THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 322/19

In the matter between:

VALOR IT **APPELLANT**

and

PREMIER, NORTH WEST PROVINCE **FIRST RESPONDENT**

MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF SPORTS, ARTS AND CULTURE, NORTH WEST PROVINCE **SECOND RESPONDENT**

DEPARTMENT OF SPORTS, ARTS AND CULTURE, NORTH WEST PROVINCE **THIRD RESPONDENT**

Neutral citation: *Valor IT v Premier, North West Province and Others* (Case no 322/19) [2020] ZASCA 62 (9 June 2020)

Coram: WALLIS, MOLEMELA, MOKGOHLOA and PLASKET JJA and KOEN AJA

Heard: No hearing. Disposed of in terms of s 19*(a)* of the Superior Courts Act 10 of 2013

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on the 9th day of June 2020.

Summary: Public procurement – contract awarded for the provision of services to organ of state – no open tender process followed, as required – agreement unlawful for want of compliance with legal prescripts – further contracts for provision of services also unlawful – effect of settlement agreement – court cannot validly make settlement agreement an order if settlement agreement unlawful.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Gura J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Plasket JA (Wallis, Molemela and Mokgohloa JJA and Koen AJA concurring)

[1] This appeal concerns the strange tale of how a public procurement contract awarded to the appellant, Valor IT CC (VIT), by the third respondent, the Department of Sports, Arts and Culture in the government of the North West Province (the Department and the provincial government respectively) escalated over about three years from its tender value of R498 000, excluding VAT, to R41 729 647 (including the payment of R22.8 million in 'damages'), the total amount that was paid to VIT by the provincial government; and how all of this occurred without any bona fide attempt to comply with the public procurement processes that have their origin in s 217 of the Constitution.[1] At the heart of this matter lies the question of whether the contractual relationship between VIT and the Department is lawful.

[1] Section 217 of the Constitution provides:
'(1) 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.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[2] That question arises because, following the termination of the contractual relationship by the provincial government, VIT applied for a declaratory order that the termination was unlawful and that it was entitled to payment of a further amount of R146 473 747.49 as damages. In the court below, the North West Division of the High Court, Mahikeng, Gura J dismissed VIT's application and granted the provincial government's counter-application in which it sought, inter alia, the setting aside of all contracts between VIT and the Department. Gura J refused VIT leave to appeal, but leave was granted by this court on petition.

Background

[3] VIT is engaged in the information technology industry. It was one of a number of entities that were accredited by the State Information Technology Agency (SITA) as approved suppliers to organs of state of information technology requirements.

[4] In January 2011, VIT submitted an apparently unsolicited proposal to the Department concerning an enterprise content management – or ECM – system, to manage its records. The Department considered the proposal and had discussions with VIT. As a result, in March 2011, VIT gave the Department another, more detailed and costed, proposal.

[5] The proposal was said to be specific to 'the Department's Business requirements', and was 'geared to analysing the requisite infrastructure, business systems and IT systems required by the Department to enable the Department to successfully meet their strategic aims and goals'. VIT stated that if it was successful in being given the task, it would 'obviously welcome the chance to work together with other consultants of the Department's choice in subsequently implementing fully working end-to-end business and IT solutions that all integrate with each other'.

[6] In its overview of what it offered the Department, VIT said that a number of steps had to be taken to 'ensure that the records management solution is successfully designed, controlled and implemented'. It listed eight steps that started with a preliminary investigation and ended with a post implementation review. It then said:

'The first of these steps will be tackled in the first stage of the engagement namely the preliminary investigation. This step will provide an understanding of the organisation, together

with the administrative, legal, business and social context in which it operates. The investigation will identify current record keeping strengths and weaknesses within the department as well as building a solid foundation on which the scope of the record keeping program can be built. The information collected in this step will be crucially important as progress is made through the project and decisions need to be made relating to record keeping systems and activities. The initial steps of the process are resource intensive, it is therefore important to ensure that appropriate time and resources are assigned to the tasks in these steps.'

[7] Later in the document, the first step in the process was identified as 'Phase 0'. In a table, the key activities involved in Phase 0 were set out. They included: determining and defining the scope of the investigation; collecting sources of information that needed to be analysed; interviewing 'relevant stakeholders/ business units etc'; drafting a report of the investigation that would include the major findings of the investigation and recommendations 'related to the scope, conduct and feasibility of the proposed records management program'; and the drafting of a 'proper plan' based on the findings in the report. The proposed price for this work was R498 000 excluding VAT. (Certain other costs were also excluded.)

[8] In July 2011, the Department directed a request for quotations to entities that were accredited by SITA. One of them was VIT. The Department requested quotations for the rendering of services on a 'Records Management solution' for the Department. Under a heading '**Task Directive/Terms of Reference**', the request for quotations specified that the work would entail an assessment of the Department's records management needs, an information audit, the design of a records management system, the automation of manual records management systems, the implementation, monitoring and evaluation of the proposed system and the training of personnel in its use and feedback on 'the findings and strategic records management implementation plan'.

[9] By letter dated 4 August 2011 addressed to VIT, the Head of the Department informed it of its successful bid. She stated:

'It is a great pleasure to inform you that the North West Department of Sports, Arts & Culture has pursuant to your presentation to my office on 03 August 2011 resolved that your proposal

for the assessment, development and management of records, and information system for the North West Provincial Government be awarded to VALOR IT CC for an amount of **R498 000.00** – (Four hundred and ninety eight thousand rand, **excluding VAT**).'

[10] The head of the Department stipulated that the project was to commence within 14 days of the date of her letter and that VIT's appointment was subject to a number of conditions. They were that: it accept the appointment in writing; sign a contract with the Department; provide a payment schedule in accordance with work done; attend an 'engagement meeting' in order to be introduced to 'management' before the commencement of the project; and that the 'tendered amount will be considered fixed for the project'. The estimated delivery period for the project was six weeks.

[11] On 4 October 2011, VIT and the Department signed an agreement that they called a service delivery agreement – an SDA – in respect of an 'enterprise content management solution' for the Department. Clause 1.1.27 defined the scope of work envisaged by the SDA to mean 'the description of the Deliverables, timeframes and Delivery Dates of the Services, scope, plan and payment schedule/s as set out in Schedule 1'. This schedule was the only schedule that formed part of the SDA. A reference to another schedule was deleted and initialled by the parties. Clause 30 of the SDA provides that '[t]his Agreement constitutes the entire Agreement between the Parties for the provision of Services by [VIT]' and that '[a]ny prior arrangements, agreements, representations or undertakings are superseded'.

[12] Schedule 1 refers, in its heading, to '**Scope of Work Phase 0**'. Immediately below the heading it is stated that the schedule and its annexures '*is based on this Agreement agreed to between the parties*'. Phase 0 is described as involving an information audit and scoping in which the 'deliverables' are: the collection of information; the collation, evaluation and interpretation of the information; the compilation of a 'comprehensive report' containing findings and recommendations; determining the strategic objective of records management in the Department; the assessment of the availability of 'sufficient human resources' within the Department; the assessment of 'the availability and use of records classification systems'; the assessment of the availability of 'policies, procedures and processes'; the assessment of 'MISS compliance and confidentiality of classified records'; the assessment of the

availability and use of registers and other record keeping systems; the assessment of the systems and practices then in use for 'storage, maintenance and transfer of electronic metadata, media and related technologies' and whether these conform to the standards set in the National Archives of South Africa Act 43 of 1996; and the assessment of the 'processes involved in the transfer of records to an archival repository'. The fee that VIT would be entitled to for this work was 'R498 000.00 (Four hundred and ninety eight thousand rand) Excluding VAT'.

[13] On 26 October 2011, the Department paid VIT the amount of R567 720, made up of R498 000 plus VAT. Even though Phase 0 had now been concluded, that did not end the relationship between the Department and VIT. On 2 December 2011, they signed a document titled 'Schedule 2: Scope of Work – Phase 1'. In VIT's founding affidavit, it was claimed that, on that date, the parties 'signed the schedule attached to the main agreement wherein they agreed on a two phased approach namely Phase 0 and Phase 1A for the implementation of the ECM project with a total cost of R498 000.00 and R9 800 000.00 respectively'. As was pointed out in the answering affidavit, however, this was not factually correct: the SDA was signed on 4 October 2011 and related only to Phase 0, having a total value of R498 000 (excluding VAT), while Schedule 2, relating to part of Phase 1, was signed on 2 December 2011, having a total value of R9 800 000 (excluding VAT). Schedule 2 was not part of the SDA, having been expressly excluded. It appears that the head of the Department and VIT wanted to create the false impression that Schedule 2 had always been part of the SDA.

[14] In terms of Schedule 2, VIT was engaged, over a period of four months and for a fee of R9 800 000, excluding VAT, to develop 'provincial governance instruments', which included, inter alia, appointing records managers and creating and implementing 'records life-cycle processes'; putting in place 'governance instruments'; and rolling out a change management plan. (VIT stated that the original budget for Phase 1 was R20.1 million but 'due to budgetary constraints', this phase was divided in two: the agreed amount of R9 800 000 was payment for what VIT called Phase 1A.) While VIT claimed to have completed the work and to have been paid R9 800 000, the provincial government disputes this on two scores. First, it stated that only R8 132

695.52 was paid to VIT, over the period between January and July 2012. Secondly, it said:

'Despite this huge payment, no evidence of outputs was attached nor could they be submitted in electronic format and/or verified in copies. To date, doubt exists whether the outcome of the project produced tangible progress with documents, record and archive management for the province. The applicant has failed to satisfy numerous requests for proof of deliverables.'

[15] In August 2012, as a result of a lack of funds to pay for the work that VIT proposed to do, the head of the Department applied for funding from the premier's discretionary fund. She sought a total of R22 million for the completion of Phase 0, Phase 1B and Phase 2. This amount was later reduced to R18.6 million in respect of only Phase 0 and Phase 1B. The Premier granted R20 million. As a result of these funds being made available, the Department and VIT agreed to a schedule of activities that VIT would perform in respect of Phase 1B at a cost of R12 882 000.

[16] When supply chain management problems began to arise, with the result that payments of invoices were refused, the arrangement was 'formalised'. On 15 October 2012, the Department and VIT entered into what they termed a service level agreement in respect of Phase 1B at a total cost (including VAT) of R12 882 000. This appeared to open the money taps again, with the result that the Department paid VIT an amount of R3 472 200.

[17] VIT then submitted a request to the Department that it purchase software from it at a cost of R37 million, and pay it, in addition, an annual maintenance fee of R6.7 million. A deputy director general was given the task of formulating a view on this proposal. He concluded that it could not be accepted because it had to go out to tender in order to comply with legal procurement requirements, but recommended that VIT be invited to 'present detailed specifications and requirements', that the Premier's office and other departments be drawn into a consideration of the need for the proposed solution, that VIT then be asked to prepare a presentation on the costs and benefits of the current system as against what it proposed, and that a 'final position regarding a submission to Extech/Exco and a review of the present proposal could be formulated thereafter'. The head of the Department accepted these recommendations and communicated her view to VIT. This drew a response from VIT.

[18] In a letter to the head of Department dated 27 October 2011, VIT's chief executive officer set out VIT's position. He said:

'It has come as quite a surprise to us that you indicate that the department now has to go out on tender for the next phase/s of the project. Our understanding of the SDA that was signed between [the Department] and [VIT] It is as follows:

1. The project was awarded by [the Department] to [VIT] as an end to end ECM Solution.
2. That the Phase 0 was only for a period of 6 weeks and that the full implementation of the ECM project spans 3 years with an option to renew if required as per the SDA.
3. That the project will be broken down into a phased approach in terms of the deliverables (Phase 0 then Phase 1 and finally Phase 2)
4. That any other further enhancements, developments, etc, for the ECM project will form Phase 3 as a deliverable/s.
5. That at the end of each Phase a Schedule of Work, Payment Schedule and a Project Plan will be developed for the following Phase that needs to be delivered. . .
6. That the SDA signed between [the Department] to [VIT] fully encompasses the total ECM Solution Implementation, Phase 0 was purely an assessment stage.
7. On the presentation on the 27th of September 2011 to DMC in Potchefstroom, a costing of R20,1 mil for Phase 1 was presented.
8. On the meeting at the 05th of October 2011 at your office boardroom in which the signing of the SDA took place, you indicated that we needed to provide a project plan, scope of work and payment schedule for Phase 1. You also removed the Scope of Work Schedule from the SDA as it was not supported by the Project Plan and Payment Schedule. You also asked if we could carry on with assisting with the development of the Government Instruments and asked us to review and use what [the Department] already has in place if possible. You will no doubt agree that this forms part of Phase 1.

Please also find attachments with various extracts that indicate clearly that the project was an end to end solution broken down into phases. It also clearly shows that Phase 1 will follow Phase 0 and that Phase 1 must start immediately over a period of 6 months. Please refer also to slide number 25 which you yourself presented and indicated that Phase 1 is included.'

[19] By this time, as a result of constant concerns being expressed by supply chain management officials about irregular expenditure, the relationship between the Department and VIT appears to have attracted the attention of, inter alia, the Auditor-General. On 1 October 2013, the Department cancelled the agreement with VIT. It did so on a number of bases including that the award of the contract did not comply with

s 217 of the Constitution and the other procurement related prescripts that give effect to it. In response to the cancellation, VIT instituted proceedings against the Department in which it claimed damages of R152 073 768.

[20] The matter was then settled on the advice of the Chief State Law Advisor and, on 13 February 2014, the settlement agreement was made an order of the North-West Division of the High Court, Mahikeng. The settlement agreement provided as follows:

'1. The termination of the agreement between [the Department] and [VIT] was unlawful.

2. The status quo before the termination of the contract as aforesaid is hereby restored with immediate effect.

3. [VIT] and/or the personnel belonging to [VIT] will be allowed on site, government premises to resume their contractual obligations in terms of the agreement with immediate effect.

4. The nature of the ECM solution contract will be re-defined as a transversal term contract so as to comply with Treasury Regulations 16A6.5.

5. The Office of the Premier together with the Department of Finance will engage one another regarding the roll-out of the project to provincial departments.

6. The litigation matter between [the Department] regarding the termination of the contract will be withdrawn by [VIT], in its capacity as the applicant.

7. The parties agree to substantiate the main agreement on ECM solution with an addendum and plans for deliverables to be rolled-out to provincial departments.

8. The parties agree that compensation to [VIT] is justified under the circumstances for loss of profit and other damages.

9. The North West Provincial Government hereby agrees to pay the settlement amount of R22.8 million to [VIT] in full and final settlement of all costs related to the unlawful termination of the contract including any monies that might have been owing as at the time of the termination of the contract.

10. The settlement amount shall be paid into the bank account of [VIT] within seven working days from the 05th February 2014.

11. The parties agree that this settlement agreement shall be made an order of court after all the parties have signed.'

[21] VIT was paid R22.8 million in terms of the order. Thereafter, VIT was paid further amounts: it was paid R213 750 in respect of Phase 1B, R2 100 021.51 in respect of Phase 0 (for all of the provincial government's remaining departments) and

R1 750 000, also for Phase 0. By this stage, the provincial government had paid VIT a total of R41 729 647.

[22] Advice was sought from legal practitioners external to the provincial government. That advice was to the effect that the award of the 'contract' to VIT was irregular and flew in the face of s 217 of the Constitution. On 9 January 2015, the provincial government again cancelled the contract. That resulted in the current proceedings, in which VIT sought a declaratory order that the provincial government's 'unilateral termination' of the contract was unlawful and an order directing the provincial government to pay VIT R146 473 747.49 as damages. The provincial government opposed that application and brought a counter-application for the setting aside of the SDA and 'all subsequent agreements' entered into between the Department and VIT, and for the setting aside or rescission of the settlement agreement.

The issues

[23] The case raises a number of issues. The first is a point taken by VIT that the provincial government's attorney has no authority to represent it in this appeal. The second is that condonation for the late filing of the answering affidavit and of the reply in the counter-application should not have been granted by the court below. If those issues are to be decided in favour of the provincial government, three issues remain to be decided. They are: whether the provincial government's delay in bringing its counter-application was unreasonable and, if so, whether condonation should be granted; whether the award of the SDA to VIT and the subsequent extensions were lawful or not; and, if they were unlawful, the effect of the settlement agreement that was made a court order, and whether it should have been rescinded.

The preliminary points

[24] The point that the provincial government's attorney has no authority has no merit. Attached to the provincial government's heads of argument is a power of attorney signed by one of the provincial government's administrators (appointed to administer the province in terms of s 100 of the Constitution). In the power of attorney, he confirmed the attorney's mandate to represent the provincial government in this appeal.

[25] The second preliminary point is that condonation should not have been granted for the provincial government's late filing of its answering affidavit and its replying affidavit in the counter-application. The explanation given for the delay was, in summary, that because of the long and complex history of the matter, it had been necessary to appoint a senior bureaucrat to investigate precisely what had transpired and to compile a report. It was only when these tasks had been completed that counsel could be properly briefed and consultations with potential deponents could take place This was a complicated and time-consuming exercise. In addition, in respect of the late filing of the reply in the counter-application, the provincial government had changed counsel and the newly briefed counsel required time to acquire an understanding of the matter and draft the reply. It was submitted that the prospects of success were good, that VIT stood to suffer no prejudice, and that, by contrast, the prejudice to the provincial government if condonation was refused, would be immense.

[26] Gura J, in the court below, considered the explanation to be a reasonable one; that VIT suffered no prejudice as a result of the delay; that the provincial government's prospects of success were good; and that, significant sums of public funds being involved, there was an overwhelming public interest in favour of the matter being heard on a full set of papers. In the exercise of his discretion, he granted condonation. The exercise of that discretion can only be set aside on appeal if it was not exercised judicially – if, in other words, the court below had exercised it on the basis of incorrect facts or incorrect legal principles.[2] That cannot be said of Gura J's exercise of discretion in this case, with the result that the attack on the granting of condonation has no merit.

The delay in bringing the counter-application

[27] The counter-application seeks, in effect, the review and setting aside of the award of the SDA to VIT (as well as all subsequent agreements). The provincial government thus applied to set aside its own decision. Its jurisdiction to do so emanates from the principle of legality that is sourced in the founding constitutional

[2] *Notyawa v Makana Municipality and Others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC) para 41.

value of the rule of law, and not from the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).[3]

[28] That means that, in terms of the common law, it was required to apply for the setting aside of the award of the SDA within a reasonable time.[4] The test entails a two-stage enquiry. First, it must be determined whether any delay in bringing the application was reasonable or unreasonable. If it was unreasonable, the second stage comes into play: the court must decide whether the unreasonable delay may be overlooked and condonation granted.[5]

[29] According to *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal*,[6] no specific application is required in a legality review for the condonation of an unreasonable delay in launching proceedings. An objection that the delay in so doing is unreasonable is 'pre-eminently a point which the respondent or the Court should raise because the respondent and the Court are best able to judge whether, having regard to the respective spheres of influence of each, the lapse of time which has occurred merits the raising of an objection'.[7]

[30] Whether a delay is unreasonable is a factual issue that involves the making of a value judgment.[8] Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry[9] in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects

---

[3] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) para 37; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) para 45.
[4] *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 380C-E.
[5] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C-D; *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) para 33; *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others* 2001 (4) SA 294 (C) at 306H-307G; *Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA) para 46; *Notyawa v Makana Municipality and Others* (note 2) para 46.
[6] *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 33 (CC) para 44.
[7] *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1193B-C.
[8] *Gqwetha v Transkei Development Corporation Ltd and Others* (note 5) para 24; *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others* (note 5) at 307E-F.
[9] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) para 144.

of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.[10]

[31] The decision to award the bid to VIT on the basis of its quotation, and to conclude the SDA with it, was taken in early August 2011. Thereafter, the scope of the work was steadily increased and significant amounts of money were paid to VIT as a result. Despite concerns being raised from time to time about the propriety of this arrangement, it continued until early October 2013 when the provincial government cancelled the SDA. That led to VIT's first application. A state law advisor gave patently poor advice that the provincial government should settle the dispute. The result was the settlement agreement, which was made a court order on 18 February 2014, and the continuation – and extension – of the contract. It was only after independent legal advice had been obtained that the contract was cancelled again, on 23 January 2015. VIT's second application was launched on 21 May 2015 and the counter-application was filed on 15 October 2015.

[32] There can be no doubt that the delay in challenging the lawfulness of the award of the SDA to VIT was unreasonable. As I have shown, it took more than two years for the provincial government to cancel the contract for the first time, only to reverse its decision. It took a further 15 months before the provincial government cancelled the contract again and another nine months before it applied for the setting aside of the contract and the rescission of the order of court embodying the settlement agreement.

[33] In these circumstances, one would have expected a full and thorough explanation for the delay. That was not to be. Instead, the provincial government gave an explanation for its delay in filing its answering affidavit, and later, for its delay in filing its reply in the counter-application. That only accounts for the period between the service of the founding papers and the filing of the answering affidavit and reply in the counter-application respectively. In order to understand why the provincial government delayed for more than four years before it challenged what was a patently unlawful contract, one has to trawl through the papers and draw inferences from the facts found

[10] *Gqwetha v Transkei Development Corporation Ltd and Others* (note 5) paras 31-35; *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others* (note 5) at 307G.

there. That is far from satisfactory, but is necessary if the interests of justice are to prevail.

[34] It is clear that officials in the Department played a pivotal role in the scheme, from the initial award of the SDA to VIT to its progressive extensions thereafter. This ongoing involvement explains why the legality of the scheme was not challenged prior to the first cancellation. It was only after the provincial government had been placed under administration, with new officials looking afresh at the relationship between the Department and VIT, that that was done.

[35] Furthermore, when VIT went too far by claiming an entitlement to sell software for a price of R37 million, and to an annual maintenance fee of R6.8 million, the head of the Department baulked. The result, when taken together with ongoing concerns about irregular expenditure in relation to VIT, was that matters were taken out of her hands, and the provincial government cancelled the contract with VIT for the first time. (It is noteworthy that, in the letter of cancellation, it was stated that the head of Department had not had the authority to contract with VIT.)

[36] One would have imagined that the first cancellation would have put an end to the saga. That was not to be, because a state law advisor gave inexplicably wrong advice that VIT's application to challenge the cancellation should be settled on terms favourable to VIT. The provincial government, it would appear, had no way of knowing that the advice it had been given was wrong, and this problem was compounded by an ill-conceived settlement agreement that was made a court order.

[37] Once the matter had been settled, the provincial government had little choice but to comply with the order to which it had agreed. It was only when it obtained independent legal advice that it found out that the state law advisor's advice had been wrong, and that it should cancel the agreement again. In due course, the counter-application was brought to set aside the SDA and everything that followed it. This accounts for the period between the first cancellation and the second cancellation.

[38] One of the factors that must be considered whenever condonation is sought is the applicant's prospects of success on the merits. It must be borne in mind that the

grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not off-set a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point).[11]

[39] As I shall demonstrate in the following paragraphs, the provincial government's prospects of success on the merits are strong: the scheme in terms of which VIT purported to provide services, and for which it was handsomely remunerated, was unlawful from start to finish. As a result, even if it were to be found that the explanation for the provincial government's delay was wanting, the interests of justice, in the light of its strong prospects of success, require condonation to be granted.

The merits

[40] Section 217 of the Constitution requires organs of state such as the Department, when it procures goods and services, to do so in terms of a system that is 'fair, equitable, transparent, competitive and cost-effective'. Its purpose is to prevent patronage and corruption, on the one hand, and to promote fairness and impartiality in the award of public procurement contracts, on the other. In order to do so, statutes, such as the Public Finance Management Act 1 of 1999 (the PFMA), subordinate legislation made under the PFMA, such as the Treasury Regulations, and supply chain management policies that have to be applied by organs of state, all give effect to s 217.

[41] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*,[12] Froneman J said of this legal framework that compliance with it was required for a valid procurement process and its components were not mere 'internal prescripts' that could be disregarded at whim. The consequence of non-compliance is clear: in *Municipal*

[11] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G; *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40H-41E.
[12] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 40.

Manager: Qaukeni Local Municipality and Another v FV General Trading CC,[13] Leach JA held that a public procurement contract concluded in breach of the legal provisions 'designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced'.

[42] From the facts that I have set out above, it is apparent that no public tendering process was ever held in respect of the SDA or any of the agreements that followed it. The SDA was awarded to VIT after it and two other firms had responded to a closed request for quotations. VIT's quotation was for an amount of R498 000, excluding VAT. It would appear that the purpose of the exclusion of VAT was to ensure that the amount was lower than R500 000: VIT and the Department thought that if the amount was below this figure, an open tendering process did not have to be embarked upon, and a contract could be awarded on the basis of a consideration of the competing quotations.

[43] On this score they were mistaken. Regulation 16A6.1 of the National Treasury Regulations provides that the procurement of goods and services by organs of state, 'either by way of quotations or through bidding process, must be within the threshold values as determined by National Treasury'. National Treasury Practice Note 8 of 2007/2008, made in terms of s 76(4)(*c*) of the PFMA, is intended to 'regulate the threshold values within which accounting officers/authorities may procure goods, works and services by means of petty cash, verbal/written price quotations or competitive bids'.[14] Section 3.4 deals with procurement above the transaction value of R500 000, VAT included. In such instances, s 3.4.1 provides that '[a]ccounting officers/authorities should invite competitive bids'. (There was no suggestion that urgency or emergency circumstances justified a departure from this prescript, and it is not suggested that the procedure for such a deviation was followed.)[15] As a result, the

---

[13] *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) para 16. See too *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30; *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) paras 8-9.

[14] Section 1.

[15] See too *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) para 79: 'What emerges from the instruments that I have discussed is that, generally speaking, when the value of the tender exceeds R500 000 a competitive, open procurement process must be followed. It is only in exceptional circumstances that deviation from this norm will be justified.'

awarding of the SDA on the basis of a request for quotations, as opposed to an open tender process, was unlawful and invalid.

[44] Thereafter, VIT and the Department purported to enter into new agreements on two further occasions before the first cancellation. These related to what VIT and the Department referred to as phase 1A, to the value of R9.8 million, and phase 1B, to the value of R12 888 000. The award of these contracts was unlawful and invalid because their award had not been preceded by an open procurement process in accordance with the required constitutional and legal prescripts. This was the state of affairs that prevailed when the provincial government cancelled the SDA and the agreements that followed it for the first time. I turn now to consider the effect of the settlement agreement.

The settlement agreement

[45] It is necessary in the first place to detail precisely what the settlement agreement purported to achieve in respect of the contractual arrangement between VIT, the Department and the provincial government. It is clear that it is a one-sided document in that all of the benefits that it bestows accrue to VIT, and all of its obligations, including a payment of R22.8 million, fall to the provincial government to meet.

[46] The core provisions of the settlement agreement provided that: (a) the 'status quo before the termination of the contract' was 'restored'; (b) VIT's staff would be permitted to 'resume' their 'contractual obligations in terms of the agreement'; (c) the 'nature' of the contract would be 're-defined as a transversal term contract' in order for it to comply with the Treasury Regulations; (d) and the contract would be extended by being 'rolled-out to provincial departments'.

[47] The effect of the settlement agreement was that the unlawful contractual arrangements between VIT and the Department would remain in force, with two important qualifications. First, in an apparent acknowledgement that the arrangement in place was indeed unlawful, the parties agreed to call it something else in order to create the impression that it was compliant with the requirements of the Treasury Regulations. Secondly, the parties agreed, not only to the restoration of the status quo

ante, but to the further extension of the already extended unlawful contractual arrangement. They applied to have this arrangement made a court order.

[48] Two issues arise for determination. The first is the effect of the attempt to 'repackage' the arrangement in order to comply with the Treasury Regulations. The second is the effect of having made the settlement agreement a court order and, more particularly, if the settlement agreement was unlawful, whether a court could have made it an order.

[49] In *Gibson v Van der Walt*,[16] Van der Walt had placed bets on credit with Gibson, a bookmaker. Van der Walt lost and owed Gibson money as a result. He undertook to pay by a future date, and Gibson agreed to the proposal. When no payment materialised – and Gibson had rejected the offer of a race horse in payment of the debt – he sued Van der Walt on the undertaking to pay, rather than on the underlying gambling agreement which, being contrary to public policy, was unenforceable. Fagan JA held that the undertaking was also unenforceable, setting out the test as follows:[17]

'The test in such a case, to my mind, should be whether the Court is asked, in effect, to enforce the unenforceable claim; in other words, is the later transaction on which the plaintiff relies merely a device for enforcing his original claim, is it merely his original claim clothed in another form or with some term or condition added to it, or a ratification or even novation of the original claim which leaves its essential character unchanged; if so, the plaintiff must fail.'

[50] I do not believe that calling the contractual arrangement between VIT and the Department a 'transversal term contract' altered the fact that it is unlawful and invalid because of non-compliance with procurement prescripts required by the law. *Gibson v Van der Walt* is authority for the proposition that if the underlying contract suffers from a defect, such as unenforceability, dressing it in different garb will not alter that fact. In other words, the settlement agreement has had no effect on the unlawfulness of the contractual arrangement between VIT and the Department: it remained an unlawful agreement whatever the parties chose to call it.

---

[16] *Gibson v Van der Walt* 1952 (1) SA 262 (A).
[17] At 270A-B.

[51] I turn now to the second issue – the effect of the settlement agreement having been made a court order. The first point that must be made is an obvious, but necessary, one: the parties asked the court to make their settlement, that purported to confirm the continuation and extension of their unlawful agreements, an order that could, presumably, be enforced by execution or contempt proceedings – to give it the court's stamp of authority.

[52] In *Eke v Parsons*,[18] a contractual dispute between two private individuals, the Constitutional Court considered the nature and effect of settlements being made court orders. Madlanga J held that first, it is not anything agreed to by the parties that can be made an order: the order must be 'competent and proper' in the sense that it relates to the dispute with which the court was seized.[19] Secondly, it may not be objectionable from either a legal or a practical perspective: its terms, in other words, must 'accord both with the Constitution and the law' and they may not be 'at odds with public policy'.[20]

[53] A similar issue arose, but in a public law context involving public procurement by an organ of state, in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*.[21] The municipality awarded a contract to Asla Construction without having complied with the required procurement processes. It later applied to set aside its own decision, but did so only after having delayed unreasonably. It failed to set aside the award on this basis in the Supreme Court of Appeal but, after its appeal had been argued in the Constitutional Court, the parties settled their dispute. The municipality brought an application for leave to withdraw its appeal and to have the settlement agreement made an order. That settlement confirmed that Asla Construction would continue with the disputed contract, and also included in it other contracts unrelated to the dispute before the court.

[54] In these circumstances, the court refused to make the settlement agreement an order. The contract awarded to Asla Construction remained unlawful and, the court

[18] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).
[19] Para 25.
[20] Para 26.
[21] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* (note 3).

held, that ‘inconsistency with the Constitution cannot be cured by a settlement agreement’. If such an order was made, it would be inconsistent with the Constitution.[22]

[55] So too in this case. For the reasons I have given above, the contractual arrangement between VIT and the Department was unlawful. The settlement agreement sought to give effect to that unlawful arrangement and should, as a result, not have been made an order. It was correctly rescinded by the court below.

The order

[56] I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

_____

C Plasket

Judge of Appeal

[22] Para 30. See too *Shabangu v Land and Agricultural Development Bank of South Africa and Others* [2019] ZACC 42; 2020 (1) SA 305 (CC); 2020 (1) BCLR 110 (CC) para 33; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC); 2019 (2) BCLR 165 (CC) para 13.

APPEARANCES

For the appellant:	P W Makhambeni Instructed by: Makhubela Attorneys, c/o Kgomo Attorneys, Mahikeng Symington De Kock, Bloemfontein
For the respondents:	V Soni SC and H Cassim Instructed by: M E Tlou Attorneys, Mahikeng Moroka Attorneys, Bloemfontein