IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 33460/2020

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

DATE	SIGNATURE
13/02/2024	**N V KHUMALO J**

In the matter between:

SOUTH AFRICA POST OFFICE SOC LIMITED **APPLICANT**

and

KONINKLIJKE JOH. ENSCHEDE B.V **1ST RESPONDENT**

JOHAN FREDERICK VAN WYK **2ND RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 12 February 2024

JUDGMENT

Khumalo N V J

Introduction

[1] This is a review application in which the Applicant, the South African Post Office SOC Limited (SAPO) seeks the following relief:

[1.1] Condonation for the late launching of this review application;

[1.2] That the decision of 2nd Respondent taken on 20 January 2014 to procure 4 (four million souvenir commemorative folders being stamps depicting the late former President Nelson Mandela ("folders) from first Respondent be declared invalid, reviewed and set aside;

[1.3] That the agreement entered into between the Applicant and 1st Respondent to procure 4 (four) million folders be declared void ab initio;

[1.4] That the 1st Respondent be ordered to repay an amount of € 743 270.40 (seven hundred and forty three thousand, two hundred and seventy euros) to the Applicant;

[1.5] That it be declared that the Applicant is not liable to pay the 1st Respondent an amount of € 869 729-60;

[1.6] Costs including costs of two counsel.

Parties

[2] The Applicant is the South African Post Office SOC Limited (SAPO), a state owned company duly registered in terms of the repealed Post Office Act 44 of 1958 and continues to exist in terms of section 3 of the South African Post Office SOC Limited Act 22 of 2011, read with the Companies Act 71 of 2008 (the Companies Act) and a major public entity listed under Schedule 2 of the Public Finance Management Act 1 of 1999. For convenience henceforth referred to as “SAPO.”

[3] The 1st Respondent is Koninklijke Joh. Enschede BV (Enschede), a private limited company pursuant to the two-tier company's Article of Association, registered in terms of the laws of the Kingdom of the Netherlands and situated in the Netherlands. The 2nd Respondent, Johan Frederick Van Wyk (Van Wyk) is a former employee of SAPO and at the time of the conclusion of the impugned agreement was a Senior Manager in the Philately section of SAPO. The 2nd Respondent does not oppose this application.

[4] For the sake of convenience the 1st Respondent Koninklijke Joh. Enschede BV is henceforth referred to as “Enschede” and the 2nd Respondent as “Van Wyk.”

Background facts

[5] The review is a reactive challenge to action proceedings instituted by Enschede on 29 October 2015 claiming from SAPO damages in the amounts of €743 270-40 and €869 729.60 for claim 1 and claim 2 respectively, on the basis of an alleged breach of the impugned agreement for the sale by Enschede of 4 million souvenir commemorative folders depicting the late former President of South Africa, Mr Nelson Mandela (“Madiba folders”) to SAPO. The claims were for the balance or outstanding amount in respect of the 1 843 200 (one million eight hundred and forty three thousand, two hundred) folders delivered to SAPO. It is common cause that SAPO paid for this delivery. The second claim is for 2 156 800 (two million one hundred and fifty six thousand eight hundred) folders which are alleged to have been manufactured but not delivered. The amounts make out the full purchase price of the 4 million folders.

[6] SAPO launched the review application subsequent to the proceedings in the trial action being adjourned for that purpose, alleging that it has since been established that the impugned agreement which is the basis of Enschede’s claims was concluded under irregular circumstances and in direct contravention of, inter alia section 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") without a competitive procurement process or request for proposal process as required by SAPO’s Supply Chain Management (“SCM”) and other policies. SAPO consequently brought this collateral review to declare the decision to procure the million folders

invalid and to be set aside and the resultant agreement entered into between SAPO and Enschede void ab initio. SAPO, as a result claims a refund of the payment it made on the partial delivery of the order and an order that it is not obliged to pay Enschede the remainder of the claim.

[7] SAPO also seeks condonation for the delay in launching the application.

[8] The interaction between the two started when SAPO's Potgieter firstly sought to obtain one (1) million souvenir commemorative folders from Enschede by sending a Request for a Quotation ("RFQ) on 6 December 2013. The tender was carried out by Mr Van Wyk. On 12 December 2013, Van Wyk sent a memorandum to Mr. Christopher Hlekane (Hlekane) SAPO's previous Group Chief Operating Officer (GCEO) in which he sought to deviate from the procurement policy and or the SCM procurement procedures by raising some kind of emergency or urgent need for the 1 million Madiba folders. He stated that a million folders were to be delivered less than two months on 11 February 2014 which was the anniversary of Madiba's release from prison. The procurement of the 1 million Madiba folders is not in dispute but serves to give an understanding of the matter.

[9] In addition, Van Wyk stated that the Madiba folders would have to be imported from foreign suppliers in view of quality and cost considerations. He had sent the Request for Quote (RFQ) to several suppliers and from the responses he received, Enschede's quote was the best of all the potential suppliers. Van Wyk therefore asked for the authorisation to appoint Enschede as manufacturer of a million folders.

[10] Hlekane granted the request for one million folders on 17 February 2014. Enschede agreed to produce and deliver a million folders to SAPO. There were delays in the delivery and in the same way, SAPO also faced challenges with respect to ensuring a complete purchase price. The parties however agreed that there was full and adequate performance of all obligations in terms of the agreement by both parties. The legitimacy and validity of that procurement process is not challenged and all the material facts pertaining to the procurement process are seemingly common cause.

[11] It is also common cause that while Enschede was in the process of producing the 1 million folders SAPO requested Enschede to produce an additional 4 million Madiba folders. The procurement procedure for the additional 4 million folders is the main reason SAPO launched a collateral review application. In particular, the parties are at odds as to the validity of that procurement and resultant agreement. It is also of importance to mention that a dispute also arose with regard to whether SAPO received the first part of the 4 (four) million folders and therefore was obliged to pay for them. SAPO is also applying for a refund of the amount paid for the partial delivery.

Validity of procurement

SAPO's submission

[12] SAPO pointed out that, in order to acquire an additional 4 million copies of Madiba folders, Van Wyk and his colleague C Mooi presented a proposal to the Executive Committee of SAPO (EXCO) on 20 January 2014. The EXCO gave provisional approval to this proposal at its meeting on 20 January 2014. The approval was subject to the following conditions, firstly that consideration ought to be given to the procurement of a quality of folders at a price of R50 per folder, that Van Wyk proposal should be revised and presented to EXCO for consideration and that Van Wyk should address in the final submission to the EXCO the endorsement of the initiative by the Nelson Mandela Foundation. In essence, Van Wyk was to return to EXCO with a revised proposal or submission for final approval. However, Van Wyk acquired 4 million folders from Enschede despite not obtaining a final approval. Van Wyk acted without an empowered decision or authorisation to do so and as a result, he had no delegated powers or mandate.

[13] It does not really matter whether Van Wyk may have considered, or even confused the preliminary or conditional approval by EXCO, final or without conditions. EXCO simply did not have the required authority. Van Wyk, as the senior manager and long-serving employee of SAPO knew this, alternatively ought to have known this. Van Wyk subsequently resigned on 5 March 2015. According to his resignation note, he had been employed by SAPO for 36 years at the time of his resignation.

[14] SAPO further refers to an email sent to Van Wyk by Philips, the SAPO Chief Audit Executive Officer expressing concerns regarding the purchase of four million folders, in order to give a clear picture that the procurement was contrary to SAPO policies, lack of consent including the absence of a formal agreement. Phillips discouraged such a sale, seeing also the cash constraints. Van Wyk brushed aside the serious concerns raised by Philips and incorrectly asserted that the procurement of additional 4 million folders was approved by EXCO, when it actually was provisionally approved.

[15] Enschede was aware that a quote or bid was necessary for the supply of the 4 (four) million folders. It had previously complied with this requirement for the supply of the 1 (one) million folders. Therefore, it ought not to have agreed to supply the folders before submission and acceptance of its bid or quote for the supply of the 4 (four) million folders. Enschede only submitted its quote in response to RFQ on 27 January 2014 (FAI1) after it has already undertaken the production of the 4 (four) million folders.

[16] In addition SAPO's Group Executive Borotho Moalosi (Borotho) warned Enschede in a letter dated 26 February 2014, to first obtain SAPO's official or quoted order number before production of additional folders. He, on behalf of SAPO re-affirmed the fact that the production of any additional folders should only be on receipt of an official order from SAPO. Borotho warned that any production done by Enschede without an official order number will be done "at Enschede's own sole risk." There was no response.

[17] Enschede disregarded the letter and instead sent two invoices to Borotho and Van Wyk. The first invoice was for the first order of 1 million folders and the second order of 4 million folders. But the issuance of the purchase orders did not comply with SAPO policies as Borotho, even as GE: Supply Chain, did not have the necessary authority for this transaction which in terms of the delegation of authority could only be approved by the SAPO Board. In that context, in so far as Enschede was warned not to make or supply any additional folders which did not have a SAPO order number, Enschede should bear the consequences. The agreement was concluded under

irregular circumstances and policies and in direct contravention of inter alia, s 217[1] of the Constitution of the Republic of South Africa 1996 ("the Constitution") with no competitive procurement process or request for proposal process as is required by its supply chain management. The procurement constitutes an irregular and fruitless expenditure because it was not a necessity for SAPO. Additionally, SAPO denies that it received the folders from Enschede as a result argue that it should not be ordered to pay anything.

[18] In addition SAPO submits that the abovementioned activities by Van Wyk, his team and Borotho actually bore the hallmarks of a procurement 'process that, apart from offending SAPO policies, does not appear fair, equitable, transparent, competitive and cost effective, as envisaged in section 217 of the Constitution.

[19] Furthermore, the RFQ sent by Enschede to manufacture the 4 million folders amounted to €1 613 000 (one million six hundred and thirteen thousand euros) which was equivalent to an amount between R23 531 573, 10 and R24 728 419 around 31 March 2014. In terms of SOPA's delegations of authority contracts of above R20 million are only authorised by the Board of Directors. As a result, the appropriate level of approval or authority for approval for the procurement of the 4 (four) million folders was the Board.

[20] In addition, SOPA points out that in a post facto attempt to correct his mistake and despite the contractual commitments already made to Enschede, on 04 February 2014, Van Wyk wrote a memorandum to Hlekane, the then SAPO's Group Chief Executice Officer, recommending, inter alia, that four (4) million folders be purchased to increase the total number of folders to five (5) million. The recommendation or the action plan in the memorandum was signed by Bernard Leeuw (without indicating whether he recommended or not recommended same); supported by Mzozoyana and approved by Hlekane. It is significant that in the memorandum Van Wyk did not disclose to Hlekane or the other persons who supported and/or approved the recommendation that he had already instructed Enschede to supply the additional 4

[1] Provides that organs of state when contracting for goods and services should do so in accordance with a system that is fair, equitable, transparent, competitive and cost –effective.

(four) million folders. In fact, in the memorandum, Van Wyk gave an impression that the 4 (four) million folders have not yet been ordered when this was clearly not the case, including when he stated: "We would like to recommend that an additional four million folders be purchased to increase the total number of folders to five million."

[21] Accordingly SOPA' argued that whether the memorandum or action plan is supported by Hlekane and his colleagues is immaterial. The appropriate approval level or authority was SAPO's Board in terms of the delegations of authority, and there was no approval by the Board.

[22] SAPO proffers that as a just and equitable remedy, the Court should declare that Enschede repay SAPO an amount of €742 270.40 (money paid for folders received), and that applicant is not liable to pay Enschede an amount of €869 729.60, or any portion thereof, as claimed by Enschede.

On Condonation

[23] SAPO detailed the sequence of events leading to its late launch of the review application, to explain the delay before the court. Accordingly, that the procurement of 4 million folders took place in the months from January to about May 2014. In November 2015, Enschede issued summons in the action proceedings. It was only on 22 September 2017 after SAPO's attorneys had, at the behest of Nemukongwe, a manager in SAPO's legal Services, handling the matter at the time, consulted with SAPO's employees, Potgieter and Rapetswa, in preparation for trial that SAPO decided to bring the reactive review. Nemukongwe had taken over after Mofokeng left in March 2017 following also the departure of Borotho in January 2017. The consultation had shed more light on the procurement process for the additional folders. Potgieter had been involved in both procurement processes for the 1 (one million and 4 (four) million folders.

[24] The trial was therefore, on 20 October 2017 postponed at the instance of SAPO's request that the action be stayed pending the determination of its reactive challenge. SAPO had first amended its Plea to add a Special Plea to reflect and to plead its correct position. One of the defences raised by SAPO in the amended Plea

was that the conclusion of the purported agreement contravened section 217(1) of the Constitution, the PFMA and SAPO'S SCM policy and that it intends to file a judicial review to set aside the resultant contract with Enschede. The plea for an immediate challenge being a dilatory one.

[25] In June 2018 Nemukongwe also left the employ of SAPO and the matter was reassigned to Johan Naude (Naude), SAPO's Senior Manager: Legal Services. SAPO claims the reassignment contributed to the delay in bringing this review and its attorneys had to apprise Naude on the facts of the matter in order for him to make an informed decision regarding the institution or decision to initiate the review, as envisaged in the amended plea.

[26] The instruction to Counsel on the review application was issued on 24 February 2020 following a practice directive handed out in terms of the Uniform Rules of the Honourable Court on 6 February 2020. It follows that a period of 34 months elapsed since the realisation and launching of the review on 28 July 2020, taking into account the time when SAPO first received the information required to be reviewed during the consultations held on 22 September 2017.

[27] SAPO pointed out that the high turnover of workers, particularly in the corporate units concerned by the decision at issue, was also a problem for SAPO. Van Wyk, for example, stepped down on 5 March 2015, Borotho in January 2017, Mofokeng in March 2017, Nemukongwe in June 2018..

[28] During this period of 34 months, they were also activities like the onset of Covid 19 pandemics between March and July 2020. SAPO further submits that challenges of a financial nature on its part also significantly contributed to the delay in bringing this review, competing with other priorities.

[29] According to SAPO save for 28 February and 20 March 2020 which were set as time frames by Potterill ADJP’s directive within which SAPO was to take senior counsel’s advice and bring this review, Enschede was never impeded to proceed with its action proceedings in terms of the Uniform Rules of Court. SAPOs defence of a reactive review did not deter Enschede from proceeding in accordance with the rules

and practices of the court. SAPO attorneys after obtaining an opinion from legal counsel confirming prospects of success, briefed senior counsel on 24 February 2020 to proceed with the review application.

[30] The consultation took place on 13 March 2020 when it became evident that further documents were required. Counsels were furnished with the documents on 18 and 24 March 2020 respectively. The onset of Covid 19 delayed the finalisation of the Application. The Supporting Affidavit was eventually signed by Mr Nongogo on 25 June 2020.

[31] In addition, SAPO points out that its mandate to distribute social security grants on behalf of the South African Social Security Agency or SASSA was enlarged by the additional grants or transactions announced by the President of South Africa Mr Ramaphosa as part of alleviation of the socio-economic impact arising from measures imposed to combat COVID-I9. From mid-March 2020 SAPO, particularly the Acting Group Chief Executive Officer, became inundated with tasks for ensuring distribution of the social security.

[32] It therefore considers that the explanation given in respect of the delay, and the circumstances under which it was delayed, are sufficient.

Enschede submissions

[33] Enschede submits that it has produced 1 million folders, in accordance with SAPO's request. The first part of 1 million folders was received by SAPO and subsequently distributed to various branches for sale and consumption at a profit. Similarly, it disputes the allegation that the procurement of the additional folders had to follow another procurement procedure. The request for the production of an additional 4 million folders was not followed by a new contract that is substantially different from its initial one, it only entailed the manufacture of additional folders in accordance with SAPO's earlier acceptance of proper tender to produce 1 million folders. There was no other competitor in an open and unrestricted market that had the capacity to manufacture another 4 million folders at similarly high levels of quality

with a better price and time. Enschede acceded to SAPO's request, as it was willing and able to manufacture the additional 4 (four) million folders.

[34] Moreover, the SAPO Board agreed to buy an additional four million folders. This is because none of the key officials negated or challenged Philips' emails specifically querying the process on lack of authority. For example, Enschede submits that, in the interim report dated 30 January 2014, in which Philips, SAPO's Chief Audit Executive asserts unambiguously and unequivocally that "approval was provided by SAPO's Board of Directors for the total amount of 5 million folders to be sold @R50 each," Hlekane and Mzozoyana, the Chief Financial Officer, were both copied in the email, including Kotsi the Executive: Main Business and they did not negate or object to the email. Hence, Enschede contends that Hlekane and Mzozoyana's failure to object to the emails as members of the Executive Board of SAPO at the time when this agreement was concluded shows that the Board was in agreement with the procurement of additional folders. Phillips furthermore on 19 February 2024 addressed an e mail to Van Wyk and Kotsi referring to internal audit raising serious concerns specifically with the acquisition of the 5 million folders. Nevertheless, there is consequently no basis on which SAPO can deny the existence of a valid agreement.

[35] There is further reference by Enschede to emails by Business Manager Keswa SAPO's Manager: Business Development - Philately that were sent with a sense of urgency to Ravenzwaaii, copying Potgieter stating that: "I have just spoken to Paul Potgieter, yes you can go ahead and prepare to print an additional 4 million stamps. On 24 January 2014, Van Wyk sent an email to Ravenzwaaij and Keswa, copying Potgieter, confirming Keswa's request to proceed with the printing of an additional 4 (four) million folders.

[36] Additionally, Enschede submits that it dealt with SAPO in good faith. There is no way it could have presumed equivocally that SAPO did not comply with all the formal and procedural requirements in terms of the relevant company laws, its memorandum of incorporation and any rules or policies of SAPO. It received purchase orders by means of a screen print not the actual signed orders. The purchase order numbers were 450035646, 4500356647, 4500356648, 4500356649.

[37] Furthermore Enschede manufactured the folders after receiving the screen print purchase orders because of the risk of being liable for breach of contract had it not manufactured and supplied folders after they were provided with a purchase order number. The first and second batch of folders were delivered as agreed, but no payments were made. As a result, Enschede had to take the stance that it would not ship the third consignment before payment for the first consignment was made which was conveyed to applicant on 29 December 2014. It did not deliver the third batch and instituted an action to recover the payments. On 30 March 2016, Potgieter sent an email wherein he confirmed the first and second delivery and that applicant's purchase orders are with applicant's Credit Officer. A special note is made to the fact that the summary indicated that the orders were "PROCESSED ON SAP." Eventually, SAPO made the two payments on 5 May 2016 and 22 August 2016 whilst the proceedings were pending.

[38] Enschede points out that there is no dispute that purchase order numbers 4500356646, 4500356647, 4500356648 and 4500356649 were delivered to the applicant. There can be no basis for a refund, the applicant received the mentioned orders and even sold same to the general public.

[39] |n the event that the review is upheld, Enschede submits that a just and equitable remedy is to order that the invalidity of the agreement will not have the effect of divesting Enschede of its rights which, but for the declaration of invalidity, it is entitled to.

[40] They submit that Enschede has produced and delivered the folders in accordance with the contract for which the expenditure and the hired labour were incurred. Enschede will suffer directly from a loss of income if it is not granted the accrued rights. Whilst SAPO will suffer no prejudice as it has received and sold the folders. However, if a court grants the relief sought, SAPO will be exempted from paying for the folders received whilst still making money on them. This could have an unduly beneficial effect. They have also made it clear that the delay in delivery is not worth taking into account.

Enschede on Condonation

[41] Enschede claims that because SAPO knew they had a baseless and unmeritorious defence, it failed to submit the review application on time. Only for the purpose of seeking an exemption from liability they decided to seek review at this stage. The explanation that the collateral review had not yet crossed the applicant's mind during the Summary Judgment stage falls short on merit and is nothing but an attempt to raise an ill-founded excuse to the inordinate delay.

[42] Further, Borotho, on advice of Mofokeng from SAPO's Legal Services Department and SAPO's attorneys, deposed to an Affidavit resisting Summary Judgment Application stating that the information and documentation that were included in his affidavit were not made available to SAPO's attorneys for inclusion in the answering affidavit even on the drafting of a plea delivered on behalf of SAPO. Even at that stage the idea of institution of this collateral judicial review had not yet crossed the collective mind of SAPO which was only to be a few years later. But in its plea filed on 20 June 2016 it indicated that: "The information used to draft the plea was essentially the same as what was available when resisting summary judgment." Enschede refers to passages in the resisting Affidavit where Borotho has under the 'heading RESPONDENT'S SUPPLY CHAIN MANAGEMENT LANDSCAPE), 'ISSUES AND FACTORS THAT ARE RELEVANT TO THE PROCUREMENT ACTIVITIES OF THE RESPONDENT...',) made submissions addressing SAPO's alleged concerns as to the procurement process. It argues that on SAPO's own version, as far back as 22 January 2016, Borotho had already addressed the alleged concerns. Enschede allege that SAPO did not pursue that aspect because it was aware that it is a baseless and unmeritorious defence to escape liability.

[43] Enschede argues that SAPO relies on the resignation of its officials as one of the explanations for the delay to bring the review application. However, Borotho and Mofokeng had together communicated with SAPO's lawyers prior to their resignation. In addition, from 12 November 2015, Mofokeng is said to have been working on this issue for 28 months prior to his resignation. Lufuno Nemukongwe was appointed as a substitute when Mofokeng left office in March 2017. For eight months, Nemukongwe worked on SAPO's behalf conducting an internal investigation to identify potential witnesses.

[44] Furthermore, Enschede maintains that, on 22 September 2017, SAPO engaged in consultations with Potgieter and Rapetswa. In addition, they submit that SAPO commenced its investigation on 25 June 2018. Similarly, it submits that it is apparent from this delay that SAPO must have intended to proceed with its request for a review. Only after Enschede had secured a judicial case management meeting forcing SAPO to take action whilst failing to comply with the stipulated time periods within which it had to file its papers, did SAPO issue its review which evidences a total disregard of the rules and directives of the court.

[45] Enschede further submit that SAPO is acting opportunistically by arguing that high turnover has made it difficult for them to launch the review Application. Consequently, Enschede submits that SAPO has failed to provide an explanation as to why it did not initiate the review procedure from 22 September 2017. They further claim that if the relief sought by SAPO is granted it would result in a prejudice on the part of the Enschede more than SAPO.

SAPO's REPLY

[46] SAPO pointed out in its reply that what is referred to by Potgieter as an approval by the board is reference to the EXCO resolution of 20 January 2014 when Van Wyk was told to revise his proposal for further consideration which was approved conditionally.

[47] SAPO also points out that the procurement of 1 million folders and that of 4 million folders may on the face of it seem to follow the same process but denies the parallel procurement process suggested by Enschede. It submits that due to the monetary value of the procurement of 4 million folders SAPO required a resolution of the Board, and there is a certain policy and process required for urgent procurement, failing of which, the process is flawed.

Issues to be determined.

(a) Whether the applicants should be granted condonation for the delay in instituting the review application.

(b) Whether the procurement of 4 million folders was invalid and not in accordance with SAPO's procurement policies.

(c) If not, the correct order to be issued

On Condonation

Legal framework

[48] In *Associated Institutions Pension Fund v Van Zyl*,[2] the court made it clear that:

> *[46] "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) at 10b–d paragraph [27]). The raison d'être of the rule is said 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 functions (see eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41).*
>
> *[47] 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 these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:*

[2]2005 (2) SA 302.

(a) 'Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?".[3]

[49] The first question on unreasonable delay has the same meaning as a value judgment, but it also calls for an investigation of facts. The exercise of judicial discretion also comes into play in the other question. The facts and circumstances of the specific case must, of course, be taken into account when answering both questions.[4]

Unreasonable delay

[50] In *Department of Transport v Tasima* (*Pty*) *Limited (Tasima I),*[5] the court held that when an applicant seeks condonation for delay, a full explanation that covers the "entire period" must be provided…The onus is thus on the Department to explain why the delay of some five years was not unreasonable or undue.[6] Further, the court in the matter of *Associated Institutions Pension Fund supra,*[7] said that:

> *"The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case. 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."*[8]

[51] *Gqwetha v Transkei Development Corporations Ltd and others,*[9] adds that "whether there has been undue delay entails a factual enquiry upon which a value

[3] Ibid para 46-47.
[4] *Mandela v Executors Estate Late Mandela and others* [2016] JOL 35772 (ECM)b para 16.
[5] 2017 (2) SA 622 (CC).
[6] *Ibid* para 153.
[7] 2005 (2) SA 302.
[8] *Ibid* para 48.
[9] [2006] 3 All SA 245 (SCA).

judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay. A material fact to be taken into account in making that value judgment bearing in mind the rationale for the rule is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside".[10] Simply, a delay cannot be evaluated in a vacuum but only relative to the challenged decision, and particularly with the potential for prejudice in mind.[11] In addition, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay.[12]

Should the delay be overlooked?

[52] *Khumalo v Member of the Executive Council for Education: KwaZulu Natal,*[13] says that courts have a "discretion to overlook a delay". In paragraph 45 the court said that:

> *"… a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay".*[14]

[53] Furthermore, in *Department of Transport v Tasima,*[15] the court explained that this discretion should not be exercised lightly. It further stated 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*

[10] Ibid para 24.
[11] Ibid para 33.
[12] *Buffalo City Metropolitan Municipality v Asla Construction* 2019 (4) SA 331 (CC) para 52.
[13] 2014 (5) SA 579 (CC*).*
[14] *Ibid* para 45.
[15] 2017 (2) SA 622 (CC).

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, reactive or otherwise.[16]

[54] The court in *Buffalo City Metropolitan Municipality v Asla Construction,*[17] emphasised the fact that 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.[18] Additionally the court listed a number of factors that should be considered when deciding whether to overlook delay. The court stated as follows:

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

[55] A second factor relevant to overlooking delay is the nature of the impugned decision. This, in essence, requires a consideration of the merits of the legal challenge against that decision…

[59] A third factor to consider when deciding to overlook delay is the conduct of an applicant. This is particularly true for State litigants seeking to review their own decisions for the simple reason that often they are best placed to explain the delay. This was recognised by Skweyiya J in Khumalo:

> *"The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead*

[16] *Ibid* para 160.
[17] 2019 (6) BCLR 661 (CC).
[18] *Ibid* para 53.

one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons. Had the matter been brought by a private litigant, this aspect of the test might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations, and that she should have within her control the relevant resources to establish the unlawfulness of the decision she impugns, the unreasonableness of the unexplained delay is serious." (Emphasis added.)

[63] The fourth principle stems directly from Gijima. Even where there is no basis for a court to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare the State's conduct unlawful. This is so because "[s]ection 172(1)(a) of the Constitution enjoins a Court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.

[131] …*The delay rule should not be viewed solely through the ancestor lens of common law review, but through our constitutional lens in which legality review serves to promote open, responsive, and accountable government.*

[132] This purpose-driven approach to procedure is very different to the formalistic notion that the delay rule must necessarily be assessed as a point in limine (preliminary point) that precludes any consideration of the merits of the review. Rather, a careful weighing up of two different aspects of the rule of law is required when considering whether it is in the interests of justice to condone or overlook a delay: the importance of declaring (and correcting) unlawful decisions, and the importance of expeditious and diligent compliance with constitutional duties so as to ensure certainty and finality for the parties relying on such decisions."[19]

[55] In the case of *SA National Roads Agency v Cape Town City*[20], it was said as follows regarding the factor relating to consideration of merits it was stated that:

[19] *Ibid* para 53,54, 59, 63, 131 and 131
[20] 2017 (1) SA 468 (SCA).

> *"…….It cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case, 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."*[21]

[56] In *Buffalo City supra*, the court *per* the minority judgment recognised that there are instances where the Court's jurisprudence, and the deep constitutional imperatives that underlie it, provide for instances where a public authority's delay in bringing "self-review"– legal proceedings to set aside its own decision – is so prodigiously and lamentably inexcusable that there is no public interest or constitutional necessity for pronouncing on its legality. Conceding that those cases will be rare, for, as the Court's decisions show, there is a constitutional imperative to locate and declare unconstitutional conduct invalid under the Constitution.[22] It would be difficult to find these instances that would justify the perpetuation and preservation of illegality especially the wastage of public funds when the majority still stay in poverty. The amelioration of prejudice should be the key factor where such delay stands before correction of illegality.

Application of the law to the facts

[57] The review application commenced in the present case 34 months after SAPO first received the information required to be reviewed, which was during the consultations held on 22 September 2017. SAPO's main explanation for the delay in commencing the proceedings was the high staff turnover, with some who were implicated in the debunked procurement process whilst others involved in defending the legal action instituted thereafter by Enschede, leaving at an inopportune time, Covid 19 and financial issues that took place. In my view, these reasons are persuasive and were all beyond SAPO's control. Even if the delay is long the sound explanation given by SAPO makes it reasonable and therefore excusable. Thus, I am

[21] *Ibid* para 81.
[22] Footnote 17 para 110

of the view that the delay can be overlooked and or condoned, the importance of declaring (and correcting) unlawful decisions being imperative.

(b): Procurement of four million folders

Legal framework

[58] Section 217 (1) of the Constitution states that when an organ of state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective.[23]

[59] Clause 5 of the Supply Chain Management Procurement Policy ("SCM" or "Supply Chain")[24] sets out the principles that govern SAPO's procurement process. The clause reads as follows:

> *"Transparency- South African Post Office shall have a procurement system that is open and fair.*
> *Effectiveness-South African Post Office Group shall strive for a procurement system of excellence that delivers on the principle of doing it right the first time.*
> *Efficiency-South African Post Office Group shall strive to standardise and simplify procedures where appropriate to optimise the process.*
> *Competition- South African Post Office Group shall satisfy its procurement requirements through open competition unless there are justifiable reasons to the contrary.*
> *Fairness- All bidders and suppliers shall be dealt with fairly and without unfair discrimination…"*

[60] Further, Clause 10.15 of the SCM outlines the instances where SAPO can procure services without following the protocol for procurement. The Clause states that:

> *<u>Deviations from normal bidding process (Limited Bidding)</u>*

[23] Section 217 (1) of the Constitution of the Republic of South Africa, 1996.
[24] Supply Chain Management Procurement Policy of August 2016.

"SAPO must only deviate from inviting competitive bids in cases of emergency and sole supplier status.

− An emergency procurement may occur when there is a serious and unexpected situation that poses an immediate risk to health, life, property, or environment which

calls an agency to action and there is insufficient time to invite competitive bids.

− Sole source procurement may occur when there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the institution.

− Apart from the two scenarios above, SAPO must invite as many suppliers as possible and select the preferred supplier using the competitive bid committee system.

− Any other deviation will be allowed in exceptional cases subject to the prior written approval from the relevant treasury."

[61] Clause 10.3 of the SCM sets out the procurement method for bids of different value. This clause sets out the procedure for bids above R1 000 000 (one million rands). The Clause is read as follows:

"Above R1 000 000 (Vat included)

-SAPO must invite competitive bids through the RFP process for all procurement above R1 000 000 (Vat inclusive).

-The bids referred to above must be advertised in the National Treasury's e-Tender portal or in another medium and for a period of 21 days, except in urgent cases when bids may be advertised for such shorter period as the GE: SCM may approve, provided that such shorter period must be at least 14 days.

- If considered necessary, GE: SCM may, in addition to the medium referred to above, also authorise the advertising of bids in other appropriate media to ensure greater exposure to potential bidders".

[62] Clause 11 of the South African Post Office and its Subsidiaries Procurement Policy provides as follows:

"The South African Post Office and its subsidiaries shall conduct its procurement activities through open competition unless there are justifiable

reasons to the contrary, in which case the limited bidding. process would be followed."

[63] In *Merifon (Pty) Limited v Greater Letaba Municipality and another*,[25] the court looked at the applicability of the Turquand rule[26] in situations where an innocent party contracts with the other party not knowing whether the proper internal procedures were followed. The court stated that:

> *"…Does the Turquand rule apply in respect of Municipalities and where innocent third parties are involved? It is trite that void acts cannot be resuscitated through the Turquand rule. It is also trite that it is a species of estoppel and therefore cannot be raised to cure an action that is ultra vires, as opposed to one that is intra vires (within one's legal powers) but suffers some other defect. The doctrine of legality is applicable and decisively trumps Merifon's argument."*[27]

[64] Enschede's attempt to invoke the *Turquand* rule arguing not to have been aware of SAPO officials' non-compliance with the procurement procedures and to have dealt with it in good faith is ousted by the doctrine of legality. The invalidity cannot be cured. This does not change the fact that the procurement was invalid.

[65] One of the arguments by SAPO is that the procurement of the four million folders was not approved by SAPO's board of directors. However, it does not state exactly who forms part of the Board of directors. Specifically, there is no evidence to ascertain whether Hlekane and Mzozoyana constituted the Board. However, even if

[25] 2022 (9) BCLR 1090 (CC).

[26] *T*he Turquand rule is a common law rule, it has been incorporated in the Companies Act, 71 of 2008 ("the Act"). Section 20 (7) of the Act provides that a person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of the Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or ought to have reasonably known of any failure by the company to comply with such requirements.

[27] *Ibid* para 42.

Hlekane and Mzozoyana were copied on the emails pertaining to the procurement of the four million folders, these two officials are part of the Board and do not constitute the whole Board of directors in SAPO. Moreover, as part of the Board they were not fully appraised of the fact that EXCO had actually provisionally approved the procurement with certain conditions to be fulfilled prior any final approval. As a result, Enschede's submissions that SAPO's Board of directors approved the procurement of the additional folders is unsustainable.

[66] SAPO has also indicated that the written memorandum by Van Wyk to Wallis, Mzozoyane and Hlekane was post facto the procurement, a fact which was also not divulged to them.

[67] It is clear from clause 10.15 of the SCMPP that an emergency procurement will take place at the time when there is a real and unforeseen situation which endangers health, life, property, or the environment immediately requiring action by the urgency without sufficient time for invitation to tender. In this case there is no evidence provided by SAPO as to whether there was a serious and unexpected situation that needed urgent procurement of the additional folders. It is only alleged that there was an expected high demand of the folders from both local and international customers. Even if this was true, this reason still does not suffice as an emergency situation. Moreover, the 1 million folders had not yet been sold out when the 4 million folders were procured.

[68] it is furthermore clear from the wording of Clause 10.3 that the procurement of the four million folders violated this clause. Enschede argued that the procurement of the additional four million folders was an extension of the existing contract as it was already in the middle of supplying the million folders. It could not have been, the additional four million way exceeds the value of the initial order and in terms of the procurement policy a different process was to be followed. It also could not be procured by extension or as part of the 1 million folder agreement. Although objectively, one might be attempted to agree with Enschede, on their allegation that why Enschede was selected to supply the first million folders is because there was no other supplier other than Enschede that could provide the folders of expected quality and price. This implies that Enschede was still going to be selected to produce the additional four million folders. However, it is very significant that there was no tender

process. Such a conclusion pre-empts a process that was not complied with. Furthermore, there was still no approval from the board of directors as argued above, a proper procurement policy not followed in that respect as well. Consequently, the procurement is invalid and a declaration as such appropriate.

[69] The next question arises as to what a just and equitable remedy in the present case will then be,

Just and equitable remedy

Applicant's Submissions

[70] As a background to the just and equitable remedy, Enschede on 29 October 2015 instituted action proceedings against SAPO for claim 1 and 2 respectively, arising from the alleged breach of contract. Both claims emanate from SAPO's procurement of four million folders from Enschede. As regards claim 1 for an amount of €743 270.40, Enschede sent SAPO, 1 843 200 (one million eight hundred and forty three thousand two hundred) folders. It is common cause that SAPO paid for this delivery. Claim 2 is for an amount of €869 729. This amount is the full purchase price for 2 156 800 (two million one hundred and fifty six thousand eight hundred) folders which were manufactured but not delivered.

[71] As a just and equitable remedy, Enschede argues in respect of claim 1, that SAPO received folders and distributed them to its various branches for the purpose of selling them and generating profit. Therefore, the amount of €743 270.40 is not to be recovered by Enschede since SAPO through its branches selling the folders continues to make a profit, paying that amount would unjustifiably enrich SAPO. Further, Enschede argues that it will be fair and reasonable on the part of SAPO to pay the €869 729 for the rest of the folders it had already manufactured. According to Enschede, if SAPO does not pay, Enschede will suffer a financial loss because they have spent so much money on the production of the folders.

[72] Contrary, SAPO submits that because the bid was awarded to Enschede in violation of section 217 of the Constitution, a just and equitable remedy will be to order Enschede to pay back to SAPO the €743 270.40 because the resultant contract was

invalid. SAPO further claims that, it does not have to pay Eschede either as regards the amount of €869 729.60 or in respect of any portion claimed by Enschede. In addition, SAPO says that Enschede should bear the consequences because it was aware or ought to have known that the procurement of the four million folders was invalid.

Applicable law

[73] Section 172 (1) of the Constitution reads as follows:

When deciding a constitutional matter within its power, a court -

a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

b. may make any order that is just and equitable, including -

I. an order limiting the retrospective effect of the declaration of invalidity; and

II. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[74] In *Buffalo City Metropolitan Municipality*,[28] the Chief Financial Officer of the city of Buffalo, has then given a contract for Reeston East Works to the Respondent. Subsequently, the municipality failed to pay Asla for its services in respect of a contract with *Reeston*. In order to recover the amount due to be paid by the municipality, Asla brought proceedings against the municipality. The municipality submitted that, prior to the award of the *Reeston* contract, it was necessary to carry out a different tender and procurement procedure. Consequently, the agreement with *Reeston* is null and void.[29] The court held that the delay in the opening of the review proceedings by the municipality was unexplained and therefore disproportionate. In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing Asla to proceed to perform in terms of the contract. Accordingly, the majority judgment ordered an annulment of the *Reeston* Agreement and did not set aside it with a view to preserving Asla's rights. In paragraph 105, the court held that:

[28] Note 8 above.
[29] *Ibid.*

> *[104] In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to perform in terms of the contract. I therefore make an order declaring the Rees ton contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. <u>It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement".</u>*[30]

[75] In *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and another,*[31] the SIU sought an order declaring a lease agreement between the Respondents and an organ of State to be unlawful, and for the Respondents to pay the Minister of Public Works an amount of R103 880 357.65 representing wasteful expenditure incurred during the lease. As regards the right to a just and equitable remedy, SIU argued that it could not benefit those parties where an agreement was found unlawful. The court rejected this argument on the basis that it was based on an incorrect reading of the dictum of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Other.*[32] In paragraph 18 and 19 the court held that:

> *[18] "A careful and contextual reading of Allpay 2 thus shows that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract. The approach in Allpay 2 of allowing a party to retain payments, and thus to benefit, under an unlawful contract has been echoed in a number of matters. One such example is found in Buffalo City, where the majority in the Constitutional Court held:*
>
> > *". . .I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to [which] the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement."*

[30] *Ibid* para 105.
[31] [2023] JOL 58437 (SCA).
[32] *Allpay Consolidated Investment Holdings* (*Pty*) *Ltd and others v Chief Executive Officer*, *South African Social Security Agency and others* 2014 (4) SA 179 (CC) *(Allpay 2).*

There, too, the contractor had performed its obligations under the contract. The Constitutional Court held that the contractor was entitled to payment for the work which had been done.

[19] It must be said that the "principle" relied upon by the SIU as set out in Mott Macdonald is no principle at all. The same must be said of the following dictum in Central Energy Fund.

> *"The second guiding principle is the 'no-profit-no-loss' principle which the Court articulated as follows: 'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract…"*[33]

[76] Moreover, the court in *State Information Technology Agency Soc Limited v Gijima Holdings (Pty) Limited,*[34] stated that:

> *[54] "Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled. Whether any such rights did accrue remains a contested issue in the arbitration, the merits of which were never determined because of the arbitrator's holding on jurisdiction".*[35]

Conclusion

[33] Note 23 above para 18-19.
[34] [2017] JOL 39257 (CC).
[35] Ibid para 24.

[77] Based on the facts and applicable principles set out above, SAPO's procurement of the four million folders from the first respondent indeed fell short of the procurement procedures. As a result, a just and equitable outcome would be that both parties should not benefit from the unlawful contract. No further obligations or rights can flow from the void agreement although to ameliorate any prejudice an order rather preserving that which had already accrued but does not permit a party to obtain further rights under the invalid agreement would be just and equitable.

[78] Following on the principle espoused in these authorities on just and equitable remedy that parties should not benefit from an unlawful contract, it is logical that SAPO should not benefit from the first batch of folders delivered by Enschede and from its own undue delay in instituting proceedings. This implies that SAPO should not be refunded the €743 270.40 it paid for the folders it received from Enschede. On the other hand, Enschede should not benefit from a contract which was unlawfully entered into. As well even if Enschede claims that it has suffered the financial loss producing the outstanding folders not yet delivered it should not receive any payment for those folders.

Costs

[79] Both parties have been partially successful in that the decision to procure has been found to be invalid, therefore reviewable and to be set aside and the resultant contract void ab initio, however, the payment obligation for the delivered folders have been preserved. For this reason, an order that there should be no order as to costs would be reasonable.

[80] Under the circumstances the following order is made:

1. The Application for condonation for the late launching of the review Application is granted;

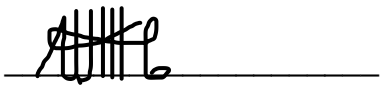
2. The decision of the 2nd Respondent (“Van Wyk”) taken on 20 January 2014 to procure 4 (four million souvenir commemorative folders being stamps depicting the late former President Nelson Mandela ("folders) from 1st Respondent is declared invalid, reviewed and set aside;

3. The agreement for the procurement of 4 Million folders entered into between the Applicant and the 1st Respondent is declared void ab initio;

4. The claim that the 1st Respondent be ordered to repay the Applicant an amount of € 743 270.40 (seven hundred and forty three thousand, two hundred and seventy euros) is dismissed.

5. The Applicant is not liable to pay the 1st Respondent an amount of €869 729-60 for the folders allegedly manufactured but not yet delivered;

6. Each party to pay its own costs.



N V Khumalo
Judge of the High Court
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