).

29. Cameron J endorsed this abiding principle in *Merofong City Local Municipality v AngloGold Ashanti Limited*³² and reiterated that:-

"... The rule against delay in instituting a review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision, but also for the efficient functioning of the decision-making body itself."

30. In *Khumalo and Another v Member of the Executive Council for Education: Kwazulu-Natal*³³ the indisputable existence of the delay rule was acknowledged. It was, however, observed that courts nevertheless have a discretion to overlook a delay where appropriate. It was held:-

"A court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that the review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay."

31. In support of the aforesaid statement, the Constitutional Court in *Khumalo* relied on section 237 of the Constitution that provides that all constitutional obligations must be performed diligently and without delay and held at paragraphs 46 to 48 as follows:-

³² 2017 (2) SA 211 (CC) at paragraph 73.

³³ 2014 (5) SA 579 (CC) at paragraph 45.

“... Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.

This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

In addition, it is important to understand that the passage of the considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of the decision-makers’ memories are bound to decline with time. Documents and evidence may be lost or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.”

32. It is also well to remember, as the Constitutional Court emphasised in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd (SITA)*³⁴ that “no discretion can be exercised in the air” and that “there must be a basis ... to do so”. In SITA it was concluded that: “that basis may be gleaned from facts placed [before the Court] by the parties or objectively available factors”.
33. Reverting to the aspect of the discretion vesting in a court to condone a delay in instituting review proceedings, it bears emphasising that in *Tasima*³⁵ the Constitutional Court cautioned that:-

“While a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review...”

34. In *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa*³⁶ a delay of 3 (three) years was condoned in circumstances where the full extent of malfeasance at PRASA was concealed from the board. The SCA held that some of the important considerations that would weigh heavily with a

³⁴ 2018 (2) SA 23 (CC) at paragraph 49.

³⁵ 2017 (2) SA 622 (CC) at paragraph 160.

³⁶ 2020 (1) SA 76 (SCA) at paragraphs 34, 36 and 40 – 42.

court considering the question as to whether to condone delay, are the interests of the justice and the public interest.

35. In *City of Cape Town v Aurocon South Africa (Pty) Ltd* (“Aurocon”)³⁷ the Constitutional Court held that the interests of clean governance required judicial intervention where irregularities uncovered by an investigation raised a spectre of corruption, collusion or fraud in a tender process. In such circumstances a court might well be justified in “*looking less askance in condoning the delay*”. The SCA also held in *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd*³⁸ that as a general rule even innocent counterparties are not entitled to benefit or profit from an unlawful contract.
36. In *Minister of International Relations v Simeka Group*³⁹ [“Simeka”] it was held as follows:-

“Whilst one must accept that the Department could have acted with more urgency than it did in unravelling the facts, given that it sought to review its own decision, sight should nevertheless not be lost of the fact that the bureaucratic machinery is notorious for moving slowly even though the exigencies of a particular case might require that matters be dealt with expeditiously. However, it must be emphasized that recognizing this reality in no way seeks to excuse laxity. It is more to say that, notwithstanding the Constitutional dictates of a responsive and accountable public administration, the reality is that public administration in our country has over time been allowed to slide to a quagmire of inefficiency. This is a state of affairs that is antithetical to the values underpinning our constitutional order that the citizenry holds dear.”

37. Whether I grant or refuse a delay in instituting a legality review, I exercise a narrow discretion. When exercising a narrow discretion a court must, in the words of *Hefer JA* in *Shepstone & Wylie and others v Geysers NO*⁴⁰: “...decide each case upon a consideration of all relevant features, without adopting a predisposition in favour or against” granting appropriate relief.

³⁷ 2017 (4) SA 223 (CC) at paragraph 50.

³⁸ 2022 (5) SA 56 (SCA) at paragraph 42.

³⁹ [2023] ZASCA 98 (14 June 2023) at par 85

⁴⁰ 1998 (3) SA 1036 (SCA) at 1045I-J.

38. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd (Asla)*⁴¹ the Constitutional Court explained that in both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken. The Constitutional Court then continued:-

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

39. The principle to be extracted from the passage quoted in the preceding paragraph is that where the delay is found not to be unreasonable, that would in itself strongly militate in favour of overlooking the delay and thus, paving the way for the court to enter into the substantive merits of the review. Indeed, this is what the minority judgment in *ASLA* recognized in instances where there was no delay, noting that in that event a declaration of unlawfulness should invariably follow describing this as a default position that accorded with the principle of legality⁴².
40. Even in circumstances where the delay is found to be unreasonable, *ASLA* tells us that the court will still be required to determine whether such delay should nevertheless be overlooked. This is what the Constitutional Court said:-

“Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors”⁴³.

41. The Constitutional Court in *ASLA* continued by holding further that:-

⁴¹ 2019 (4) SA 331 (CC) at paragraphs 49 and 50.

⁴² *Ibid* para 118.

⁴³ *Ibid* para 53.

“The approach to overlooking a delay in a legality review is flexible. In Tasima (i), Khampepe J made reference to the “factual, multi-factor, context-sensitive framework” expounded in Khumalo. This entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the potential consequences of setting aside the impugned decision. The potential prejudice to the affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this Court’s power to grant a just and equitable remedy and this ought to be taken into account”⁴⁴.

42. *Khumalo* also tells us that “an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision and considering the legal challenges made against that decision”⁴⁵. I am also reminded by ASLA that the merits of the impugned decision “must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious”⁴⁶.

43. The Constitutional Court went further in ASLA and stated ⁴⁷ the following:-

“... The extent and nature of the illegality may be a crucial factor in determining the relief to be granted when faced with a delayed review. Therefore, this Court may consider, as part of assessing the delay, the lawfulness of the contract under the principle of legality”.

44. Accordingly, the more egregious the non-compliance with constitutional and statutory prescripts is when viewed against the extent and unreasonableness of the delay, the more a court will be inclined to overlook the delay. As it was put in ASLA, reviewing courts are therefore enjoined to: “...balance the seriousness of the possible illegality with the extent and unreasonableness of the delay”⁴⁸. It is well to remember that maladministration is inconsistent with the rule of law and antithetical to our constitutional ethos that seeks to foster an open, accountable and responsive government.

⁴⁴ *Ibid* para 54.

⁴⁵ *Ibid* para 57.

⁴⁶ *Ibid* para 56.

⁴⁷ *Ibid* para 58.

⁴⁸ ASLA para 147.

45. *In casu*, there seems to be no dispute that the applicant delayed in instituting the review proceedings. Where there is an unreasonable delay in instituting review proceedings, the crucial question becomes whether the delay should be overlooked. The test for determining this aspect is a flexible one, based on the proven facts of each case and other objectively available considerations⁴⁹. Various factors bear on this issue. Firstly, this calls for a “*factual, multi-factor and context sensitive*” enquiry in which a whole range of factors are considered and evaluated⁵⁰. In this regard a court is enjoined to take into account:-
- (a) any potential prejudice to interested parties;
 - (b) the potential consequences of setting aside the impugned decision; and
 - (c) how such potential prejudice could be ameliorated by invocation of section 172(1)(b) of the Constitution which empowers a court deciding a constitutional issue to make “*any order that is just and equitable*”.
46. Secondly, the nature of the impugned decision and the extent and nature of the illegality bear on this issue. On this count, *ASLA* tells us that the stronger the prospects of success, the more will a court readily incline in favour of overlooking an unreasonable delay. Finally, the conduct of the functionaries is also relevant. Here, a court must be vigilant to ensure that a self-review is designed to: “*promote open, responsive and accountable government rather than self-interest of state official seeking to evade the consequences of their prior decision*”⁵¹.
47. As to the interest of justice, the remarks of the Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd*⁵² are instructive. The Constitutional Court there said that:-

⁴⁹ *Central Energy Fund SOC Ltd v Venus Rays Trade* at paragraph 290.

⁵⁰ *Valor IT v Premier North-West Province* 2021 (1) SA 42 (SC) at paragraph 30.

⁵¹ *ASLA* para 120.

⁵² 2000 (2) SA 837 (CC) at paragraph 3.

"The interest of justice may be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay ...".

48. In similar vein the SCA emphasized in *Aurocon*⁵³ with reference to judicial authority, that: *"...whether it is in the interest of justice to condone a delay depends entirely on the facts and circumstances of each case. The relevant factors in that enquiry generally include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, ... the importance of the issue to be raised, and the prospects of success".*

49. In *Simeka*⁵⁴, the SCA further stated:-

"To sum up: approaching the matter holistically, one cannot say with conviction that the government parties were not in certain respects tardy in bringing the review application. Thus, to a limited extent, one is constrained to share the reserve expressed by the respondents that the review application could and should have been instituted much earlier than what happened in this case. Nevertheless, that the delay in this case, although inordinate, did not manifest indifference to what was at stake is a weighty consideration that must tip the scales in favour of overlooking the delay. This is particularly so, if the interests of justice, the substantive merits of the review itself, and the extent of the material deviations from the requirements of the RFPs coupled with the whopping amount that would be foisted on the department and indeed the fiscus if the review is dismissed solely on the basis of delay without regard to the substantive merits of the review. Accordingly, given the egregious nature of the infractions that occurred during the procurement process in this case, the interests of justice dictate that procedural obstacles ought not to be allowed to stand in the way of enquiring into the lawfulness or otherwise of the exercise of public power".

50. In conclusion, it is clear that the *Khumalo* test should be applied that requires firstly to determine whether the delay is unreasonable or undue and, if so, secondly whether the Court should overlook the delay. It is also important to note that no formal condonation application is required where there has been

⁵³ *Aurocon* at paragraph 17.

⁵⁴ At paragraph 112.

a delay in instituting a legality review – a court: “*can simply consider the delay, and then apply the two-step Khumalo test*”⁵⁵.

51. The review proceedings were instituted on 24 June 2022. Thus, reckoned from September 2018 when it is alleged that the applicant became aware of the purported unlawfulness of the PSA, the legality review was instituted approximately 3 (three) years and 9 (nine) months thereafter. Objectively viewed, I consider the delay in the circumstances to be unreasonable. Nevertheless, and for the reasons that follow I find that the delay should nevertheless be overlooked and/or condoned in the interest of justice. My reasons are:-

51.1 from September 2018 to October 2019, the parties tried to settle their issues/dispute by way of agreement. Had such agreement resulted, it would either have been an amendment to the PSA or a settlement/compromise. A settlement not only serves the interest of parties, but also serves the interests of the administration of justice. After all, a compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits. The policy underlying the favouring of settlements has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial/application, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently⁵⁶. I would loath to think that I should discourage parties to endeavour to settle their disputes and thereby saving public funds on costly and acrimonious legal proceedings should I not overlook the unreasonable delay. Put differently, by not overlooking the delay, I will effectively prevent parties to attempt a compromise/settlement;

⁵⁵ ASLA at paragraph 51, *Khumalo* at paragraph 44 and *Motala v Master North Gauteng High Court* 2019 (6) SA 68 (SCA) at paragraph 58.

⁵⁶*Eke v Parsons* 2016 (3) SA 37 (CC) at paragraph 22 and 23.

- 51.2 the respondent's gripe is actually that the applicant failed to explain what it did from October 2019 to November 2020. Although the applicant did fail to explain what it did in this timeframe, I consider that the reasonable, natural and plausible inference to be drawn (although not necessarily the only inference) from the facts is that the applicant was awaiting the respondent to initiate arbitration proceedings and then in such proceedings to raise its contentions in relation to the PSA. After all, it was only on 29 October 2019 that the respondent intimated that clause 28 of the ESA be invoked and that the matter be referred to arbitration⁵⁷;
- 51.3 from November 2020 to February 2022, the arbitration was initiated and the relevant pleadings filed. As revealed, the applicant thought and/or considered the dispute to be more of a contractual nature and therefore believed that the dispute would be resolved in the arbitration. I find this explanation to be supported by the evidence and therefore reasonable in the circumstances;
- 51.4 regarding the main contentions in respect of the merits of the legality review, I find that at this stage of the enquiry that the merits for and against the main contentions are in equilibrium – at least *prima facie* based on the language of clause 7.2.1 of the PSA and the relevant provisions of the PFMA;
- 51.5 of particular importance is the fact that the respondent has not shown any prejudice – in fact, the respondent does not even allege prejudice⁵⁸. The delay has also not hampered my ability to assess the purported unlawfulness and the facts on which it is based. It is also not alleged that some or other documentation and/or evidence was lost or destroyed thereby undermining my ability to evaluate the purported illegality. After all, and in addition to what the applicant alleges and

⁵⁷ *Skilya v Lloyds of London Underwriting* 2002 (3) SA 765 (T) at 780H-781C.

⁵⁸ CL008-5 to CL008-6 [paragraphs 9 to 16].

attached to its Founding Affidavit to condone the delay, the respondent has also provided additional information and therefore it should be clear that the respondent was not prejudiced and the quality of the evidence not compromised. In fact, the respondent was able to meaningfully answer the allegations made in this regard by the applicant;

51.6 the arbitrator has already ruled that he does not have jurisdiction to adjudicate the counterclaim pertaining to setting aside of the PSA on the basis of illegality. In view of the importance of the main contentions raised and the gargantuan impact a finding of illegality will have in possibly saving public funds and/or depriving consumers of their consideration in terms of the relevant agreements, it will surely be in the interest of justice that the main contentions of the applicant be considered and adjudicated and in this manner finality be achieved thereby creating certainty that it also in the public interest; and

51.7 further to the above, I consider that the functionaries of the applicant were not actuated to evade the consequences of the PSA by way of a self-review.

Lis alibi pendens

52. Before proceeding to deal with this issue comprehensively, I find it prudent to set out the facts and circumstances leading up to the conclusion of the relevant agreements as well as their terms. This is done at this juncture as it is also relevant when I deal with the merits of the legality review.

53. The relevant facts in chronological order are as follows:-

53.1 during 2018 [the date not being specified or mentioned], the applicant introduced the OSIP with the objective to reward incremental consumption of electricity by key customers based on achievement by them of certain gate-keeping requirements and in the process grow its

business⁵⁹. The OSIP is governed by the Programme Rules which were developed by the applicant for that purpose. Again, it is unclear when these programme rules were developed and/or published⁶⁰

53.2 on 24 April 2018, the applicant invited the respondent to participate in the OSIP. The invitation also sought from the respondent to avail itself for a question and answer briefing session the following week, where all the queries regarding the proposed OSIP would be discussed. The briefing sessions were intended to afford each party an opportunity to communicate its views and intent regarding the OSIP. It is unclear whether such question and answer session ever took place. However, it is clear that there were email and telephone exchanges regarding each party's respective inputs regarding the contents of the contemplated agreement as well as the calculation of the consumption baseline⁶¹;

53.3 on 24 and 25 May 2018, the respondent exchanged emails with the applicant regarding queries the Sales Incentive Committee had regarding the respondent's application to participate in the OSIP. The respondent duly completed the application form and sent it back to the applicant together with the respondent's calculations of the consumption baseline. It is apparent from block 5 of the application form that the respondent was requested to indicate in which incentive programmes offered by the applicant they have participated in. The respondent indicated in the said block that it is not participating in any other incentive programme;

53.4 from the commencement of the engagements with the applicant regarding the OSIP, the respondent accepted the Programme Rules as proposed by the applicant with no material changes suggested⁶²;

⁵⁹ CL003-11 [paragraph 21].

⁶⁰ CL003-12 [paragraph 25].

⁶¹ CL008-9 [paragraphs 32 – 35].

⁶² CL008-10 [paragraphs 36 – 38].

- 53.5 on 31 May 2018, the respondent received an email from the applicant indicating that the OSIP had been submitted for approval and further indicating that the respondent had to decide whether it wished to participate in the said programme or another (NERSA) incentive programme. The email also indicated that the respondent should remember that it is a two-year programme and that if the respondent decided to withdraw from the offer before 2 (two) years lapsed, all the rebates paid out to the respondent will be recovered. The email was accompanied with a presentation that was directed to the respondent and headed “*Sales Incentive Committee The Offer – Silicon Smelters – Rand Carbide*”. In respect of the baseline, it indicates that the final baseline is set at 455,8GWh and that adjustments will take place pertaining to winter monitoring peak sales and winter deal. In addition, the presentation also reflects the targeted annual growth at 538,4GWh. Furthermore, it is apparent from page 9 thereof that the applicant’s Customer Service Incentive Committee was to approve the rebate values and targets for the respondent as indicated in the table set out therein and that “*PMO to input*”;
- 53.6 on 1 June 2018, the respondent sent an email to the applicant where among other issues, the respondent asked the applicant to confirm that clause 6.3 of the Programme Rules would allow for the adjustment of the consumption baseline for the respondent’s participation in the DR Programme, and if that is so, the respondent was agreeable⁶³;
- 53.7 on 4 June 2018, the respondent sent an email to the applicant indicating that it had marked up changes to the PSA document that the applicant provided to the respondent. It is evidently clear that none of the changes and comments that were affected by the respondent were material terms of the PSA and certainly did not change anything concerning clause 7.2.1. It should be noted that these changes that were made by the respondent concerned the draft PSA that was provided by the applicant to the respondent and wherein it is expressly

⁶³ CL008 – 11 [paragraph 41] read with CL008 – 65 to CL008 – 67.

provided in clause 7.2.1 thereof that the applicant shall adjust the consumption baseline in respect of the customer's participation in the Supplemental Demand Response during the agreement period⁶⁴;

53.8 in the weeks that followed during June 2019, the respondent followed-up with the applicant enquiring about the status of approval of the proposed programme that the applicant indicated had been submitted for approval. On 8 June 2018, the respondent received an email from the applicant confirming that the programme had been approved. It is also apparent from the applicant's email of 6 June 2018 sent at 16:01 that the programme had to undergo some sort of committee approval as it is stated by the applicant in the email: "... they were awaiting to see the chairperson on the committee"⁶⁵;

53.9 on 12 June 2018, in response to an enquiry from the respondent, the applicant sent the respondent the PSA for the respondent's signature and remittal of the PSA back to the applicant for its countersignature. Following signature of the PSA by the respondent on 14 June 2018, arrangements were made to deliver the signed originals back to the applicant. The respondent signed the final documents bearing the consumption baseline and growth target and the applicant countersigned them on 27 June 2018. These documents are annexed to the PSA as:-

53.9.1 annexure A – confirming that the respondent's baseline electricity consumption is 455 821 663 (456 million) kWh per annum;

53.9.2 annexure B – confirming that the respondent's growth target is 555 million kWh per annum; and

⁶⁴ CL008 – 11 [paragraph 42] read with CL008 – 69 to CL008 – 95.

⁶⁵ CL008 – 11 [paragraphs 42 – 44] read with CL008 – 96 to CL008 – 98.

53.9.3 annexure C – confirming the respondent’s incentive and time of use adjustment rates⁶⁶

53.10 on 20 June 2018, the respondent followed-up with the applicant by email to check whether the applicant had countersigned. Subsequently, and on 27 June 2018, the applicant by way of email sent back a countersigned copy of the PSA reflecting that the PSA was signed by the applicant on 25 June 2018 (except the annexures that were signed by the applicant on 27 June 2018). This marked the complete execution of the PSA;

53.11 of importance is paragraph 49 of the Answering Affidavit that is noted [and therefore admitted] by the applicant in reply. The respondent expressly alleges as follows:-

“It bears pointing out that the email exchanges between Ms. Nkuna⁶⁷ and Lema⁶⁸ over the period April 2018 to the end of June 2018, reveal that the conclusion of the PSA went through several layers of scrutiny, being the Programme development and consultation, committee approval of the Programme, legal contract drafting, and finally, the execution of the agreement”;

53.12 it is also important to note that the applicant does not dispute paragraph 99 of the respondent’s Answering Affidavit that I quote *verbatim*:-

“At no point during the discussions leading up to Silicon’s acceptance and application to apply for participation in the Programme and the subsequent conclusion of the PSA, was there ever any discussion regarding the PFMA. I am advised that Silicon was in any event entitled to assume that Eskom has complied with any statutory provisions to which it is obliged to comply”⁶⁹;

53.13 subsequent to the conclusion of the PSA, and during August 2018, the applicant also invited the respondent to avail itself for participation in the DR Programme. During the preliminary interaction, the respondent indicated to the applicant [per Ferdi Becker who at all times was the

⁶⁶ CL008 – 11 to CL008 – 12 [paragraphs 45 and 46].

⁶⁷ From the applicant.

⁶⁸ From the respondent.

⁶⁹ CL008 – 21 [paragraph 99] read with CL009 – 17 [paragraph 50].

contact person in respect of the DR Programme and who was then the Chief Advisor: Product Implementation, Demand Response of the applicant] that the respondent was already participating in the OSIP and asked of the applicant whether the respondent's participation in the DR Programme will cater for same. The said Mr Becker drew the respondent's attention to clause 7.2.1 of the PSA which provides for consumption baseline adjustment for participation in the DR Programme and he confirmed that the two programmes can exist alongside each other. These allegations were made in paragraph 114 of the respondent's Answering Affidavit and it is again of importance to note that the applicant did not dispute same whatsoever in its Replying Affidavit⁷⁰;

53.14 on 8 August 2018, and following a meeting with the applicant's representatives led by Mr Becker, the respondent received an email confirming in summary, what had been discussed earlier that day and the next steps to be taken to commence the respondent's participation in the DR Programme; and

53.15 the applicant satisfied itself that participation in the DR Programme is catered for in the PSA and the OSIP resulting therein that on 21 August 2018 and 24 August 2018, the applicant and respondent signed the DR Agreement⁷¹. In essence, the DR Agreement obliged the respondent on any date during the subsistence of the DR Agreement, within 30 (thirty) minutes of receiving an instruction from the applicant, to reduce its electricity consumption by the amounts agreed. In exchange for the applicant's instructed reduction of electricity consumption, the applicant was obliged to pay (by way of crediting the electricity account) respondent's electricity account at a rate of R1485 per megawatt hour⁷².

⁷⁰ CL008 – 24 [paragraph 114] read with CL009 – 20 [paragraph 61].

⁷¹ CL008 – 24 [paragraphs 115 and 116].

⁷² CL008 – 24 [paragraph 117] read with the applicant's admission in reply [CL009 – 20: paragraph 62].

Programme Rules

54. Annexure ESK1⁷³ constitutes a copy of the Programme Rules. It is entitled: "*Bulk Sale Incentive for Large Industrial Customers (The Offer) Rules*". On the last page thereof appears the names and designation of the officials within the employ of the applicant that influenced and supported the Programme Rules. Eight such officials are named having the following designations, *inter alia*, (i) Transmission and Sustainability IDM – Manager Project Support; (ii) Transmission and Sustainability IDM – Middle Manager Business Development; (iii) Customer Sales and Services – Chief Engineer; (iv) Transmission and Sustainability IDM – Senior Advisor Inst Project Management; (v) Customer Sales and Services – Senior Manager; (vi) Transmission and Sustainability IDM – Middle Manager Customer Services; (vii) Customer Sales and Services – Senior Advisor; and (viii) Integrated Demand Management – Senior Manager. The applicant's deponent to both its Founding Affidavit and Replying Affidavit is a certain Mr Herman Claassen and who is an industrial engineer employed by the applicant. Even though his name does not appear in the aforesaid list, he made it patently clear in the Replying Affidavit that: "... *It is equally true that I participated throughout the process. The omission was surely an error*"⁷⁴. The Programme Rules contain the following material provisions:-

54.1 clause 1 provides that the Programme Rules govern the OSIP;

54.2 clause 2.1 identifies the purpose of the OSIP as (i) setting out a mechanism for the applicant to incentivise large power users to increase electricity consumption; (ii) setting out the minimum incremental electricity growth requirements for the customer to participate; and (iii) provide structure with regards to how customers can benefit from cheaper electricity and increase production through incentivised electricity;

⁷³ CL003 – 56 to CL003 – 69.

⁷⁴ CL008 – 17 [paragraph 51].

- 54.3 clause 2.2 sets out an overview and provides that in order to achieve the objectives of the OSIP every customer will be required to comply with the Programme Rules to determine its (i) reference consumption baseline; and (ii) incremental electricity consumption growth performance;
- 54.4 clause 3 sets out certain definitions. The most important definitions for purposes hereof are (i) "*Consumption Baseline*" means the agreed historic half-hourly load profile representative of the customers electricity consumption, over a continuous 12 (twelve) month period, upon which incremental electricity sales will be measured; (ii) "*Adjustment*" means the adjustments that are calculated from the TOU incremental energy and the TOU adjustment rates; (iii) "*Demand Response Programme*" means a programme where large electricity customers participate and respond to requests to reduce consumption to protect the technical integrity of the electricity network; (iv) "*Eskom Megaflex Tariff*" means the bulk electricity tariff for large customers, as per the published Eskom tariff book, and can change from time to time; (v) "*Incremental Consumption*" means the energy consumed over and above the contracted baseline consumption; (vi) "*Sales Incentive Committee*" means the relevant Eskom approval committee required to approve any financial, contractual or legal queries with respect to the offer incentive programme within its governance processes; (vii) "*Sales Incentive Programmes*" means the programmes that offer financial benefits for the increase in electricity consumption that includes, *inter alia*, demand response morning peak sales programme, the winter deal, the offer incentive programme; (viii) "*The Incentivised Effective Rate*" means the incentivised effective flat rate that the customer will pay, regardless of when energy is used; (ix) "*The Offer Incentive Programme*" means the sales programme based on a financial incentive for incremental electricity consumption; and (ix) "*Time of Use*" ("*TOU*") means defined times of a day/week in an electricity tariff as approved by NERSA;

54.5 I take the liberty to quote the remaining relevant provisions thereof *verbatim*:-

“4. Qualifications and Participation Requirements

4.1 *The offer incentive programme is open to all Eskom customers and customers of municipalities for participation that meet the minimum consumption threshold of 100GWh per Eskom financial year in a consecutive 12 (twelve) month period in the last 60 (sixty) months prior to programme start date.*

4.2 *The participation principles for a customer or customer group are:*

4.2.1 *a minimum incremental consumption of 25GWh above the baseline per annum.*

4.2.3 *the customer need to achieve a minimum of 50% of the total contracted incremental consumption on a year to date basis, to qualify for incentive adjustments;*

4.3 *Participating customers' electricity payments must be up to date to participate in the programme.*

4.4 *Customers of municipalities may participate in the offer incentive programme under the following conditions:*

4.4.5 *the municipality must provide Eskom with the participating customers metering data for consumption baselining and performance monitoring.*

4.6 *Customers participating in the offer incentive programme are:*

4.6.1 *allowed to participate in Eskom's Demand Response Programme. The impact of which will be considered in performance monitoring calculations set out in section 6.*

4.6.2 *Not allowed to double-dip by participating in other Eskom or National Government Sales incentive programmes or special electricity pricing deals (NPA's) unless with approval in writing from Eskom.*

4.7 *The customer is required to provide Eskom with an incremental consumption forecast per TOU period per month for the duration of the contract.*

4.8 *Should the customer not provide Eskom with incremental consumption forecasts above the baseline per TOU period, Eskom assumes that the incremental growth will be aligned to the customers current load profile in the different TOU periods.*

5. Consumption Baseline

5.1 Introduction

5.1.1 *Effective operation of the programme requires each customer/group's annual consumption baseline to be determined in accordance with this section of the Rules.*

5.1.2 *For the purposes of calculating a customer/group's annual consumption baseline, Eskom will consider the amount of electricity in KWh consumed by the customer/group over the last 12 consecutive calendar months.*

5.1.3 *The last 12 consecutive month's usage profile must be reflective of normal consumption for the customer/group. Eskom will assess the latest 12 (twelve) months usage baseline against each of the prior 4 (four) years usage baselines as a representative test*

5.1.3.1 *if the customer/group's last 12 (twelve) months usage baseline is greater than or equal to 50% of each of the prior 4 (four) year's baselines, then they can participate in the programme*

5.1.3.2 *if the customer/group's last 12 (twelve) months usage baseline is less than 50% of each of the prior 4 (four) year's baselines, then they cannot participate in the programme*

5.1.5 *Eskom will create a single consumption baseline for the contract period, the consumer/group will not be baselined each year.*

5.3 Consumption Baseline

5.3.1 *The consumption baseline for a customer will be calculated as an aggregate of all accounts at said production facility listed in the customer's account. Eskom will decide on the aggregation process*

5.3.5 *The consumption baseline development measurement and verification methodology and processes will be approved by an independent party.*

5.3.6 *The participating customer and Eskom must contractually agree on a consumption baseline measurement values.*

5.4 Consumption Baseline Adjustments

5.4.1 *Eskom will make the adjustments to the customer/groups consumption baseline for historical participation in incentive programmes.*

5.4.1.1 For the supplemental Demand Response programme, the load shifting, will be added to the baseline.

5.4.3 The application for adjustment to the consumption baseline will be reviewed by Eskom's Sales Incentive Committee. Once the baseline is contracted it cannot be renegotiated.

6. **Performance Tracking**

6.1 Introduction

6.1.1 Effective operation of the programme requires the customers increased electricity usage to be measured with respect to the consumption baseline and the contracted incremental consumption growth profile.

6.1.2 The confirmed incremental consumption growth will be the quantification required for the adjustments.

6.2 Performance monitoring

6.2.1 The customer's performance with respect to the consumption baseline and contracted incremental performance will be monitored per calendar month for the performance period

6.2.2 Eskom will assess the customer's performance on a monthly basis in accordance with the TOU period consumption baselines. The adjustments will be calculated per TOU period per month, but paid on a quarterly basis. For the customer to qualify for an adjustment during the assessment month, they need to meet

6.2.2.1 a minimum of 50% of the proposed total incremental YTD consumption at the end of the quarter.

6.2.2.2 consumption in all TOU periods in an assessment month must exceed the baseline, if not then the customer does not qualify for adjustments in any TOU period in the month.

6.2.3 Eskom will assess performance on a year-to-date basis, allowing the customer to meet the full contractual incremental consumption within the year should they underdeliver in specific quarters. The high demand season quarter will be managed separately due to the variable adjustment rates. In this period, over-performance can be counted to the low demand season quarters, but under-delivery in the high demand quarter will not be retrospectively paid.

6.2.4 A maximum of 10% growth above the contracted incremental consumption per TOU period will be incentivised. Excess

energy consumed above the threshold will be charged at the customer's relevant tariff.

6.2.5 Eskom will provide a performance report to the customer at the end of each quarter. Should the customer be supplied by a municipality, a copy of the report will be shared with the municipality and the customer.

6.2.6 Should the customer not meet the 50% proposed incremental growth for two consecutive quarters, Eskom reserves the right to cancel the contract and to recuperate all adjustments.

6.2.7 The customer can query the performance and request a target re-phasing as per Rule 6.3.

6.2.8 An independent assurance process will be followed to verify the measurement and verification methodology for performance monitoring.

6.3 Performance Monitoring Target Re-phasing

6.3.1 Eskom will make the necessary performance adjustments to the customers consumption baseline for participation in supplemental demand response programme during this contractual period.

6.3.2 The customer may apply to re-phase their proposed target for force majeure events or exceptional circumstances. Proof of condonable events for adjustments to the consumption baseline per period needs to be made in writing to Eskom within 14 (fourteen) days post the event.

6.3.3 The application for adjustment of target deferrals will be reviewed by Eskom's Sales Incentive Committee for approval.

7.3 Payments

7.3.1 After performance monitoring verification at the end of each quarter, Eskom will load adjustments onto the customer's invoice in the next billing cycle.

7.3.6 The objective of the offer incentive programme is to provide an incentivized effective flat rate for all incremental usage above the customer's baseline. The flat rate is calculated to meet an average incentive rate, 16c/kWh, for the programme, but due to the different adjustment rates in the TOU periods, the customer's specific average may vary depending on their consumption pattern. Should the customer's average incentive rate exceed the Eskom mandated average, Eskom reserves the right to adjust the

final incentive payments to meet the Eskom mandated average.

9. **Contracting Terms**

9.1 Contract period

9.1.1 the Offer Incentive Programme contract will be for a fixed two year period.

9.4 General

9.4.1 The customer may not change to an alternative tariff during the contract period.

9.4.2 The customer may not participate in any other sales incentives during the contract unless approved in writing by Eskom. [my underlining]

PSA

55. I have already dealt with clauses 2.2 to 2.6 of the PSA and in what follows I set out the relevant material terms of the PSA *verbatim*:

“3. **General Agreement**

3.1 The customer agrees to participate in the programme in respect of the electricity supplied to the customer's electrical installation on the terms and conditions as set out in this Supplementary Agreement; subject to the provisions of the Codes, the Electricity Regulation Act, rules issued by NERSA in terms thereof, and regulations, Eskom's licenses issued by NERSA, the Schedule of Standard Prices and any other applicable law;

3.2 The customer may not change to an existing alternative tariff during the agreement period.

3.3 The customer may not participate in any other sales incentive programme during the agreement period, unless approved in writing by Eskom.

3.4 The customer shall comply with the Programme Rules in respect of the Consumption Baseline, the incremental consumption, and performance monitoring.

3.5 The parties agree that save for the express changes set out and agreed to herein, all terms of the Electricity Supply Agreement shall remain intact.

4. **Definitions and Interpretation**

- 4.1.1 *“Actual Adjustment Percentage” means the actual percentage discount achieved by the customer in each contract year, calculated by dividing the total incentive adjustment by the full energy cost of the incremental consumption multiplied by 100;*
- 4.1.8 *“Consumption Baseline” means the agreed historic half-hourly load profile representing the amount of electricity that the customer would have consumed over 12 (twelve) consecutive billing periods as specified in table 1 of Annexure A, after adjusting the customer’s actual consumption in accordance with the Programme Rules with the amendments as specified in table 2 of Annexure A.*
- 4.1.15 *“Demand Response Programme” means a programme where large electricity consumers participate and respond to requests to reduce electricity consumption to protect the technical integrity of the electricity network.*
- 4.1.26 *“Growth Target” means the amount of electricity that the customer undertakes to consume over and above the consumption baseline, as described in tables 1 and 2 of Annexure B.*
- 4.1.28 *“Incentive Adjustment” means the credit on the customer’s electricity account, calculated from the incentivised incremental consumption in each TOU period and the TOU adjustment rates;*
- 4.1.29 *“Incentivised Incremental Consumption” means the verified amount of the incremental consumption that qualifies to be included in the calculation of the incentive adjustment in accordance with clause 8 and clause 7.1.3 of this Supplementary Agreement;*
- 4.1.30 *“Incremental Consumption” means the actual electricity consumed (in GWh) by the customer over and above the consumption baseline, as measured by Eskom.*
- 4.1.32 *“Instantaneous Demand Response” means the immediate load reduction by customers to assist the system operator to manage system frequency;*
- 4.1.33 *“Key Customer” means a customer that consumes more than 100GWh per annum on a contiguous site;*
- 4.1.35 *“Load Curtailment” means compulsory load reduction implemented during electricity constraint periods;*
- 4.1.44 *“Performance Conditions” means the minimum conditions that the customer must comply with as set out in clause 7.1.2 of this Supplementary Agreement;*
- 4.1.45 *“Performance Monitoring” means the monitoring of the customer’s compliance with the performance conditions;*
- 4.1.50 *“Programme Rules” means the rules to determine the customer’s consumption baseline, then incremental consumption and performance;*

- 4.1.51 “Programme Start Date” means the date on which this Supplementary Agreement shall come into force, as set out in clause 5.1 of this Supplementary Agreement;
- 4.1.58 “Sales Incentive Committee” means the relevant Eskom approval committee required to approve any financial, contractual or legal queries with respect to the offer incentive programme within its governance processes;
- 4.1.59 “Sales Incentive Programme” means programmes that offer financial benefits for the increase in electricity consumption, such as demand response morning peak sales programme, the winter deal and the offer sales incentive programme.
- 4.1.62 “Supplemental Demand Response” means load reduction by a customer that can respond within a minimum notice period of 30 (thirty) minutes to assist Eskom in managing its demand;

5. **Effectiveness**

- 5.1 This Supplementary Agreement shall not notwithstanding the date of last signature, come into force with retrospective effect from 1 June 2018 (“the Programme Start Date”) and shall endure for two periods consisting each of 12 (twelve) consecutive billing periods (“the agreement period”), subject to the provisions of this Agreement.

6. **Qualification and Participation Requirements**

- 6.1 The customer has met the minimum electricity consumption threshold of 100GWh in 12 (twelve) consecutive billing periods during the last 60 (sixty) calendar months prior to programme start date.
- 6.2 The customer participating in this programme is:
- 6.2.1 permitted to participate in Eskom’s Demand Response programme; the impact of which will be accounted for in calculating the customer’s performance as set out in clause 7;
- 6.2.2 not allowed to participate and benefit in other Eskom or National Government Sales Incentive Programmes or special electricity pricing deals (NPA’s) unless with approval in writing from Eskom.
- 6.3 In addition to Eskom’s right to temporarily interrupt or reduce the supply of electricity or require the customer to reduce its demand for the supply of electricity in terms of the Electricity Supply Agreement, the customer shall reduce its demand for electricity in excess of the consumption baseline within 30 (thirty) minutes of a verbal notice issued by the system operator to the customer (each a load reduction event), provided that:
- 6.3.1 the load reduction events shall be limited to the evening peak period;
- 6.3.2 the total number of load reduction events shall not exceed 1 (one) per week up to a maximum of 2 (two) hours per event; and

6.3.3 Eskom shall not compensate the customer for the load reduction events.

7. Performance

7.1 Performance monitoring

7.1.1 Eskom shall monitor the customer's incremental consumption in comparison with the consumption baseline and growth target, based on metering data, in each TOU period and billing period in the year.

7.1.2 In order for the customer to qualify for an incentive adjustment Eskom shall assess the customer's performance on a year-to-date basis and the customer shall be required to comply with the following performance conditions:

7.1.2.1 the YTD incremental consumption must be equal to or exceed 50% of the total YTD growth target at the end of each quarter; and

7.1.2.2 the incremental consumption must exceed the consumption baseline in all TOU periods in the applicable billing period, if not then the customer shall not qualify for an incentive adjustment in any TOU period in that billing period.

7.1.3 Should the incremental consumption in any quarter be less than the growth target, the customer may increase its electricity consumption in any other quarter, excluding the high demand season quarter, in order to comply with the growth target for the contract year. Should the customer consume electricity in excess of the growth target in each TOU period, a maximum of 10% above growth target per TOU period shall be included in the incentivised incremental consumption. Excess energy consumed above this threshold shall not be included in the calculation of incentivised incremental consumption.

7.1.4 Eskom shall provide a performance target to the customer at the end of each quarter in the form attached hereto as Annexure D indicating the incentivised incremental consumption.

7.1.5 The customer may query the performance report, within 15 (fifteen) business days of the date of the performance report and may request a re-phrasing of the growth target as per clause 8.3.

7.2 Performance monitoring target re-phrasing

7.2.1 Eskom shall adjust the consumption baseline in respect of the customer's participation in the supplemental demand response during this agreement period.

7.2.2 the customer may apply to re-phase the growth target for force majeure events, provided that the customer has complied with the provisions of the force majeure clause of the Electricity Supply Agreement in relation to force majeure event, or exceptional

circumstances. The customer must request and provide proof of condonable events for adjustments to the consumption baseline per TOU period in writing to Eskom within 14 (fourteen) calendar days post the event.

7.2.3 The customer's application for adjustment or deferment of the growth target shall be reviewed by Eskom for approval.

8. **Incentive adjustments**

8.1 Eskom shall credit the customer's electricity account with an incentive for the incentivised incremental consumption; provided that the customer has for the duration of this agreement, paid in full their electricity accounts in accordance with the provisions of the Electricity Supply Agreement.

8.2 **TOU adjustment rate calculation**

8.2.1 Eskom shall recalculate the TOU adjustment rates to take into consideration any price increase as approved by NERSA, to adjust to the new tariff rates and shall notify the customer in writing of any change in the TOU adjustment rates.

8.3 **Incentive adjustment calculation**

8.3.1 If the customer meets the performance conditions, then the incentive adjustment shall be calculated as the summation of the incentivised incremental consumption per TOU period multiplied by the TOU adjustment rates per TOU period for the billing period.

8.3.2 Any re-phrasing of the growth target allowed during the billing period shall be taken into account when determining the incentivised incremental consumption.

8.3.3 The Megaflex Schedule of standard prices for non-local authority supplies currently in force is attached as Annexure E.

9. **Payment**

9.1 After verification of the performance report at the end of the each quarter, Eskom shall credit the customer's electricity account with the incentive adjustment in the next billing cycle.

9.2 The incentive adjustment shall be shown as a separate line item on the customer's electricity account.

9.3 The objective of the programme is to charge the effective flat rate for the incentivised incremental consumption.

9.3.1 If the customer's actual adjustment percentage exceed the effective adjustment percentage, Eskom shall amend the incentive adjustment applicable at the end of the each contract year to limit the actual adjustment percentage to the lower of 5% above the effective adjustment percentage or an actual adjustment rate of 16c/kWh".

DR Agreement

56. The DR Agreement has the following relevant and/or material terms that I quote *verbatim*:-

“2. Introduction

- 2.1 *The customer is presently supplied by Eskom in terms of an existing electricity supply agreement;*
- 2.2 *The customer is willing to provide load reduction through supplemental DR as a supplemental reserve.*
- 2.3 *Eskom shall at its own cost supply, install, maintain, calibrate and operate the DR installation on the customer’s premises.*
- 2.4 *Load reduction practices as published in the NRS 048-9 2010 (“Electricity Supply Quality of Supply part 9: Load reduction practices, system restoration and critical load and essential load requirements under system emergencies”) shall apply should the customer comply with the performance criteria as set out in this agreement.*

3. Definitions and interpretation

3.1 Definitions

- 3.1.8 *“Capacity payment” means the payment (in R/MW/h) to the customer by Eskom for capacity scheduled by Eskom as a supplemental reserve, and which capacity has been or can be successfully reduced on instruction from Eskom, such payment is to be made irrespective of whether or not the customer is required to provide load reduction on instruction from Eskom;*
- 3.1.10 *“Certified capacity” means the capacity in megawatt that the customer has provided to Eskom on two or more occasions that it can reduce, and which has subsequently been accepted and certified by Eskom;*
- 3.1.12 *“Contract Schedule” means the schedule sent to the customer by Eskom in accordance with subclause 6.3., specifying the capacity (in MW per hour) to be available for load reduction during each hour of the next day.*
- 3.1.13 *“Customer Baseline (CBL)” means a daily profile representing the amount of electricity the customer would have consumed in each*

integration period for week days and week-end days as described in subclause 6.4.6.

- 3.1.16 “Demand Response (DR)” means an Eskom initiative through which customers contract with Eskom to make agreed capacity available for reduction on instruction from Eskom.
- 3.1.19 “Energy payment” means the payment (in R/MWh) to the customer by Eskom for energy reduced during an event for the supplemental reserve.
- 3.1.20 “Event” means a request for load reduction by Eskom.
- 3.1.23 “Integration period” means a 30-minute interval over which the load at a particular metering point is accumulated, unless specifically stated otherwise in this agreement.
- 3.1.24 “Load reduction {LR}” means a reduction in customer load or consumption on instruction by Eskom, measured in MW and MWh, respectively, over the integration period or a period as specifically instructed by the CDS, calculated in terms of subclause 6.4.6.
- 3.1.27 “On target load reduction” means an average reduction of more than 90% of the scheduled capacity (in MW) for all load reduction instructions issued per month.
- 3.1.32 “Re-certified” means an adjustment of the certified capacity as notified by Eskom to the customer.
- 3.1.33 “Scheduled capacity” means the load in MW that Eskom requires the customer to have available for load reduction as specified in the contract schedule.
- 3.1.34 “Supplemental reserves” means the capacity available for reliable and secure balancing of supply and demand within 10 (ten) minutes without energy restrictions. It should be sustainable for a sufficient period to meet likely contingencies. It may be generation capacity or dispatchable load reduction.

5. Duration of agreement

- 5.1 This agreement shall come into effect from 13 August 2018, notwithstanding the signature date hereof by the parties, and shall endure until 31 March 2019, subject to the provisions of this agreement.

6. Principles of the DR product for this agreement

6.1 Certification of load

- 6.1.1 In order to participate in the supplemental DR, the customer has to request to be certified by Eskom for the load it shall participate with under normal circumstances...

6.1.2 If ESKOM is satisfied with the load reduction results in terms of subclause 6.1.1, it shall notify the customer via email of its certified capacity, which is the capacity that Eskom shall assume is available for participation as a supplemental reserve, unless Eskom is otherwise notified in terms of subclause 6.2 and subject to subclause 6.4.

6.2 Notification of load reduction information by the customer

6.2.1 The customer shall inform the CDS, on or before 09:00 of every date, whether the certified capacity will be available for participation in the supplemental reserve. It is compulsory for the customer to be available for load reduction at least during all system peak hours.

6.3 Bidding of load information in the supplemental reserves and scheduling

6.3.1 ESKOM shall use the CDS to bid the customer's bid capacity as a supplemental reserve on behalf of the customer.

6.3.6 The maximum amount of hours that Eskom may request the customer to reduce its load with, shall be limited in accordance with the terms contained in Annexure B. Furthermore, the maximum amount of load reductions that Eskom may request the customer to reduce its load with, shall be restricted to 150 on target load reduction for the duration of the agreement.

6.4 Load reduction and payment as a supplemental reserve

6.4.1 The customer shall ensure that the scheduled capacity specified in the contract schedule is available during all specified hours and that the load is reduced within 30 (thirty) minutes from the time the instruction is given by Eskom. The instruction will be given by telephone from the CDS to the customer's nominated representative. Eskom shall ensure at all times that it communicates only with the customer's nominated representative/s using the telephone number designated by the customer for the purpose, as provided in Annexure A or otherwise specified by the customer in writing...

6.4.2 The customer may restore its load after the maximum duration of the load reduction, which is 2 (two) hours, or as soon as the event has been cleared or an electronic restore signal has been given by the DR installation, whichever is the earlier.

6.4.3 Eskom shall be the customer a capacity payment for the scheduled capacity made available as follows:

- (a) R31,72/MW/h VAT exclusive, during system peak hours, for each hour as specified in the contract schedule; and
- (b) R13,31/MW/h VAT exclusive, during all hours of the day not defined as system peak hours, for each hour as specified on the contract schedule.

6.4.4 *If the customer's median performance for all load reductions during a particular month is above 90%, the customer will receive the full capacity payment. If the customer's median performance during a particular month is equal to or below 90%, the customer shall only receive a pro-rata portion of the capacity payment, based on actual performance for the month.*

6.4.6 *Load reduction shall be calculated per integration period, subtracting the actual load from the CBL and summated for the duration of the load reduction request, as instructed by Eskom.*

6.4.6.1 *The CBL shall consist of average half-hourly week day and week-end day profiles. These profiles shall exclude curtailment days. A planned and unplanned maintenance day may be excluded and replaced by Eskom with a subsequent day for the purpose of CBL calculations. Should the customer not query such replacement within 3 (three) business days after the receipt of the event performance report, it shall be deemed to be an acceptance thereof.*

6.4.7 *Eskom shall in addition to the capacity payment in subclause 6.4.3, pay the customer for all load reduction occurrences, for energy reduced, as follows:*

6.4.7.1 *an energy payment shall be made for events where the performance is greater than 30%, metered in MWh as described in subclause 6.4.6.*

6.4.7.2 *no energy payment shall be made where the event performance is equal or below to 30%.*

6.4.7.3 *payment shall be made at a price equal to the lesser of the customer's bid price, or R1485/MWh, VAT exclusive.*

6.5 **Billing**

6.5.1 *Eskom shall itemise all events and repayments in a report and send to the customer by the 10th business day of the month following the month of participation, for verification.*

6.5.2 *If the parties agree on the amount payable, the customer shall provide Eskom with a tax invoice by the 15th business day of the same month, reflecting the agreed amount. Such tax invoices shall comply with the South African Revenue Services requirements. If an electronic invoice cannot be generated by the customer, the original tax invoice shall be sent by courier to Eskom at the address stated in subclause 12.1.*

6.5.3 *Eskom will only credit the customer's electricity account following a receipt of a valid tax invoice. In the case where the customer has provided Eskom with a tax invoices by the date specified in 6.5.2, Eskom shall settle the tax invoice by*

crediting the customer's electricity account following the month of participation (e.g. the May 2018 electricity account will be credited for participation in April 2018). If Eskom received a tax invoice after the date specified in subclause 6.5.2, the tax invoice shall be settled by crediting the customer's next electricity account (e.g. the electricity account will be credited in June instead of May for participating in April). It is specifically agreed that the amount invoiced by the customer shall be as calculated by Eskom and verified by the customer, unless the parties agree in writing on another amount in which case Eskom shall issue a new report and send it to the customer in terms of subclause 6.5.2. If the parties fail to reach agreement on the amount to be invoiced, the matter shall be resolved in accordance with clause 10⁷⁵. [my underlining]

57. The requirements for a dilatory special plea of *lis alibi pendens* are:-
- 57.1 there must be litigation pending;
 - 57.2 the other proceedings must be pending between the same parties or their privies;
 - 57.3 the pending proceedings must be based on the same cause of action; and
 - 57.4 the pending proceedings must be in respect of the same subject matter.
58. Whether the subject matter is the same depends on a determination of the issues with reference to the pleadings. The mere fact that the same evidence may be led in both cases is beside the point. The *onus* of proving the requisites rest on the party raising the defence – ie the respondent. Once the requisites are established, a factual presumption arises that the second proceedings are *prime facie* vexatious. The party who instituted the second proceedings then bears the *onus* of convincing the court that the new/second proceedings are not vexatious. To do this, that party must satisfy the court, despite the fact that all the required elements are present, that the balance of convenience and equity are in favour of allowing the new/second case to

⁷⁵ Clause 10 is a dispute resolution clause making provision for mediation and then arbitration.

proceed. However, the court has an overriding discretion to order a stay even if the elements have not been established⁷⁶.

59. In *Richtersveld Community v Alexkor Ltd*⁷⁷, Gildenhuis J dealt with a situation wherein 1997 five members of the R Community instituted an action in the Provincial Division against the Government and Alexkor claiming an order declaring that the R Community was entitled to the exclusive beneficial occupation and use of certain land on the grounds that the R Community held aboriginal title to the land. Certain alternative claims were also made. Thereafter, in 1998, the R Community and the individual members thereof instituted an action in the Land Claims Court against the government alleging that the R Community held aboriginal title to the land which had not been lawfully extinguished or diminished at any time prior to 19 June 1913 and that they had been dispossessed of their rights in respect of the land by legislative and executive state action after 19 June 1913 as a result of discriminatory laws and practices and that they had not received just and equitable compensation at all in respect of the disposition, and claiming restitution under the Restitution of Land Rights Act, 20 of 1994. The plea of *lis alibi pendens* was raised.

60. At 340E-343C, Gildenhuis J held as follows:-

“A defence of lis alibi pendens depends upon the existence of a pending earlier action. The mischief at which the defence is directed is that it is prima facie vexatious to bring two actions in respect of the same subject matter. The requisites for a valid plea of lis alibi pendens are that the actions must be between the same parties, must concern the same thing and must arise from the same cause of action. In this instance, both actions are between the same parties and relate to the same land. In the High Court Action the plaintiff’s allege that they hold certain rights in respect of the land and they claimed enforcement of those rights. In the action before this Court, the plaintiff alleged that, in the past, they held certain rights in respect of the land and that they were dispossessed of those rights after 19 June 1913 as a result of past discriminatory laws and practices. They claim restitution of rights, either through restoration of the rights or through equitable redress. In both cases, different forms of relief are pleaded in the alternative. Some of the alternatives pleaded in the High Court overlap with alternatives pleaded in this Court, particularly the right to indigenous title.”

⁷⁶ *Van As v Appollus* 1993 (1) SA 606 (KPA) at 610D-G, *Nordbak v Wearcon* 2009 (6) SA 106 (W), *Marks & Kantor v Van Diggelen* 1935 TPD 29, *Dreyer v Tuckers Land and Development Corp (Pty) Ltd* 1981 (1) SA 121 (T) at 1231 and *Cesarstone SDOT-YAM Ltd v The World of Marble and Granite* 2000 (CC) 2013 (6) SA 499 (SCA).

⁷⁷ 2000 (1) SA 337 (LCC).

The defence of lis alibi pendens is related to the defence of res judicata. See Voet 44.2.7:-

“Exceptions of lis pendens also require same persons, thing and causa – the exception that the suit is already pending is quite akin to the exception of res judicata, in as much as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended, there is room for the exception of res judicata in terms of what has already been said. Thus the suit must have started to be mooted before another judge between the same persons, about the same matter and on the same causa, since the place where a judicial proceeding has once been taken is also the place where it ought to be given its ending.”

In determining the ambit of the defence of lis pendens, regard may be had to the authorities dealing not only with lis pendens, but also res judicata.

In the matter of Bafokeng v Impala Platinum Ltd and others Friedman JP described the essentials of the exceptio res judicata as follows:

“From the foregoing analysis I find that the essentials of the exceptio res judicata are threefold, namely that the previous judgment was given in an action or application by a competent Court (1) between the same parties; (2) based on the same cause of action (ex eadem petendi causa; (3) with respect to the same subject matter, or thing (de eadem re). Requirements 2 and 3 are not immutable requirements of res judicata. The subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.”

In the present instance, if the case in the High Court should proceed and the High Court should find that the plaintiffs never acquired any rights under indigenous title, this Court would be bound by that finding pursuant to the doctrine known as issue estoppel. Friedman JP in the Bafokeng tribe case, described the doctrine of issue estoppel as follows:-

“The doctrine of issue estoppel has the following requirements: (a) where a Court in a final judgment on a causa has determined an issue involved in the cause of action in a certain way, (b) if the same issues are again involved, and the right to reclaim depends on that issue, the termination in (a) may be advanced as an estoppel in a later action between the same parties, even if the latter action is founded on a similar cause of action. Issue estoppel is a rule of res judicata, but is distinguished from the Roman Dutch Law exception in that in issue estoppel the requirements that the same subject matter or thing must be claimed in the subsequent action is not required. Issue estoppel has a twofold requirement”.

Friedman JP then pointed out that issue estoppel is founded on a policy to avoid multiplicity of actions and said:-

“There is a tension between a multiplicity of actions and the palpable realities of injustice. It must be determined on a case by case foundation whether rigidity and the overriding or paramount consideration being overall fairness and equity.”

The considerations of equity will differ from case to case, as was said by Botha JA in Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk:-

“Elke saak moet volgens sy eie feite beslis word. Dit is ook nie doenlik om in abstrakte terme rigsnoere te probeer formuleer wat op alle situasies van toepassing gemaak kan word nie.”

The basis of any argument that I must stay this action pending the decision of the Cape High Court on the question of whether the plaintiffs ever acquired land rights under indigenous title or otherwise, is based on the premise that a finding by the High Court on that issue will be binding on this Court. On the principles of issue estoppel, this premise may well be correct. Issue estoppel is a rule of res judicata. The rules of res judicata are identical to the rules of lis

pendens. The rule are, however, not immutable rules. If I borrow from them to decide a lis pendens defence, I must at the same time respect the other requirements of the defence. Given the wide diversity of the overall ambit of the two cases, the mere existence of one or more identical issues in dispute in the two cases does not, in my view, justify a successful plea of lis pendens.

I now revert to the requirement that, for a successful plea of lis pendens, both cases must arise from the same cause of action. Although some relief claimed in the High Court as well as some relief claimed in this Court is based on the same imperative, namely, that plaintiffs must have acquired certain rights in respect of the land (particularly the right of aboriginal title), the causes of action are entirely different. The fundamental issue in the first case is the enforcement of existing rights. In the second case it is the restitution of previously held rights which were taken away. The relief in the second case is not merely incidental upon a finding that the original rights existed. There are many more requirements to be met under the Restitution Act. Furthermore, the relief in the second case will not necessarily be the restoration of the rights. It might be well be equitable redress... I conclude my finding that the issue of whether the plaintiffs ever had the rights in land which they allege they had is not the fundamental causa agendi in both actions. Accordingly, the defence of lis pendens must fail. Even if the requisites of a plea of lis pendens had been met, I would still have had the discretion to allow this action to proceed.”

61. In *Nestle (SA) (Pty) Ltd v Mars Inc*⁷⁸, the SCA held at 548J-549G as follows:-

“The defence of lis alibi pendens share features in common with defence of res judicata because they have a common underlying principle, which that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated. By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion. The same suit, between the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. ... There is no prospect of a defence of res judicata in the proceedings before the ASA once the registrar has made its ruling and by the same token a plea of lis alibi pendens is thus bound to fail”.

62. Applying the above principles, I find as follows in connection with the plea of *lis alibi pendens*:-

62.1 at prayers 1 and 2 of the Notice of Motion the applicant seek orders reviewing and setting aside the PSA and/or clause 7.2.1 thereof on the basis of invalidity and/or unlawfulness. In the arbitration, the respondent seeks to enforce certain clauses of the PSA. To my mind,

⁷⁸ 2001 (4) SA 542 (SCA).

seeking relief to the effect of declaring a contract unlawful and/or invalid is something entirely different from a claim that seeks to enforce such particular contract. Accordingly, the requisites for a successful plea of *lis alibi pendens* have not been satisfied in relation to prayers 1 and 2 of the Notice of Motion *vis-à-vis* the respondent's Claims A, B and C in the arbitration;

62.2 In respect of the applicant's counterclaim in the arbitration pertaining to the rescission and/or setting aside of the PSA and/or clause 7.2.1 thereof, it is evident that this particular relief overlaps the relief sought by the applicant in prayers 1 and 2 of the Notice of Motion. I am satisfied that in this instance the requisites of *lis alibi pendens* have been satisfied. However, I am also satisfied that the applicant discharged the *onus* to show that the balance of convenience and equity are in favour of allowing the legality review to proceed. I base this principally upon the fact that the arbitrator already found and/or held that he/she does not have jurisdiction to determine this particular issue as it constituted a collateral challenge defence. Put differently, only this Court is in a position to determine such issue and not the arbitrator. In addition, and should I uphold the plea of *lis alibi pendens*, it will result in a gargantuan waste of legal costs and time as the parties will simply be back in this Court to determine such issue/s; and

62.3 I also find that there is a clear overlap between the relief sought by the applicant in prayer 3 of the Notice of Motion [seeking rectification of clause 7.2.1 of the PSA] as compared to the applicant's counterclaim where identical relief is also sought pertaining to rectification of clause 7.2.1 of the PSA. In this instance, however, I am of the view that the applicant failed to discharge the onus of convincing me that the balance of convenience and equity are in favour of allowing prayer 3 of the Notice of Motion to proceed. This is because no facts and/or circumstances have been alleged and/or placed before me in order to exercise such discretion and I am also of the view that the arbitrator will be in a far better position to determine the merits (and/or demerits) of

the claim for rectification. After all, a claim for rectification is fact based that is more appropriately to be dealt with in the arbitration that has the added advantage of cross-examination, discovery and the like. In the circumstances, the relief in prayer 3 of the Notice of Motion falls to be stayed until determination of the applicant's counterclaim for rectification in the arbitration proceedings.

Merits of legality review

63. The first main contention of the applicant for unlawfulness and invalidity can be swiftly dealt with.
64. Section 14 of the ERA⁷⁹ is headed "*Conditions of Licence*" and provides that NERSA may make any licence subject to conditions relating to:-
- (a) the establishment of and compliance with directives to govern relations between a licensee and its or end users, including the establishment of or end user forums;
 - (b) the furnishing of information, documents and details that the Regulator may require for the purposes of the ERA;
 - (c) the validity of the licence in accordance with section 20 thereof;
 - (d) the setting and approval of prices, charges, rates and tariffs charged by licensees;
 - (e) the methodology to be used in the determination of rates and tariffs which are imposed by licensees;
 - (f) the format of and contents of agreements entered into by licensees;
 - (g) the regulation of the revenues by licensees;
 - (h)
 - (i) the setting, approving and meeting of performance improvement targets, including the monitoring thereof through certificates of performance;
 - (j) the quality of electricity supply and service;

⁷⁹ Act 4 of 2006.

- (k) the cession, transfer or encumbrance of licences, including the compulsory transfer of a licence to another person under certain conditions, and terms and conditions relating thereto;
- (l) the right to operate generation, transmission or distribution facilities, to import or export electricity, to trade or perform prescribed activities relating thereto, including exclusive rights to do so, and conditions attached to or limiting such rights;
- (m) the duty or obligation to trade, or to generate, transmit or distribute, electricity, and conditions attached to such duties or obligations;
- (n) the termination of electricity supply to customers and end users under certain circumstances, the duty to reconnect without undue discrimination, and conditions relating thereto;
- (o) the area of electricity supply to which a licensee is entitled or bound;
- (p) the classes of customers and end users to which electricity may or must be supplied;
- (q) the persons from whom and to whom electricity must or may be bought or sold;
- (r) the types of energy sources from which electricity must or may be generated, bought or sold;
- (s) compliance with health, safety and environmental standards and requirements;
- (t) compliance with any regulation, rule or code made under the ERA,
- (u) compliance with energy efficiency standards and requirements, including demand – side management:
- (v) the undertaking of customer or end user education programmes;
- (w)
- (x) the need to maintain facilities in a fully operational condition;
- (y) the period within which licensed facilities must become operational; and
- (z) any other condition prescribed by the Regulator.

65. Section 15 of the ERA is headed “*Tariff principles*” and provides in subsection 1 thereof that a licence condition determined under section 14 relating to the

setting or approval of prices, charges and tariffs and the regulation of revenue:- (a) must enable an efficient licensee to cover the full costs of its licensed activities, including a reasonable margin or return; (b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided; (c) must give end users proper information regarding the costs that their consumption imposes on the licensee's business; (d) must avoid undue discrimination between customer categories; and (e) may permit the cross-subsidy of tariffs to certain classes of customers. Section 15(2) provides that the licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the regulator as part of the licensing conditions.

66. The first main contention raised by the applicant received no attention during the hearing. In fact, not merely did the applicant's counsel not make any submission in relation thereto, but the Heads of Argument of the applicant is also silent in respect thereof. This is unsurprising in view thereof that the applicant's legal representatives made the licences of the applicant available to the respondent's legal representatives subsequent to a notice in terms of Rule 35(12)⁸⁰.
67. It is clear from section 14(1)(f) of the ERA that the Regulator may make any licence subject to conditions relating to the format of and contents of agreements entered into by licensees. It follows from this that the applicant is mistaken in its submission contained in its Founding Affidavit that the format and contents of the PSA had to be approved by NERSA. After all, only the licence conditions could contain such a requirement. A perusal of the licences makes it vividly clear that not a single condition in them prescribes the format or what content agreements should contain when the applicant contracts. On this score, the first main contention has no merit⁸¹.

⁸⁰ CL0061 to CL002 read with CL007 - 3.

⁸¹ CL007-1 to CL007-38

68. Further to the above, the generation licence provides that the licence was issued to the applicant to generate electricity for the purposes of enabling a supply to be offered to the distribution division. Evidently, this licence pertains to internal arrangement between divisions of the applicant. Furthermore, the distribution licence does not provide anywhere that the applicant must obtain the prior approval of NERSA before entering into a contract such as the PSA with a customer. Instead, clause 4.6 thereof provides that “*the licensee shall comply with the price and tariff methodology provided by NERSA in determining its prices and tariffs*”. Clause 4.7 thereof again provides that: “[*Eskom*] shall charge [*Silicon*] tariffs and prices approved by NERSA”. NERSA applies a multi-year pricing model for the pricing and tariff structure used by the applicant. To this end, clause 7.1 of the ESA provides for the applicant to use Megaflex prices when charging the respondent.
69. In the premises, I conclude that neither the PSA nor clause 7.2.1 thereof are unlawful and/or invalid by virtue of the first main contention relied upon by the applicant and which contention appears to have been abandoned (at least implicitly).
70. As regards the second main contention relied upon by the applicant, I firstly find that clause 7.2.1 of the PSA is not at variance with the OSIP and/or the Programme Rules. After all, clause 4.6.1 of the Programme Rules expressly provides therefore that the respondent is allowed to participate in the DR Programme. Clause 4.6.2 pertains to double-dipping by participating in “*other*” incentive programmes and accordingly clause 4.6.2 is not applicable. In fact, such authority to participate in the DR Programme was perpetuated in clause 6.2.1 of the PSA itself that provides that despite the respondent’s participation in the OSIP, the respondent is permitted to participate in the DR Programme and that the impact thereof is set out in clause 7 thereof. Again, clause 6.2.2 is of no application as it pertains to “*other*” incentive programmes.
71. Further to the foregoing, I am also of the view that the applicant’s contention that the PSA and/or clause 7.2.1 of the PSA violate the Constitution is meritless in that it transgresses the principle of subsidiarity. In any event, the

applicant did not even indicate and/or specify what provision/section of the Constitution was violated. The PFMA was enacted to give effect to section 216(1) of the Constitution and it is also clear the applicant does not attack the constitutionality of the PMFA. Its attack on the unlawfulness and/or invalidity of the PSA and/or clause 7.2.1 thereof is simply that it amounts to fruitless and wasteful expenditure and accordingly the PSA and/or clause 7.2.1 thereof is unlawful and/or invalid by virtue to the provisions of the PMFA. It suffice to refer to what was stated by Cameron J in *My Vote Counts NPC v Speaker of the National Assembly and others*⁸²:-

- [46] *Parliament's argument brings to the fore the principle of subsidiarity in our constitutional law. Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institutional, or higher norm, should be invoked only where the more local institutional or concrete norm, or detailed principle or remedy does not avail. The word has been given a range of meanings in our constitutional law. It is useful in considering the scope of subsidiarity, and Parliament's reliance on it – to have them all in mind.*
- [47] *Subsidiarity has been used, in assessing the constitutional validity of a statutory provision licencing the use of reasonably necessary force in effecting an arrest, to indicate the necessity for tempering the amount of force. Force is permitted only where there are no lessor means of achieving the arrest. Using force is, in other words, subsidiary to all other means.*
- [48] *In international law, subsidiarity is employed to resolve a clash of jurisdictions. It determines which state should act when multiple states have jurisdiction over the same events constituting an international crime. Under our Constitution it signifies the duty of the South African Police Service to investigate international crimes, including crimes against humanity, is subsidiary to that of the foreign state in which the crimes were committed.*
- [49] *Subsidiarity has also been used to describe the principle that overlap in functional areas of concurrent constitutional competence should be resolved by assigning the power to the sphere of government where the specific function is most appropriate. Within the Bill of Rights, subsidiarity entails that where the Constitution contains both a specific right, like the right of access to housing, and a more general right, like the right to human dignity, which informs the right to housing, the litigant must first invoke the specific right. The more general right is subsidiary.*
- [50] *But the most frequent invocation of subsidiarity has been to describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement of a right. Under the interim Constitution, where the Appellate Division had no Constitutional jurisdiction, and this Court had Constitutional jurisdiction only, this Court laid down as a general principle that, where it was possible to decide a case, civil or criminal, without reaching a Constitutional issue, that should be done. This entailed the subsidiarity of the interim Constitution to other judicial approaches to rights enforcement.*

⁸² 2016 (1) SA 132 (CC).

- [51] *Of course, this approach has long since been abandoned under the final Constitution in favour of its opposite, namely the primacy of Constitutional approaches to rights determination. Far from avoiding Constitutional issues whenever possible, the Court has emphasised that virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are ultimately, Constitutional. This is because the Constitution’s rights and values give shape and colour to all law.*
- [52] *But it does not follow that resort to Constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first.*
- [53] *These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of Constitutional subsidiary Parliament invokes here. Once legislation to fulfil a Constitutional right exists, the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.*
- [54] *Over the past 10 years this Court has often affirmed this. It has done so in a range of cases. First, in cases involving social and economic rights, which the Bill of Rights obliges the state to take reasonable legislative and other measures, within its available resources, to progressively realise, the Court has emphasised the need for litigants to premise their claims on, or challenge, legislation Parliament has enacted. In Mazibuko the right to have access to sufficient water guaranteed by section 27(1)(b) was in issue. The applicant sought a declaration that a local authority’s water policy was unreasonable. But it did so without challenging a regulation, issued in terms of the Water Services Act, that specified the minimum standard for basic water supply services. This, the Court said, raised “the difficult question of the principle of Constitutional subsidiarity”. O’Regan J on behalf of the Court, pointed out that the Court had repeatedly held “that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution”. The litigant could not invoke the Constitutional entitlement to access to water without attacking the regulation and, if necessary, the statute.*
- [55] *Second, the Court has applied the principle to legislation Parliament adopts with the clear design of codifying a right afforded by the Bill of Rights. After Parliament enacted the Labour Relations Act (LRA), the High Court in Naptosa refused to allow a litigant to rely directly on the fair labour practices provision in the Bill of Rights. It has to rely instead on the unfair labour practice provisions in the statute, or challenge the statute itself. Conradie J said he could not “conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes”. He also stated that it was inappropriate, in a highly regulated statutory environment like labour law, to ask a Court to fashion a remedy “which the legislature has not seen fit to provide”.*
- [56] *This approach was first quoted with approval in this Court in a context unrelated to employment rights, then adopted and endorsed unanimously in a case about Labour Relations, Sandu. Even though National Regulations had been enacted providing for collective bargaining, the supplicant sought to rely directly on the provisions of section 23(5) of the Bill of Rights to found a more encompassing duty to bargain. The Court*

disallowed this. It held that where legislation has been enacted to give effect to a Constitutional right, “a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the Constitutional standard”. If the legislation is wanting in its protection of the right, then that legislation “should be challenged constitutionally”.

[57] Third, the Court has applied the principle of subsidiarity to those provisions of the Bill of Rights that specifically oblige Parliament to enact legislation: ss9(4), 25(9), 33(3) and 32(2) – the lattermost section at issue in this case. The Court has held that unfair discrimination cases must be brought “within the four corners” of the Promotion of Equality and Prevention of Unfair Discrimination Act, rather than under the Bill of Rights. In *Pillay Langa CJ*, on behalf of the majority, citing *New Clicks*, *Sandu* and *Naptosa*, held that “a litigant cannot circumvent legislation enacted to give effect to a Constitutional right by attempting to rely directly on the Constitutional right”.

[58] In *Bato Star* the application of the Promotion of Administrative Justice Act was at issue. Neither the High Court nor the Supreme Court of Appeal considered the applicant’s claim to administrative review in the context of PAJA. This Court held that they had erred. The Court held that “the provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA”. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.

[59] In *New Clicks* the applicability of PAJA was also at stake, though the Court was divided on whether it applied to the regulations in issue. *Chaskalson JC* affirmed that a litigant “cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law”. *Ngcobo J* expressly endorsing the High Court’s approach in *Naptosa*, said that our Constitution –

“contemplates a single system of law which is shaped by the Constitution. To rely directly on section 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to section 33 is applicable, is in my view inappropriate”.

He proceeded:

“Where, as here, the Constitution requires Parliament to enact legislation to give effect to the Constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides”

[60] In *PFE International* the “heart of the matter” was “the determination of the legislative regime regulating the exercise of the right of access to information held by the state after the commencement of legal proceedings”. *Jafta J*, on behalf of a unanimous Court, said:-

“PAIA is the national legislation contemplated in section 33(2) of the Constitution. In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. Ordinarily, according to the principle of Constitutional subsidiarity, claims for enforcing the right to access to information must be based on PAIA”.

[61] These instances explain the powerful, interrelated reasons from which the notion of subsidiarity springs. The principle is concerned in the first place with the programmatic scheme and significance of the Constitution. In *New Clicks*

Chaskalson CJ said that allowing a litigant to rely on section 33(1) of the Constitution, rather than on PAJA, “would defeat the purposes of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation”.

[62] A second concern is Parliament’s indispensable role in fulfilling Constitutional rights. Ngcobo J in *New Clicks* pointed out that “legislation enacted by Parliament to give effect to a Constitutional right ought not to be ignored”. The Constitution’s delegation of tasks to the legislature must be respected, and comity between the arms of government requires respect for a cooperative partnership between the various institutions and arms tasked with fulfilling Constitutional rights. As this Court has said “the courts and the legislature act in partnership to give life to Constitutional rights”. The respective duties of the various partners and their associates must be valued and respected if the partnership is to thrive. In *Sandu* the Court pointed out that not to apply the principle “would be to fail to recognize the important task conferred on the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights”.

[63] A third interest the principle protects is the development of a consistent and integrated rights jurisprudence. Our Courts have held that allowing reliance directly on Constitutional rights, in defiance of their statutory embodiment, would encourage the development of “two parallel systems” of law. In other words, coherence in development and applying rights within a unitary system of norms is a further reason for requiring litigants to rely on, or challenge, legislation that gives effect to a provision in the Bill of Rights”.

[64] This approach prevailed in *Idasa*. There the applicants sought to rely directly on section 32 of the Constitution but failed to challenge PAIA. The High Court held that it could not proceed in that way. It found that section 32 was “subsumed” by PAIA, which regulates the right of access to information. Hence, in the absence of a challenge to the Constitutional validity of PAIA, the provision in the Constitution could not serve as an independent legal basis or cause of action to enforce rights of access to information. The applicants accordingly had to seek their remedy “within the four corners” of the statute, for to hold otherwise would encourage the development of two systems of law”.

72. Section 216(1) of the Constitution provides that National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of Government, by introducing:-

- (a) generally recognized accounting practice;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.

73. One of the most important pieces of legislation enacted by Parliament in compliance with its obligation in terms of section 216(1) of the Constitution, is the PFMA.

74. The preamble of the PFMA provides that it is to regulate financial management in the National Government and Provincial Governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; and to provide for the responsibilities of persons entrusted with financial management in those governments.
75. In what follows I set out the materially relevant provisions of the PFMA and/or what I consider to be informative for purposes of adjudicating the second main contention relied upon by the applicant. In this regard, the PFMA provides:-

1 Definitions

In this Act, unless the context otherwise indicates-

'accounting officer' means a person mentioned in section 36;

'accounting authority' means a body or person mentioned in section 49;

'executive authority'-

(a) in relation to a national department, means the Cabinet member who is accountable to Parliament for that department;

(b) in relation to a provincial department, means the member of the Executive Council of a province who is accountable to the provincial legislature for that department;

(c) in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls; and

(d) in relation to a provincial public entity, means the member of the provincial Executive Council who is accountable to the provincial legislature for that public entity or in whose portfolio it falls;

'fruitless and wasteful expenditure' means expenditure which was made in vain and would have been avoided had reasonable care been exercised;

'irregular expenditure' means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including-

(a) this Act; or

(b) the State Tender Board Act, 1968 ([Act 86 of 1968](#)), or any regulations made in terms of that Act; or

(c) any provincial legislation providing for procurement procedures in that provincial government;

'national public entity' means-

(a) a national government business enterprise; or

(b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is-

(i) established in terms of national legislation;

(ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and

(iii) accountable to Parliament;

'public entity' means a national or provincial public entity;

2 Object of this Act

The object of this Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.

3 Institutions to which this Act applies

- (1) This Act, to the extent indicated in the Act, applies to-
- (a) departments;
 - (b) public entities listed in Schedule 2 or 3; and
 - (c) constitutional institutions.

6 Functions and powers

- (1) The National Treasury must-
- (a) promote the national government's fiscal policy framework and the co-ordination of macro-economic policy;
 - (b) co-ordinate intergovernmental financial and fiscal relations;
 - (c) manage the budget preparation process;
 - (d) exercise control over the implementation of the annual national budget, including any adjustments budgets;
 - (e) facilitate the implementation of the annual Division of Revenue Act;
 - (f) monitor the implementation of provincial budgets;
 - (g) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions; and
 - (h) perform the other functions assigned to the National Treasury in terms of this Act.
- (2) To the extent necessary to perform the functions mentioned in subsection (1), the National Treasury-
- (a) must prescribe uniform treasury norms and standards;
 - (b) must enforce this Act and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments;
 - (c) must monitor and assess the implementation of this Act, including any prescribed norms and standards, in provincial departments, in public entities and in constitutional institutions;
 - (d) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management;
 - (e) may investigate any system of financial management and internal control in any department, public entity or constitutional institution;
 - (f) must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and
 - (g) may do anything further that is necessary to fulfil its responsibilities effectively.
- (3) Subsections (1) (g) and (2) apply to public entities listed in Schedule 2 only to the extent provided for in this Act.

13 Deposits into National Revenue Fund

(1) All money received by the national government must be paid into the National Revenue Fund, except money received by-

- (a)
[Para. (a) repealed by s. 72 (b) (iii) of [Act 10 of 2009](#) (wef 19 April 2009).]
- (b) a national public entity;
- (c) the South African Reserve Bank;
- (d) the Auditor-General;
- (e) the national government from donor agencies which in terms of legislation or the agreement with the donor, must be paid to the Reconstruction and Development Programme Fund;
- (f) a national department-

- (i) operating a trading entity, if the money is received in the ordinary course of operating the trading entity;
 - (ii) in trust for a specific person or category of persons or for a specific purpose;
 - (iii) from another department to render an agency service for that department; or
 - (iv) if the money is of a kind described in Schedule 4; or
 - (g) a constitutional institution-
 - (i) in trust for a specific person or category of persons or for a specific purpose; or
 - (ii) if the money is of a kind described in Schedule 4.
- (2) The exclusion in subsection (1) (b) does not apply to a national public entity which is not listed in Schedule 2 or 3 but which in terms of section 47 is required to be listed.
- (3) Draft legislation that excludes money from payment into the National Revenue Fund may be introduced in Parliament only after the Minister has been consulted on the reasonableness of the exclusion and has consented to the exclusion.
- (4) Any legislation inconsistent with subsection (1) is of no force and effect to the extent of the inconsistency.
- (5) Money received by a national public entity listed in Schedule 2 or 3, the South African Reserve Bank or the Auditor-General must be paid into a bank account opened by the institution concerned.

36 Accounting officers

- (1) Every department and every constitutional institution must have an accounting officer.
- (2) Subject to subsection (3)-
- (a) the head of a department must be the accounting officer for the department; and
 - (b) the chief executive officer of a constitutional institution must be the accounting officer for that institution.
- (3) The relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer for-
- (a) a department or a constitutional institution; or
 - (b) a trading entity within a department.
- (4) The relevant treasury may at any time withdraw in writing an approval or instruction in terms of subsection (3).
- (5) The employment contract of an accounting officer for a department, trading entity or constitutional institution must be in writing and, where possible, include performance standards. The provisions of sections 38 to 42, as may be appropriate, are regarded as forming part of each such contract.

38 General responsibilities of accounting officers

- (1) The accounting officer for a department, trading entity or constitutional institution-
- (a) must ensure that that department, trading entity or constitutional institution has and maintains-
 - (i) effective, efficient and transparent systems of financial and risk management and internal control;
 - (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;
 - (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
 - (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;
 - (b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;
 - (c) must take effective and appropriate steps to-
 - (i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(d) is responsible for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

(e) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;

(f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who-

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(i) when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with;

(j) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(k) must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(l) must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(m) must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(n) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.

40 Accounting officers' reporting responsibilities

(1) The accounting officer for a department, trading entity or constitutional institution-

(a) must keep full and proper records of the financial affairs of the department, trading entity or constitutional institution in accordance with any prescribed norms and standards;

(b) must prepare financial statements for each financial year in accordance with generally recognized accounting practice;

(c) must submit those financial statements within two months after the end of the financial year to-

(i) the Auditor-General for auditing; and

(ii) the relevant treasury to enable that treasury to prepare consolidated financial statements in terms of section 8 or 19;

(d) must submit within five months of the end of a financial year to the relevant treasury and, in the case of a department or trading entity, also to the executive authority responsible for that department or trading entity-

(i) an annual report on the activities of that department, trading entity or constitutional institution during that financial year;

(ii) the financial statements for that financial year after those statements have been audited; and

(iii) the Auditor-General's report on those statements;

(e) must, in the case of a constitutional institution, submit to Parliament that institution's annual report and financial statements referred to in paragraph (d), and the Auditor-General's report on those statements, within one month after the accounting officer received the Auditor-General's audit report; and

(f) is responsible for the submission by the department or constitutional institution of all reports, returns, notices and other information to Parliament, the relevant provincial legislature, an executive authority, the relevant treasury or the Auditor-General, as may be required by this Act.

(2) The Auditor-General must audit the financial statements referred to in subsection (1) (b) and submit an audit report on those statements to the accounting officer within two months of receipt of the statements.

(3) The annual report and audited financial statements referred to in subsection (1) (d) must-

(a) fairly present the state of affairs of the department, trading entity or constitutional institution, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned; and

(b) include particulars of-

(i) any material losses through criminal conduct, and any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure, that occurred during the financial year;

(ii) any criminal or disciplinary steps taken as a result of such losses, unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure;

(iii) any material losses recovered or written off; and

(iv) any other matters that may be prescribed.

(4) The accounting officer of a department must-

(a) each year before the beginning of a financial year provide the relevant treasury in the prescribed format with a breakdown per month of the anticipated revenue and expenditure of that department for that financial year;

(b) each month submit information in the prescribed format on actual revenue and expenditure for the preceding month and the amounts anticipated for that month in terms of paragraph (a); and

(c) within 15 days of the end of each month submit to the relevant treasury and the executive authority responsible for that department-

(i) the information for that month;

(ii) a projection of expected expenditure and revenue collection for the remainder of the current financial year; and

(iii) when necessary, an explanation of any material variances and a summary of the steps that are taken to ensure that the projected expenditure and revenue remain within budget.

(5) If an accounting officer is unable to comply with any of the responsibilities determined for accounting officers in this Part, the accounting officer must promptly report the inability, together with reasons, to the relevant executive authority and treasury.

44 Assignment of powers and duties by accounting officers

(1) The accounting officer for a department, trading entity or constitutional institution may-

(a) in writing delegate any of the powers entrusted or delegated to the accounting officer in terms of this Act, to an official in that department, trading entity or constitutional institution; or

- (b) instruct any official in that department, trading entity or constitutional institution to perform any of the duties assigned to the accounting officer in terms of this Act.
- (2) A delegation or instruction to an official in terms of subsection (1)-
- (a) is subject to any limitations and conditions prescribed in terms of this Act or as the relevant treasury may impose;
 - (b) is subject to any limitations and conditions the accounting officer may impose;
 - (c) may either be to a specific individual or to the holder of a specific post in the relevant department, trading entity or constitutional institution; and
 - (d) does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.
- (3) The accounting officer may confirm, vary or revoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1), subject to any rights that may have become vested as a consequence of the decision.

45 Responsibilities of other officials

An official in a department, trading entity or constitutional institution-

- (a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;
- (b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;
- (c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;
- (d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 44; and
- (e) is responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility.

PUBLIC ENTITIES (ss 46-62)

46 Application

The provisions of this Chapter apply, to the extent indicated, to all public entities listed in Schedule 2 or 3.

Accounting authorities for public entities (ss 49-55)

49 Accounting authorities

- (1) Every public entity must have an authority which must be accountable for the purposes of this Act.
- (2) If the public entity-
- (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or
 - (b) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.

50 Fiduciary duties of accounting authorities

- (1) The accounting authority for a public entity must-
- (a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;
 - (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;
 - (c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including

those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not-

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

(3) A member of an accounting authority must-

(a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.

51 General responsibilities of accounting authorities

(1) An accounting authority for a public entity-

(a) must ensure that that public entity has and maintains-

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) must take effective and appropriate steps to-

(i) collect all revenue due to the public entity concerned; and

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

(c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;

(d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;

(e) must take effective and appropriate disciplinary steps against any employee of the public entity who-

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the public entity; or

(iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;

(f) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;

(g) must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and

(h) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.

(2) If an accounting authority is unable to comply with any of the responsibilities determined for an accounting authority in this Part, the accounting authority must

promptly report the inability, together with reasons, to the relevant executive authority and treasury.

54 Information to be submitted by accounting authorities

(1) The accounting authority for a public entity must submit to the relevant treasury or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as the relevant treasury or the Auditor-General may require.

(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

- (a) establishment or participation in the establishment of a company;
- (b) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;
- (c) acquisition or disposal of a significant shareholding in a company;
- (d) acquisition or disposal of a significant asset;
- (e) commencement or cessation of a significant business activity; and
- (f) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.

(3) A public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms of subsection (2) within 30 days or within a longer period as may be agreed to between itself and the executive authority.

(4) The executive authority may exempt a public entity listed in Schedule 2 or 3 from subsection (2).

55 Annual report and financial statements

(1) The accounting authority for a public entity-

- (a) must keep full and proper records of the financial affairs of the public entity;
- (b) prepare financial statements for each financial year in accordance with generally accepted accounting practice, unless the Accounting Standards Board approves the application of generally recognised accounting practice for that public entity;
- (c) must submit those financial statements within two months after the end of the financial year-
 - (i) to the auditors of the public entity for auditing; and
 - (ii) if it is a business enterprise or other public entity under the ownership control of the national or a provincial government, to the relevant treasury; and
- (d) must submit within five months of the end of a financial year to the relevant treasury, to the executive authority responsible for that public entity and, if the Auditor-General did not perform the audit of the financial statements, to the Auditor-General-
 - (i) an annual report on the activities of that public entity during that financial year;
 - (ii) the financial statements for that financial year after the statements have been audited; and
 - (iii) the report of the auditors on those statements.

(2) The annual report and financial statements referred to in subsection (1) (d) must-

- (a) fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned;
- (b) include particulars of-
 - (i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year;
 - (ii) any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful expenditure;
 - (iii) any losses recovered or written off;
 - (iv) any financial assistance received from the state and commitments made by the state on its behalf; and
 - (v) any other matters that may be prescribed; and

(c) include the financial statements of any subsidiaries.

(3) An accounting authority must submit the report and statements referred to in subsection (1) (d), for tabling in Parliament or the provincial legislature, to the relevant executive authority through the accounting officer of a department designated by the executive authority.

56 Assignment of powers and duties by accounting authorities

(1) The accounting authority for a public entity may-

(a) in writing delegate any of the powers entrusted or delegated to the accounting authority in terms of this Act, to an official in that public entity; or

(b) instruct an official in that public entity to perform any of the duties assigned to the accounting authority in terms of this Act.

(2) A delegation or instruction to an official in terms of subsection (1)-

(a) is subject to any limitations and conditions the accounting authority may impose;

(b) may either be to a specific individual or to the holder of a specific post in the relevant public entity; and

(c) does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

(3) The accounting authority may confirm, vary or revoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1), subject to any rights that may have become vested as a consequence of the decision.

57 Responsibilities of other officials

An official in a public entity-

(a) must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

(c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and

(e) is responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility.

65 Tabling in legislatures

(1) The executive authority responsible for a department or public entity must table in the National Assembly or a provincial legislature, as may be appropriate-

(a) the annual report and financial statements referred to in section 40 (1) (d) or 55 (1) (d) and the audit report on those statements, within one month after the accounting officer for the department or the accounting authority for the public entity received the audit report; and

(b) the findings of a disciplinary board, and any sanctions imposed by such a board, which heard a case of financial misconduct against an accounting officer or accounting authority in terms of section 81 or 83.

66 Restrictions on borrowing, guarantees and other commitments

(1) An institution to which this Act applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction-

(a) is authorised by this Act;

(b) in the case of public entities, is also authorised by other legislation not in conflict with this Act; and

(c) in the case of loans by a province or a provincial government business enterprise under the ownership control of a provincial executive, is within the limits as set in terms of the Borrowing Powers of Provincial Governments Act, 1996 ([Act 48 of 1996](#)).

(2) A government may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind a Revenue Fund to any future financial commitment:

(a) The National Revenue Fund: The Minister or, in the case of the issue of a guarantee, indemnity or security, the responsible Cabinet member acting with the concurrence of the Minister in terms of section 70.

(b) A Provincial Revenue Fund: The MEC for finance in the province, acting in accordance with the Borrowing Powers of Provincial Governments Act, 1996.

(3) Public entities may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment:

(a) A public entity listed in Schedule 2: The accounting authority for that Schedule 2 public entity.

(b) A national government business enterprise listed in Schedule 3 and authorised by notice in the national *Government Gazette* by the Minister: The accounting authority for that government business enterprise, subject to any conditions the Minister may impose.

(c) Any other national public entity: The Minister or, in the case of the issue of a guarantee, indemnity or security, the Cabinet member who is the executive authority responsible for that public entity, acting with the concurrence of the Minister in terms of section 70.

(d) A provincial government business enterprise listed in Schedule 3 and authorised by notice in the national *Government Gazette* by the Minister: The MEC for finance in the province, acting with the concurrence of the Minister, subject to any conditions that the Minister may impose.

(4) Constitutional institutions and provincial public entities not mentioned in subsection (3) (d) may not borrow money, nor issue a guarantee, indemnity or security, nor enter into any other transaction that binds or may bind the institution or entity to any future financial commitment.

(5) Despite subsection (4), the Minister may in writing permit a public entity mentioned in subsection (3) (c) or (d) or a constitutional institution to borrow money for bridging purposes up to a prescribed limit, including a temporary bank overdraft, subject to such conditions as the Minister may impose.

(6) A person mentioned in subsection (2) or (3) may not delegate a power conferred in terms of that subsection, except with the prior written approval of the Minister.

(7) A public entity authorised to borrow money-

(a) must annually submit to the Minister a borrowing programme for the year; and

(b) may not borrow money in a foreign currency above a prescribed limit, except when that public entity is a company in which the state is not the only shareholder.

67 No provincial foreign commitments

A provincial government, including any provincial public entity, may not borrow money or issue a guarantee, indemnity or security or enter into any other transaction that binds itself to any future financial commitment, denominated in a foreign currency or concluded on a foreign financial market.¹⁶

68 Consequences of unauthorised transactions

If a person, otherwise than in accordance with section 66, lends money to an institution to which this Act applies or purports to issue on behalf of such an institution a guarantee, indemnity or security, or enters into any other transaction which purports to bind such an institution to any future financial commitment, the state and that institution is not bound by the lending contract or the guarantee, indemnity, security or other transaction.

83 Financial misconduct by accounting authorities and officials of public entities

(1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently-

- (a) fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or
- (b) makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

(2) If the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.

(3) An official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.

(4) Financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person referred to in subsection (2) or (3) despite any other legislation.

84 Applicable legal regime for disciplinary proceedings

A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85.

85 Regulations on financial misconduct procedures

(1) The Minister must make regulations prescribing-

(a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the relevant provincial treasury and the Auditor-General, including-

- (i) particulars of the alleged financial misconduct; and
- (ii) the steps taken in connection with such financial misconduct;

(b) matters relating to the investigation of allegations of financial misconduct;
(c) the circumstances in which the National Treasury or a provincial treasury may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;

(d) the circumstances in which a disciplinary board which hears a charge of financial misconduct must include a person whose name appears on a list of persons with expertise in state finances or public accounting compiled by the National Treasury;

(e) the circumstances in which the findings of a disciplinary board and any sanctions imposed by the board must be reported to the National Treasury, the relevant provincial treasury and the Auditor-General; and

(f) any other matters to the extent necessary to facilitate the object of this Chapter.

(2) A regulation in terms of subsection (1) may-

- (a) differentiate between different categories of-
 - (i) accounting officers;
 - (ii) accounting authorities;
 - (iii) officials; and
 - (iv) institutions to which this Act applies; and

(b) be limited in its application to a particular category of accounting officers, accounting authorities, officials or institutions only.

86 Offences and penalties

(1) An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.

(2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.

(3) Any person, other than a person mentioned in section 66 (2) or (3), who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of a department, public entity or constitutional institution, or who enters into any other contract which purports to bind a department, public entity or constitutional institution to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.[underlining added]

76. As this is a legality review it will be helpful at this juncture to say something more about what a legality review entails.

77. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*⁸³ the Constitutional Court said that:-

“It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law.”

78. The Constitutional Court went on to elaborate that:-

*“... a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognized in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* the Supreme Court of Canada held that:-*

*“Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary Supremacy to one of Constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc v The Queen*, [1985] 1 S.C.R.441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source”.*⁸⁴

⁸³ 1999 (1) SA 374 (CC) [“Fedure”] at paragraph 58.

⁸⁴ *Ibid* paragraph 56.

79. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*⁸⁵, the Constitutional Court explained that the principle of legality is “an incident of the rule of law”⁸⁶ which is a founding value of the Constitution itself⁸⁷. Ngcobo J further clarified the principle of legality in *Affordable Medicines Trust and Others v Minister of Health and Another*⁸⁸ as follows:-

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution”.

80. On this score, it is well to remember that section 2 of the Constitution decrees that the Constitution is “*the supreme law of the Republic*” and that “*conduct inconsistent with it is invalid*”. In that event, section 172(1)(a) of the Constitution enjoins the courts to declare any conduct inconsistent with it to be invalid. What is clear from this constitutional imperative is that once a court has found that any conduct is, as a fact, inconsistent with the Constitution, such a court is obliged to declare it invalid. It has no choice in the matter⁸⁹.

81. Accordingly, and in order to determine whether (i) the PSA and/or section 7.2.1 of the PSA violate section 51(1)(b)(ii) of the PFMA and (ii) because of such violation are rendered unlawful and invalid in terms of the provisions of the PFMA, requires an interpretation (which is an exercise in law) of the relevant provisions of the PFMA. In addition, certain guidelines and/or principles developed and/or evolved that guides a court to determine whether the particular contract – assuming a violation of the provisions of the PFMA has been found – is invalid and/or void. It is to these principles that I now turn before embarking upon a deliberation.

⁸⁵ 2000 (2) SA 674 (CC).

⁸⁶ *Ibid* paragraph 17.

⁸⁷ The source of this is section 1 of the Constitution which provides that: “*The Republic of South Africa is one sovereign, democratic state founded on the following values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms; (b) non-racialism and non-sexism; (c) supremacy of the Constitution and the rule of law.*”

⁸⁸ 2006 (3) SA 247 (CC) at paragraph 49.

⁸⁹ *Simeka* at paragraph 31.

82. Interpretation of any statutory instrument or provision thereof must be approached in the way indicated by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁹⁰:-

"... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as a reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. ... From the outset one considers the context and the language together, with neither predominating over the other. This is the approach that Courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. ... An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration".

83. In *Cool Ideas 1186 CC v Hubbard*⁹¹ the Constitutional Court said:-

[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principal namely:-

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity." (footnotes omitted).*

84. According to De Wet and Van Wyk *Kontraktereg en Handelsreg* 5th Ed, Vol 1 at 89-90 the position is set out as follows:-

⁹⁰ 2012 (4) SA 593 (SCA) at paragraphs 18 to 26.

⁹¹ 2014 (4) SA 474 (CC) at paragraph 28.

“Die ooreenkoms moet geoorloof wees, is dit ongeoorloof dan is dit kragteloos. Ongeoorloof is nie slegs ooreenkomste wat kragtens wetgewing or kragtens die gemenerereg verbode is nie, maar ook ooreenkomste wat strydig is met die openbare belang of die goeie sedes... Dikwels verbied die wetgewer ooreenkomste juis omdat hy die ooreenkomste as strydig met die openbare belang, of botsend met die goeie sedes beskou ...

Uit die ongeoorloofde ooreenkoms ontstaan geen verbintenisse nie. Die ooreenkoms is kragteloos, en nie een van die partye kan die ander op die ooreenkoms aanspreek nie – ex turpi vel iniusta causa non oritur actio.”

85. In *Schierhout v Minister van Justisie* 1926 AD 99 at 109, Innes CJ stated that:-

“It is a fundamental principal of our law that a thing done contrary to the direct prohibition of the law is void and of no effect... so that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act... And the disregard of the peremptory provisions in a statute is fatal to the validity of the proceeding affected”.

86. This is, however, only a general rule. If the legislature intended a different result, effect must be given to such intention⁹².

87. In *Swart v Smuts* 1971 (1) SA 819 (A) at 892E - 830C, Corbett AJA summarised the applicable principles as follows:-

*“Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepalings self nie uitdruklik verklaar dat sodanige transaksie of handling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die wetgewer afhang. In die algemeen word ‘n handling wat in stryd met ‘n statutêre bepaling verrig is, as ‘n nietigheid beskou, maar hierdie is nie ‘n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die wetgewer geen nietigheidsbedoeling gehad het nie. Daar is in hierdie verband verskeie indicia en interpretasie reëls wat van diens is om die bedoeling van die wetgewer vas te stel. Dit is bv beslis, na aanleiding van die bewoording van die wetvoorskrif self, dat die gebruik van die woord “moet” (Engels) “shall”, of enige ander woord van ‘n gebiedende aard, ‘n aanduiding is van ‘n nietigheidsbedoeling; en dat ‘n soortgelyke uitleg van toepassing is in gevalle waar die wetsbepaling negatief ingekleur is, dit wil sê in die vorm van ‘n verbod. Selfs in sodanige gevalle kan daar ander oorwegings wees was desondanks tot ‘n geldigheids bedoeling lei. As ‘n strafbepaling of soortgelyke sanksie ten opsigte van ‘n oortreding van die statutêre bepaling bygevoeg word, dan ontstaan natuurlik die vraag of die wetgewer dalk volstaan het met die oplegging van die straf of sanksie dan wel daarbenewens bedoel het dat die handeling self as nietig beskou moet word. Soos Bowen LJ, die saak in ‘n Engelse gewysde, *Mellias and Another v The Shirley and Freemantle Local Board of Health* (1885) 16 QBD 446 te 454, gestel het:-*

⁹² *Messenger of the Magistrate’s Court, Durban v Pillay* 1952 (3) SA 678 (A) at 682 and *De Faria v Sheriff, High Court Witbank* 2005 (3) SA 372 (TPD) at paragraph 26.

“...in the end we have to find out, upon the construction of the Act, whether it was intended by the legislature to prohibit the doing of an act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence”.

In hierdie verband moet die doel van die wetgewing, en veral die kwaad wat die wetgewer wou bestry, in oorweging geneem word. Aandag moet ook gewy word aan die volgende vraag: verg die verwesenliking van die wetgewers se doel die vernietiging van die strydige handeling, of sal die oplegging van die straf of sanksie daardie doel volkome verwesenlik? Die volgende uittaling van Hoofregter Fagen in Pottie v Kotze (supra) [1954] (3) SA 719 (A) te 726H, is hier tersake:-

“... The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the legislature wishes to prevent.”

Nog 'n belangrike oorweging wat hier tersprake kom is die feit dat nietigheid soms groter ongerief en meer onwenslike gevolge (“greater inconveniences and impropriety” – soos die gewysdes dit stel) kan veroorsaak as die verbode handeling self⁹³.

88. In *Palm Fifteen (Pty)Ltd v Cotton Tail Homes (Pty)Ltd* 1978 (2) SA 872 (A) at 885E the Court found that a prohibition couched in negative terms is *“generally a factor strongly indicative of an intention that anything done in breach of the prohibition will be invalid”*.
89. In *Sutter v Scheepers* 1932 AD 165 at 173-4, Wessels JA referred to certain guiding principles which have evolved in England to determine when a provision in an Act is directory and when it is peremptory. He described the following tests as useful guides in this context:-
- 89.1 the word *“shall”* when used in the statute is rather to be construed as peremptory than directory unless there are other circumstances which negative this construction;
 - 89.2 if a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate;
 - 89.3 if a provision is couched in positive language and there is no sanction added in case the requisites are carried out, then the presumption is in favour of the intention to make the provision only directory;

⁹³ *Palm 15 (Pty) Ltd v Cottontail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 885E-G, *Neugarten v Standard Bank of South Africa* 1989 (1) SA 797 (A) at 808D-809E and *Simplex (Pty) Ltd v Van der Merwe* NNO 1996 (1) SA 111 (W) at 112D-113E.

89.4 if, when we consider the scope and object of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory; and
89.5 the history of the legislation will also afford a clue in some cases.⁹⁴

90. It has also been suggested that when a contract is not expressly prohibited but it is penalised, ie the entering into it is made a criminal offence, then it is impliedly prohibited and so rendered void⁹⁵.

91. The principle itself must not be taken as rigid rules, but only as guides in the search for the legislation's purpose⁹⁶. Indeed, the fact that a penalty is provided may be an indication that the penalty is a sufficient sanction without the contract being void⁹⁷. Conversely, a prohibition without a criminal sanction may indicate that a contract contravening the prohibition would be void⁹⁸. The leading case is *Standard Bank v Estate Van Rhyn*⁹⁹ in which Solomon JA said:-

"The contention on behalf of the respondent is that when the legislature penalises an act it impliedly prohibits it, and the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the legislature, and, if we are satisfied in any case that the legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.13.16) puts it – "but that which is done contrary to the law is not ipso jure null and void, where the law is content with the penalty laid down against those who contravene it". Then after giving some instances in illustration of this principle, he proceeds: "The reason for all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law". These remarks are peculiarly applicable to the present case, and I find it difficult to conceive that the legislature had any intention in enacting the directions referred to in section 116(1) other than that of punishing the executor who did not comply with them."

⁹⁴ See also *Sayers v Kahn* 2002 (5) SA 688 (CC) at 690F-692H.

⁹⁵ *Christie The Law of Contract* 4th Ed at 393 and *Henry v Bramfield* 1996 (1) SA 244 (D) at 250C-D.

⁹⁶ *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A).

⁹⁷ A sanction other than a criminal punishment may justify the same conclusion – *Swart v Smuts* at 831.

⁹⁸ *Simplex (Pty) Ltd v Van der Merwe* at 113C-E.

⁹⁹ 1925 AD 266 at 274-275.

92. One type of statute in which it will be easy to draw the conclusion that the prescribed penalty is sufficient without also rendering the contract void is a revenue statute, typically where, either by positive imposition or negative prohibition, a licence has to be obtained (and, of course, paid for) as a prerequisite to entering into any contract of a specified class. In *McLoughlin v Turner*¹⁰⁰, the then Appellate Division had to consider Transvaal Ordinance 11 of 1919 making it unlawful for certain professional persons, including advocates, to “*carry on business*” without a licence, and imposing a penalty for doing so. Innes CJ said:-

“This is a revenue statute and it is a well-recognised rule of construction that the mere imposition of a penalty for the purpose of protecting the revenue does not invalidate the relative transaction. Where the object of the legislature in imposing the penalty is merely the protection of the revenue, the statute will not be construed as prohibiting the act in respect of which the penalty is imposed. But, of course, the legislature may prohibit or invalidate the transaction even where the sole object is to protect the revenue and if that intention is clear effect must be given to it. But the literal meaning of the language used is not always decisive on the point.”

93. Even when it is concluded that the object of the legislation is not to invalidate a contract that contravenes a particular statutory provision, the intention of the parties may be relevant in inducing the Court to declare the contract void. A contract that is entered into with the deliberate intention of contravening a statute may therefore be void while a contract that inadvertently contravenes the same statute may not¹⁰¹.
94. In *Cool Ideas 1186 CC v Hubbard*, the Constitutional Court confirmed the Supreme Court of Appeal’s refusal to enforce an arbitration award for payment of consideration to a builder, unregistered at the time of contracting for the work, by a homeowner for work the builder had completed. The basis for the refusal was that to enforce the arbitration award would sanction a situation that the legislature wished to prevent, which was not to allow claims by home builders for consideration where they had failed to register as such in terms of the Housing Consumers Protection Measures Act. The relevant provisions of this Act prohibit a person from carrying on the business of a

¹⁰⁰ 1921 AD 537 at 544.

¹⁰¹ Christi’s *The Law of Contract in South Africa*, 7th Ed at page 398.

home builder, constructing a home, or receiving any consideration under an agreement for the sale or construction of a home, unless that person is registered as a home builder with the National Home Builders Registration Council. The majority of the Constitutional Court confirmed the Supreme Court of Appeal's interpretation of section 10 of the Act as not invalidating a home-building agreement concluded with an unregistered builder, but precluding the builder from claiming, or receiving, any consideration under the agreement¹⁰². The Constitutional Court also held that equitable considerations played no role in this instance, because: "...the law cannot countenance a situation where, on a case-by-case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve as is the case here. To do so would be to undermine the essential fundamentals of the rule of law, namely the principle of legality."¹⁰³

Deliberation

95. The definition of fruitless and waste expenditure is that it is expenditure which was made "in vain". In *Bolombe 82 Trading and Projects CC v PRASA*¹⁰⁴, PRASA contended that it should not be obliged to make payment of Bolombe's invoices without Bolombe rendering actual maintenance and support services. The reason advanced was that such payment would constitute fruitless and wasteful expenditure and would be struck by the provisions of the PFMA and would in effect be an illegality. Killian AJ did not agree with PRASA's submission and held at paragraph 51 as follows:-

"PRASA received a quid pro quo with the fixed monthly maintenance and support costs. It retained the services of a willing and able service provider who would render those services on an "as and when" basis. That was the nature of the maintenance and support portion of the contract. It would have been a different matter altogether if there was evidence before me which suggested that Bolombe in fact lacked the capacity and was in fact unwilling and unable to render maintenance and support services. In those circumstances, the payments claimed by Bolombe could possibly be labelled as fruitless and wasteful expenditure."

¹⁰² *Cool Ideas* at paragraph 37.

¹⁰³ *Cool Ideas* at paragraph 57.

¹⁰⁴ Judgment in the Gauteng Division (Pretoria) by Killian AJ under case number 79684/2019 (5 July 2019).

96. According to well-known dictionaries¹⁰⁵ the meaning of “*in vain*” is “*to no end: without success or result*”. Other definitions include “*to no avail; fruitlessly*” and “*unsuccessful; of no value*”. It is therefore clear that expenditure will be fruitless and wasteful if there is no *quid pro quo*. From *Bolombe* it is also apparent that such *quid pro quo* need not have an immediate result or success.
97. The meaning of “*quid pro quo*” is “*teenprestasie, iets vir iets*”. The counter performance need not be financial in nature, although it will usually have some or other value. Accordingly, and as appears from *Bolombe*, the counter performance was maintenance services.
98. Further to the above, I consider that an expenditure incurred does require a result (whether financial or otherwise) that is contemplated from a commercial perspective and/or even moral or ethical considerations. Thus, and as an example, lets think of insurance. Taking out insurance means that expenditure is incurred for a contingency that may or may not eventuate in the future. Suppose the incident and/or event insured against does never eventuate. Surely, no one will have a gripe with such expenditure incurred. On the other hand, and if no insurance was taken out, many will be astounded if it should turn out that no insurance was taken out and will brand the person who failed to do so as unreasonable and/or even incompetent. Similarly, should expenditure be incurred, such as buying basic household necessities such as food, water, blankets etc for the less fortunate, then it will mean that the supplier provided such items as its counter performance to the expenditure incurred. However, should such goods then be given to the less fortunate for free, in order to ensure their survival and dignity, then it similarly cannot be said that simply to give the goods away to the less fortunate for their survival and dignity is “*in vain*”. One may also think of a sponsorship deal where a company, for instance, is willing to sponsor a sport team. All the sport team has to do is perhaps, and as an example, put the logo of the public entity on their gaming apparel. In such instance, the counter performance of wearing the logo on sport apparel would in most instances be regarded as a counter

¹⁰⁵ Merriam-Webster.

performance with little to no value whatsoever. However, the sponsorship was actually done in order to better the public relations perception of an entity in the eyes of the public. Such attempt may or may not work and assuming that there was a factual basis to conclude that such sponsorship deal could, for instance, better the perception of potential public consumers of the entity concerned and could therefore result in better sales for such entity, then I think it cannot be said that such expenditure incurred for a sponsorship deal would necessarily be regarded “*in vain*”. One will therefore look not merely at the immediate result, but also any future intended/contemplated future result that may have nothing to do with the counter performance.

99. In view of the above, it becomes clear that each case will have to be determined based on its own circumstances. Factors that will have to be considered include not merely whether there is a *quid pro quo* [that could either be financial or otherwise and need not be an immediate counter performance, but only a counter performance that has to be provided in the event of a contingency or on a risk occurring], but also the motives of those who incurred the expenditure and the ultimate result that they may have wished to achieve.

100. *In casu*, I find that the PSA and/or clause 7.2.1 thereof as read with the DR Agreement did not amount to fruitless and wasteful expenditure as defined in the PFMA and therefore there cannot be a violation of section 51(1)(b)(ii) of the PFMA. My reasons for this finding are the following:-

100.1 the OSIP was developed to solve the applicant’s excess capacity problem. For this reason the PSA was concluded whereby the respondent is compensated for additional electricity taken over and above the consumption baseline;

100.2 the DR Agreement is one whereby the respondent was compensated for reducing its electricity consumption below the consumption baseline in order to ensure the technical integrity of the electricity network;

- 100.3 viewing each of these agreements separately, the conclusion is inevitable that there was a financial benefit to both parties in complying with the relevant provisions thereof and therefore a *quid pro quo*. Accordingly, viewing each agreement separately it follows that they did not result in fruitless and wasteful expenditure;
- 100.4 viewed together, it is clear that the two programmes can and did exist alongside each other - they were running parallel to one another, each with opposite effect. Thus, the respondent was incentivized to consume more electricity in terms of the OSIP and less electricity in terms of the DR Agreement. In other words, each of the programmes have opposing operational outcomes. The problem appears to be that the generation capacity of the applicant decreased substantially and which has resulted in loadshedding that has become the order of the day in South Africa. Put differently, simply because the ultimate result (*post facto*) is not to the liking of the applicant, cannot mean that when the agreements were concluded that they constituted fruitless and wasteful expenditure;
- 100.5 the following analogy will illustrate the pitfalls in the applicant's argument and accordingly why there was no fruitless and wasteful expenditure. Suppose A is an ice-cream vendor (the equivalent of the respondent), while B is the ice-cream supplier (the equivalent of the applicant). In the recent period (say a month) A purchased 1000 ice-creams from B (say 33 ice-creams per day). Confronted with excess ice-cream production, B incentivizes A to purchase more ice-cream for the forthcoming period and if A purchases more than 1100 (meaning 100 more ice-creams), B will give A a discount. It is also agreed that if B fails to supply A the ice-cream quantities ordered by A, the agreed target will be reduced proportionally, such that A will still be entitled to a discount for the proportional additional purchases. Let us call this "*Agreement 1*". For A to reach the new target, more resources are put into marketing to create additional demand for the additional ice-creams to be purchased. In so doing, it results therein that A's costs of

sales/costs of production increase. A few days later, anticipating outages in its production, B approaches A with an incentive that A should reduce the units of ice-cream it purchases on some days, in which event B will reimburse A any profit margin A would have made had A purchased all the ice-creams to reach the target of 1100. Let us call this “*Agreement 2*”. Agreement 1 and Agreement 2 run parallel to each other. At the end of the agreed period, A was only able to purchase 1010 ice-creams (ten more than the previous period). The ninety units shortfall was due to B’s request in terms of Agreement 2. B agreed to pay A for the ninety units shortfall in terms of Agreement 2, but refuses to pay A the agreed discount for the 1010 units purchased in terms of Agreement 1. The reason being given for its refusal to pay A in terms of Agreement 1, is that A has already been paid in terms of Agreement 2. It should therefore be clear that even if the agreements are viewed together, they run parallel to each other which have different operational outcomes and in view of the *quid pro quo* received in terms of each of them, it cannot be said that same constituted fruitless and wasteful expenditure; and

100.6 in addition to the above, it is clear that the applicant was running a pilot programme and/or an experiment. In any event, such pilot and/or experiment would only have lasted for 2 (two) years. The purpose of obtaining a pilot and/or experiment is to derive lessons. In other words, it is in the nature of a learning programme. In fact, the applicant described the OSIP itself as “*market research*”¹⁰⁶. Some of the lessons learned are carried forward and others discarded. Therefore, even if there was no *quid pro quo* (whether financially or otherwise), the motive and/or intention of the OSIP was one of learning and if it happens that the ultimate result was a negative learning experience in the sense of not achieving the financial or profit goals, then it cannot be said that such expenditure was incurred in vain and therefore constitutes fruitless and wasteful expenditure. After all, we all learn by trial and error and history is no better teacher.

¹⁰⁶ CL009-33 [paragraph 108.1].

101. Assuming against my finding aforesaid, I proceed to consider the question whether the PSA and/or clause 7.2.1 thereof is void and/or invalid by virtue of the provisions of the PFMA. In other words, I assume that a contravention of section 51(1)(b)(ii) of the PFMA has been shown or found. I find that it is not the intention of the PFMA to render the PSA and/or clause 7.2 thereof void and/or invalid if they in fact did constitute and/or resulted in fruitless and wasteful expenditure. My reasons for this finding are:-

101.1 it was conceded during argument by both counsel that the parties were *bona fide* and did not enter into PSA with a deliberate intention of contravening the PFMA. This is accordingly not a case where there is a deliberate intention of contravening a statute which may result in a contract being declared void. If there was a contravention at all, it could merely have been a contravention of the PFMA in an inadvertent manner;

101.2 the PFMA does not by its express terms anywhere provide that non-compliance with section 51(1)(b)(ii) results therein that the agreement concluded in violation thereof is void and/or or invalid. Surely, the legislature could easily have said so. The legislature did so in respect of any other legislation that is inconsistent with section 13(1) as provided for in section 13(4) of the PFMA and, again in section 68, the legislature spelt out the consequences of contravening section 66 of the PFMA where a person otherwise than in accordance with section 66, lends money to an institution to which the PFMA applies or purports to issue on behalf of such an institution a guarantee, indemnity or security, or enters into any other transaction which purports to bind such an institution, then the state and that institution is not bound thereby. Surely, if the intention of the legislature was to visit an agreement that violates section 51(1)(b)(ii) with invalidity and/or voidness, then it would surely have said so. However, it failed to do so;

101.3 the definition of fruitless and wasteful expenditure refers to expenditure “*which was made*” and which “*would have been avoided*”. This language is suggestive that a contract concluded which results in fruitless and wasteful expenditure, is not hit by invalidity. After all, what the definition seems to suggest is one of “*avoidance*”. In other words, it is the steps and/or duties and/or obligations taken before concluding the agreement that results in wasteful and fruitless expenditure that the legislature wants to regulate, and not the subsequent contract/agreement that has these results. This interpretation is supported by the provisions of section 51(1)(b)(ii) which is directed at prevention, as well as section 55(2)(b)(ii) that provides that the accounting officer for a public entity must prepare annual reports and financial statements and which report and statements must include particulars of any material “*losses*” through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that “*occurred*” during the financial year. Surely, losses can only occur if the expenditure was actually incurred/paid. In other words, what section 51(1)(b)(ii) requires is for an accounting authority of a public entity to take effective and appropriate steps to prevent such losses that constitutes fruitless and wasteful expenditure. However, if such expenditure was indeed incurred, they remain payable and must be reported on. However, the agreements giving rise thereto are not hit by invalidity and/or voidness;

101.4 what the legislature accordingly intended is prevention. Before an agreement is concluded preventative steps must be taken. However, if an agreement is concluded resulting in fruitless and wasteful expenditure and without preventative steps taken, then the accounting authority is to be held accountable and the agreement resulting from a failure to comply with section 51(1)(b)(ii) is not visited with invalidity and/or nullity. This interpretation is fortified by the following, namely:- (i) the preamble of the PFMA that provides that same is to provide for the responsibilities of persons entrusted with financial management; (ii) section 2 of the PFMA that identifies the objects of the PFMA as

transparency, accountability and sound management of expenditure;
(iii) section 51(1)(c) that provides that the accounting authority is responsible for the management of the expenditure of the public entity;
(iv) section 51(1)(e) that provides that an accounting authority must take effective and appropriate disciplinary steps against any employee of the public entity who makes or permits an irregular expenditure or a fruitless and wasteful expenditure;

101.5 although section 51(1)(b)(ii) is couched in peremptory terms as well as in positive language, I consider these to be of lesser relevance particularly when one has regard to the object to be achieved by the legislature. Such object and/or intention is that the accounting authority must be proactive and failure to be proactive will result in disciplinary steps and even criminal prosecution. The object and/or intention of the legislature is not reactive in the sense that an agreement concluded on a failure to be proactive as provided in section 51(1)(b)(ii) should be visited with nullity and/or invalidity. However, there is an element of reactivity in that a failure by an accounting authority to be proactive as required by section 51(1)(b)(ii) will result in disciplinary steps and even criminal prosecution against the accounting authority and/or its employees;

101.6 there is no penalty, sanction or even a criminal sanction imposed on those who conclude agreements when the accounting authority or otherwise failed to comply with its proactive obligations in terms of section 51(1)(b)(ii). This is not surprising, and which is but again a further indication that the legislature did not intend to visit the PSA and/or clause 7.2 thereof with nullity and/or invalidity, as third parties dealing with public entities will simply not be able to know whether the accounting authority complied with its proactive obligations in terms of section 51(1)(b)(ii). Even if it was remotely possible to determine whether the accounting authority has taken effective and appropriate steps to prevent fruitless and wasteful expenditure, such exercise to be undertaken by a third party intending to contract with the public entity

will be a task of such magnitude and time duration that it will stifle and/or hamper the ultimate conclusion of an agreement and therefore commerce. Furthermore, and what is clear from the PFMA, is that not merely will the accounting authority and/or its officials and/or employees who fail to act proactive in terms of their obligations in terms of section 51(1)(b)(ii) be found guilty of an act of financial misconduct if they wilfully or negligently make or permit an irregular expenditure or fruitless and wasteful expenditure [section 83(1)(b)], but it will also be the accounting authority that will be guilty of an offence should it fail to comply with the provisions of section 51 or 55 thereof. Put differently, there is no penalty or sanction for the agreement concluded in violation of section 51(1)(b)(ii), but only penalties and sanctions for those within the public entity who failed to comply with their proactive duties and/or obligations and/or responsibilities in terms of section 51(1)(b)(ii) of the PFMA;

101.7 an interpretation of section 51(1)(b)(ii) of the PFMA to the effect that the agreement concluded subsequent to a failure of the accounting authority to comply with its proactive obligations in terms of section 51(1)(b)(ii) will effectively hinder and/or hamper and/or stultify the object of the legislature. This is because the object is to ensure that the accounting authority must act proactive. By consequently interpreting the provisions of the PFMA as also invalidating the subsequent agreement, there will be little to no desire or impetus on the accounting authority or its officials to act proactively prior to the conclusion of the agreement as mandated and required by section 51(1)(b)(ii). In fact, it will result in a situation where the accounting authority and/or its officials and/or employees would simply never have to comply with its obligations and then thereafter come to court to declare the subsequent agreement invalid and/or void. Surely, such an interpretation cannot be countenanced as it will be contrary to the objects and purposes of the PFMA; and

101.8 greater inconvenience and impropriety will result by interpreting the provisions of the PFMA as invalidating an agreement concluded subsequent to a failure by the accounting authority to comply with its proactive obligations in terms of section 51(1)(b)(ii). On the one hand, it could lead to the accounting authority and/or its officials and/or employees being absolved from its proactive obligations/duties, but also from disciplinary proceedings and criminal sanction. On the other hand, it will result therein that innocent third parties that contract with the public entity [such as the respondent *in casu*], and who would have incurred substantial infrastructure changes and/or changed its position in order to comply with the said agreement by concluding other agreements with third parties, will now face a myriad of challenges, expenses. Surely, the legislature could not have contemplated such a consequence.

102. In the premises, I find no merit in the applicant's second main contention and hold that neither the PSA nor clause 7.2.1 thereof are invalid and unlawful on that ground.

103. As regards costs, counsel for both parties were agreed that costs should follow the result and in the exercise of my discretion, I find that such agreement is fair and just in the circumstances.

ORDER

In the result, I make the following order:

1. The relief sought in prayers 1 and 2 of the applicant's Notice of Motion (dated 24 June 2022) are dismissed.
2. The relief sought in prayer 3 of the applicant's Notice of Motion (dated 24 June 2022) is stayed pending final determination of the applicant's

counterclaim for rectification in the arbitration proceedings between the applicant and the respondent.

3. The applicant shall pay the respondent's costs of the application.

L MEINTJES
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

21 APRIL 2023

DATE OF JUDGMENT:

25 JULY 2023

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[HEADS OF ARGUMENT PREPARED BY ADVOCATE M GWALA SC]

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