

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
17 March 2023	_____
DATE	SIGNATURE

Case Number: 18770/2022

In the matter between:

VODACOM (PTY) LTD

Applicant

and

NATIONAL COMMISSIONER,

SOUTH AFRICAN POLICE SERVICE

First Respondent

MOBILE TELEPHONE NETWORK (PTY) LTD

Second Respondent

TELKOM SOC LTD

Third Respondent

CELL C (PTY) LTD

Fourth Respondent

MINISTER OF FINANCE

Fifth Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be **17 March 2023**.

Summary: Review application in terms of section 217 of the Constitution, PAJA and the legality principle. Application to extend the period for filing the application in terms of section 9 of PAJA. The period extended on the grounds of prospects of success and the interest of justice.

The Department of Treasury concluded a Master Transversal Agreement with four mobile network service providers. The Transversal Agreement concluded following an open tender process. The agreement was initially concluded between the Treasury Department and each of the service providers. The participating State department was

included later in the agreement once they signed the Participation Agreement. Having signed a Participation Agreement, a participating State department did not have to issue a tender when requiring mobile services from any of the four service providers.

After signing the Participation Agreement, the South African Police Services invited the four mobile providers to make submissions about, amongst others, their mobile coverage in communities in the country. In considering the submissions of both Vodacom and MTN, the SAPS took into account two incompatible concepts of 'network coverage and network availability' of mobile networks. The SAPS accepted the proposal of MTN and rejected that of Vodacom.

The SAPS and MTN contended that the decision to accept the proposal of MTN was not reviewable under the Constitution, PAJA or the principle of legality because the decision was contractual in nature, made in terms of the Transversal Agreement.

The court considered the distinction between public and private law concepts and their application in matters involving tenders by State organs. It also considered the contractual rights of State organs in the tender process. The other point considered is the obligation of public authority towards a private tendering party when a contract has been concluded.

Held that- The acceptance of the MTN's proposal by the SAPS was an administrative action as envisaged by PAJA and was thus reviewable. Further that even if the acceptance of the MTN's proposal was accepted as part of the Transversal agreement, the relationship between the parties continued to be governed by the principle of administrative justice.

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant, Vodacom, seeks an order reviewing and setting aside two decisions, (the impugned decisions) by the South African Police Service (SAPS) accepting the Mobile Telephone Network's (MTN) proposal for the procurement of mobile devices and services. In challenging the impugned decisions, MTN relies on the Promotion of Administrative Justice Act (PAJA),¹ alternatively, the principle of legality.

[2] The application is opposed by both SAPS and MTN, broadly on the grounds that Vodacom has failed to establish any irregularity in the appointment of MTN to

provide the mobile devices and services. In the heads of argument MTN specifically argued that the Court's review powers in this matter are limited to asking whether the SAPS has acted in accordance with the provisions of the Transversal Agreement in selecting and contracting with it. It further argued that opening the decisions to review under section 217 of the Constitution, PAJA and the principle of legality would undermine and render nugatory the procurement process that Treasury undertook in compliance with legislative frame work.²

[3] The controversy in this matter arises from decisions made by the SAPS after agreeing to participate in the National Transversal Agreements concluded by the National Treasury for mobile services with various service providers, namely MTN, Vodacom, Telkom and, Cell-C. It concerns the SAPS' acceptance of the proposal for the provision of mobile communication services by MTN.

[4] As stated earlier, aggrieved by the two impugned decisions, Vodacom filed this review application. The two impugned decisions are:

- (a) The acceptance of MTN's mobile offerings for categories 1A, 1B and 3 as defined by the Transversal Agreement.
- (b) All contracts concluded between the SAPS and MTN including implementation protocols and activities to give effect to the impugned decisions.

[5] The impugned decisions complained of are set out in both the founding and supplementary affidavits of Vodacom. The supplementary affidavit was filed after the SAPS provided written reasons in terms of Rule 53 of the Uniform Rules of Court (the Rules).

The background facts

[6] It is common cause that the Treasury concluded a Master Transversal Agreement (Transversal Agreements) for the supply and the delivery of mobile communication services - RT15-2021 (concluded on 7 February 2022) - with the four

² CaseLines at 021-13.

mobile network companies referred to above. This was done following an open tender, which had been issued by the Treasury.

[7] The Transversal Agreement was concluded initially between the National Treasury and the various service providers and thereafter included participating State institution in the agreement, such as the SAPS.

[8] In terms of the Traversal Agreement, any government entity that accepts participation in the agreement need not follow the usual process in securing goods and services mentioned in the agreement. In other words, a participating government entity need not issue a tender when procuring the goods and or services mentioned in the agreement. The steps to follow in the process of selecting a service provider(s) are set out fully in the Treasury's Circular. The State entity, (such as the SAPS) that has elected to participate in the Transversal Agreement and wishes to secure mobile services must contact all the service providers identified in the Transversal Agreement and invite them to "unpack their mobile packages." The service providers would unpack their packages to assist the participating State entity "to make an informed decision" on which service provider(s) to utilise. In selecting a service provider the State entity is once the selection is made bound by the mobile packages set out in the Transversal Agreement.

[9] Furthermore, upon the selection of the service provider's written proposal the following requirements are to be satisfied in terms of clause 7 of the "PARTICIPATION AGREEMENT IMPLIMENTATION DOCUMENTS:

"7.1 The following shall be the documents to be signed and attached to each Participation Agreement in relation to procurement of the Mobile Communication Services referred to in Category 1 of RT15-2021 (mobile voice minutes, SMS, uncapped data, and Mobile Devices):

7.1.1 Proposal signed by both the Service Provider and the Participant.

7.1.2 Purchase Order."

[10] The Transversal Agreements are for five years commencing from April 2021 to 31 March 2026. The four Transversal Agreements are identical.

[11] The underlying consideration for the conclusion of the Transversal Agreements is to leverage the purchasing power for the State in securing goods and services from suppliers. This objective is illustrated by clause 5.1.1.7 of the Transversal Agreement, which provides as follows:

- (a) “All Subscriptions for category 1A and 1B must not exceed a maximum limit value of R500 including Value Added Tax (VAT) per mobile user per month”. (Emphasis added.)

[12] It is common cause that once the SAPS had accepted participation in the Transversal Agreements it would be entitled to procure the following goods and services from any or all of the mobile operators mentioned above:

- (a) Category 1A: Mobile services with a mobile device;
- (b) Category 1B: Mobile services without a mobile device;
- (c) Category 1C: Mobile device without mobile services;
- (d) Category 2: Value Added Services; and
- (e) Category 3: Accessories.³

[13] To become a participant and to create a relationship with any of the mobile providers within the broad framework of the Transversal Agreement, the SAPS had to sign a participation letter which was to be addressed to the Treasury. In other words, once the SAPS signed and forwarded the letter to the Treasury, then it would be entitled to select one or more of the mobile service providers to render mobile services including the supply of mobile equipment without having to issue a tender for such services.

[14] Following the acceptance to participate in the Transversal Agreement, the SAPS issued an email inviting the mobile service providers to a meeting on 21 June 2021 to make presentations on services they could provide in terms of the requirements of RT15-2021.

³ CaseLines at 008-13, para 14.2.

[15] After that, the SAPS issued an email on 24 June 2021 requesting the service providers to present and submit information on their mobile services, including prices and network coverage. The email reads as follows:

“SAPS is currently embarking on National Network Upgrade Program (NNUP). The aim of this program is to replace all legacy system network devices and to install modern digital technology. This modern digital technology includes the commissioning of Voice Over IP telephone system. There is work that needs to be done to upgrade the existing infrastructure on site in order to get the site to be VOIP ready [e.g.]: POE switches, voice routers, etc.]. These sites are currently using the traditional telephone systems.

and

There are also sites that are currently without any telephone services and negatively impacting the service delivery that SAPS is mandated to carry out. As part of the [Transversal Contract], SAPS is hereby requesting a presentation not limiting the categories (1C, 2, three) on [Transversal Contract] according to Annexure O in order to sure case (sic) other possible solutions and address technology challenges at various police stations across the country. Any solution that will be presented must cater for the sensitivity of this organization.”⁴

[16] On 2 September 2021, the SAPS requested the service providers to provide pricing with regard to categories 1C and 1B based on the mobile services which the SAPS sought to procure. The “network coverage” referred to in the email concerned the geographic area covered by the service providers within the South African population.

[17] Vodacom made its presentation on 28 June 2021 and forwarded the same to the SAPS two days later by email.

[18] The SAPS sub-committee Telecommunication Task Team: Voice Modernisation and Mobile Connectivity (the Task Team) was tasked to deal with the procurement process. In this regard the Task Team received and considered the presentation of each of the service providers that made a presentation.

⁴ CaseLines at 002-13-14, para 21.

[19] After assessing the various submissions made by each of the service providers the Task Team accepted MTNS's proposal.

[20] The next step in this process was to have the National Commissioner of the SAPS, who is the accounting officer, to approve the expenditure on the procurement of the mobile devices and services. To secure his approval, the Task Team prepared an "Information Note" on "Implementation of RT-15 of 2021 by Telecommunication Task Team: Voice Modernisation and Mobile Connectivity."

[21] It is apparent that throughout the process of considering the submissions made by the service providers that the Task Team interacted with the Bid Adjudication Committee (BAC) which guided them as to any additional information that may be required from the service providers. The feedback received from the BAC was incorporated into the revised Information Note.

[22] The final version of the Information Note was compiled by the Task Team after the approval of the first draft by the BAC and after that the same was forwarded to the Acting National Commissioner for approval. The approval was made on 26 January 2022.

[23] The Information Note upon which the decision of the Acting Commissioner is based on concerning Vodacom's submission provides the following in the relevant paragraph:

"5.4.4.1 Network coverage is 86% throughout the country (dropped from 99% to 86% due to load shedding)."

In relation to MTN, the Task team found that their "network coverage is 99%."

Grounds of review

[24] Vodacom contends that the impugned decisions fall within the meaning of procurement as envisaged under section 217(1) of the Constitution, PAJA, and the principle of legality. The process according to it involved the decision of an organ of

state to select service providers for the purposes of obtaining goods and services with public funds and for public benefit.

[25] The complaint about the process of accepting MTN's proposal is that it is based on two incomparable concepts of "coverage and availability" of mobile network. The other complaint is that Vodacom's proposal was rejected despite it having offered the lowest pricing for the goods which the SAPS was seeking to procure.

[26] As indicated earlier the SAPS and MTN opposed the application and in particular, raised the point concerning the delay in instituting the proceedings. In this regard, the contention is that Vodacom was aware of the impugned decisions since 7 February 2022.

The issues for determination

[27] The main issues for determination are:

- (a) Whether the impugned decisions are subject to review under the Constitution, PAJA, alternatively, the principle of legality.
- (b) Is Vodacom's review application out of time or unreasonably late, and, if so, whether it is in the interests of justice to extend the time period for filing the review application in terms of section 9 of PAJA or overlooking the delay?

As concerning the merits of the review the issues are:

- (a) Whether SAPS erroneously compared Vodacom's network availability to MTN's network coverage and if so whether the alleged error constitutes a material irregularity which makes the impugned decision susceptible to judicial review;
- (b) Whether MTN and SAPS contravened the Master Transversal Agreement when MTN tendered a Proposal and SAPS accepted a Proposal for an amount of above R500.00;

- (c) Whether the Participation Agreement between MTN and SAPS is unlawful; and
- (d) Whether SAPS's Implementation Protocol is unlawful in so far as it pertains to Category 1A and Category 1B.
- (e) If the review application is upheld, what constitutes a just and equitable remedy?

Condonation or extension of the time frames

[28] The timeframes within which reviews against administrative decisions are to be instituted are provided for under section 7(1) of PAJA. Section 7(1)(b) of PAJA requires that judicial review proceedings should be instituted without unreasonable delay and not later than 180 days after the date—

“... on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

[29] In dealing with the issue of when review proceedings under PAJA should be instituted the Supreme Court of Appeal (SCA) in *Cape Town City v Aurecon SA (Pty) Ltd* said:⁵

“Section 7(1) of PAJA does not provide that an application must be brought within 180 days after [the applicant] became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.”

[30] The institution of proceedings under the legality principle has to be done within a reasonable period and without “undue delay” as stated in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*.⁶

[31] The timeframe provided for under section 7(1) of PAJA can be extended by the court in terms of section 9(2) of PAJA “where the interests of justice so require.”

5 [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) at para 41.

6 [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at para 49. See also *Gqwetha v Transkei Development Corporation Ltd and Others (Gqwetha)* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) at para 24.

[32] Vodacom's reasons for the delay are based on the fact that no reasons were given at the time the impugned decisions were communicated to it. A further delay, according to it, was caused by the fact that when the reasons were furnished, certain parts of the documents containing the reasons were redacted at the request of MTN. This resulted in Vodacom having to invoke the provisions of section 74 of the Promotion of Access to Information (PAIA).⁷ The application was filed on 26 August 2022.

[33] There is no doubt in my view that Vodacom delayed in filing its application. If the delay is calculated from 28 February 2022 to 26 August 2022, then the application was launched about six months late. After receipt of the PAIA request, Vodacom waited for another four months before instituting this application.

[34] The SAPS contended that the duration of the delay is so substantial that it is unduly prejudicial to it. In this regard, the SAPS persuaded the court to take into account that it has begun arranging its affairs in line with the agreement concluded with MTN. It further contends that Vodacom is not entitled to the extension of the time frame because it has no prospects of success on the merits.

[35] The approach to adopt when dealing with the issue of a delay in instituting a review under PAJA received attention in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited (Buffalo City)*:⁸

"The standard to be applied in assessing delay under both PAJA and legality is thus whether the delay was unreasonable. Moreover, in both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken. However, it is important to note that the assessment is not the same. A distinction between the assessments of the delay under PAJA versus the principle of legality turns on the prescribed time period of 180 days. This distinction was succinctly described by the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance* which found that section 7 creates a presumption that a delay of longer than 180 days is 'per se unreasonable':

'At common law application of the undue delay rule required a two stage enquiry.

⁷ Act 2 of 2000.

⁸ [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) at para 49.

First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned. . . . Up to a point, I think, section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay."⁹

[36] In dealing further with the undue delay in the context of the legality challenge, the Court had the following to say:

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

The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step *Khumalo* test to ascertain whether the delay is undue and if so, whether it should be overlooked."¹⁰

[37] In *Van Wyk v Unitas Hospital and Another* the Constitutional Court held that:¹¹

⁹ See *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) at para 26.

¹⁰ *Buffalo City* above n 6 at paras 50-1. See also *Gqwetha* above n 5 at paras 24 and 31 in which the Court stated that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.

¹¹ [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

“... [T]he standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

[38] Vodacom’s contention is that the period within which it was required to file its review application commenced from the time it received the record in terms of Rule 53 of the Rules. In other words, the period commenced running from the date it was informed of the reasons for the decision that MTN's proposal had been accepted.

[39] Vodacom has clearly unduly delayed in filing its review application. However, this is not the end of the inquiry. The next question to answer is whether this Court should extend or ignore the period of the delay.

[40] In my view, the facts and the circumstances of this case favours the extension of the period for the following reasons: (a) the prospect of success as appears from the merits of the review, discussed below, are strong; (b) it is in the public interest that the dispute be adjudicated to address the complex issues surrounding the application of the principles governing administrative action and private law in matters of this nature; (c) there is a significant amount of money invested in this project (the indications are that R1 billion is to be spent by the SAPS in this regard); and (d) it is also in the interests of justice to determine the issue of whether the action of the SAPS is subject to scrutiny under PAJA or the legality principle.

The merits

[41] As indicated above the case of Vodacom is that the impugned decision to accept the MTN proposal by the SAPS is reviewable under the Constitution or PAJA or the principle of legality.

[42] The cases of both MTN and SAPS is that the proposal was accepted in terms

of the Transversal Agreement which, as indicated earlier, was concluded between the various mobile service providers and the National Treasury. It was further argued, as stated earlier that the process of inviting the service providers to make proposals and accepting the one proposal did not amount to a procurement process envisaged in section 217 of the Constitution. The proposition is based on the contention that the conclusion of the Transversal Agreement was preceded by a comprehensive procurement process.

[43] The essence of the above argument is that in embarking on the process that ended with the acceptance of MTN's proposal, the SAPS was merely implementing the Transversal Agreement, which is in fulfilment of a contractual obligation which cannot be subjected to scrutiny under section 217 of the Constitution. 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.”

[44] The SAPS further argued that post the conclusion of the Transversal Agreement the negotiations regarding the implementation of the agreement were not subject to public law but private law. In support of this proposition, the SAPS relied on the decision in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa (Trencon)*,¹² where the Constitutional Court noted that even though there may be an interplay between public and private law, the distinction between the two should not be ignored or collapsed. In this regard the Court said:

“Second, the Supreme Court of Appeal did not value the distinction between public and private law. The decision to award a tender is a matter of public law. It is governed by the Constitution, the Public Finance Management Act, the Procurement Act and the

12 [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 75.

Procurement Regulations. Although there may be interplay between public and private law, the distinction must not be collapsed. Ordinarily, an issue like contract price adjustment that is subject to negotiation after the procurement process has taken place, ought to fall squarely within the domain of private law. It is subject to ordinary contractual negotiations between enterprising parties. Importantly, the parties agreed during oral argument that this distinction is applicable.”

[45] It is based on the above that the SAPS contended that the process it embarked on post- award of the tender in terms of the Transversal Agreement is subject to private and not public law.

[46] *Trencon* involved a JBCC Agreement which was a standard contractual document prepared by the Joint Building Contracts Committee Inc. The Agreement formed the basis of the Industrial Development Corporation of South Africa’s (IDC) tender contract as modified by the Contract Data

[47] The SAPS relied particularly on what the Constitutional Court said in paragraphs 75-7 of *Trencon* where in dealing with the issue of the distinction between public and private law the Court said:

“I am satisfied that the JBCC agreement adequately provides for price adjustments. Even the IDC, in disputing *Trencon*'s price escalation during the tender period, stated in its notice of application for leave to appeal to the Supreme Court of Appeal that ‘[i]n the post-award, *Trencon* could ... claim for expenses or loss on account of the delay in handing over the contract site in terms of ... the JBCC’. It is not clear why, then, this option is not available to account for the delay in these circumstances.

Since both parties agree that the negotiations after the award of the tender would be subject to private law, I am inclined to accept that the final contract price will be a matter of contractual negotiations between them.”¹³

[48] It is apparent from the above that the facts and the issues that confronted the Constitutional Court in that case are distinguishable to those in the present matter. The key issue in that case concerned the price adjustments as was provided for in the JBCC Agreement. The Court found that the post-award price adjustments did

13 *Id* at paras 76-7.

not offend the tender document nor the public law requirements or standard. It is also important to note that the Constitutional Court did not make any pronouncement on the issue of whether the post-award contracts could be subject to judicial review under PAJA or the legality principle. It accepted that the negotiations between the parties post-award was governed by private law since the parties agreed that that would be the case.

[49] MTN in its contention that PAJA does not find application in this matter relied on the decision in *Cell C Service Provider (Pty) Ltd MEC: Free State Provincial Government Department of Treasury*¹⁴ where it was held that:

"In the circumstances, I have come to the conclusion that the decision of any provincial department to participate in the national transversal contract does not constitute an administrative action. Any department is at liberty to make an internal decision to participate or not to participate in a national transversal contract. Such an internal decision has absolutely no external effect. By its very domestic nature such a decision is not reviewable by a court of law in terms of any statute. In short it is an executive decision. The principle is clear. Public decision-makers, such as heads of government departments, are under no obligation to consult outsiders as to how they should best procure goods or services they need to run their departments. It is trite that executive decisions are not ordinarily reviewable by the courts.

In the circumstances, I am inclined to decide the issue in favour of the respondent. For the reasons given above, I am of the view that participation of the four or even of all the provincial departments in the national transversal contract did not constitute administrative act as envisaged in the provisions of Promotion of Administrative Justice Act 3 of 2000. Therefore, I am not persuaded otherwise by the applicant's submissions."

[50] The issue for determination in *Cell C Service Provider's* case as appears from the above quotation was about whether the option of a provincial department to participate in a national transversal contract amounted to an administrative action or not. This occurred in the context where the provincial department decided to participate in the national transversal agreement after the expiry of the provincial transversal agreement. It did not involve, as is the case in the present matter, the

14 (2812/2018) [2019]ZAFSHC 45; [2019]3 Ail SA 80 (FB) (16 May 2019) para 78

issue of selecting a proposal from the submissions made by several service providers who were part of the National Transversal Agreement.

[51] The weight of authorities discussed below support the proposition that in accepting the MTN's proposal the SAPS embarked on an administrative action that is subject to administrative law and not private law. In other words, the impugned decisions are subject to scrutiny under the Constitution and PAJA. PAJA in the relevant part defines "administrative action" as follows:

"**administrative action**" means any decision taken, or any failure to take a decision, by –

- (a) An organ of state, when –
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision."

[52] In *MEC, Department of Education, North-West v KC Productions CC*,¹⁵ the full court had to decide whether the decision to cancel a contract arising out of an award of a tender was an administrative action in terms of PAJA. The decision to cancel the contract was taken by the provincial government. The Court held that because there "was a seamless transition from a tender to the contract", the termination of the contract was an exercise of public power.¹⁶ It further held that:

"An organ of the state which is empowered by statute to contract is obliged to exercise its contractual rights with due regard to public duties of fairness." See *Transnet Ltd v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at 120 paragraph 21. The appellant, being a public organ, cannot act like any other contracting party. In its management of a contractual relationship, it must ensure that it satisfies the requirements of administrative justice and fairness. It cannot for unjustifiable reasons or improper motives decide to cancel a contract when such an act impacts on the rights of others."¹⁷

15 [2009] ZANWHC 10.

16 Id at para 18.

17 Id at para 20.

[53] In *Logbro Properties CC v Bedderson NO and Others (Logbro)*,¹⁸ the SCA, in dealing with a similar situation as that of *KC Productions*, held that the Province, in exercising its powers under the agreement, could only do so with due regard to the principles of administrative justice. In other words, it could not withdraw the property from the applicant “capriciously, or for an improper or unjustified reason.”¹⁹

[54] In *South African National Parks v MTO Forestry (Pty) Ltd & Another (SANParks)*,²⁰ the SCA dealt with an appeal from the Western Cape Division of the High Court, where Gamble J found that South African National Parks’ (SANParks) authority and obligations in respect of Tokai Forest including the lease agreement were an exercise of public power. It also found that the accelerated felling of trees schedule was administrative action. The issue between the parties in that case arose from the decision by SANParks authorising MTO Forestry to vary a previously agreed tree felling programme in the Tokai Forest, in terms of a lease agreement between the two. SANParks allowed MTO to accelerate the tree-felling schedule (following the damage which was caused by the fire at Upper Tokai Forest) and to exit the lease prematurely without first consulting the public. The High Court found that the decision was irregular and thus the decision was reviewed and set aside.

[55] SANParks contended that the decision to accelerate the tree-felling schedule and to exit the lease agreement prematurely was made in terms of the lease agreement and therefore there was no public law obligation on its part to consult with the public before granting the request for variation.

[56] In dismissing the appeal by SANParks, Dambuza JA, writing for the majority, quoted with approval what was said by Cameron JA in *Logbro* when he said the following:

“Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province’s duties toward the tenderers. Principles of administrative justice continued to govern that relationship,

18 [2002] ZASCA 135; 2003 (2) SA 460 (SCA).

19 *Id* at para 14.

20 [2018] ZASCA 59; 2018 (5) SA 177 (SCA).

and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation.”²¹

[57] Dambuza JA, further held that:

“*Logbro* highlighted that *Cape Metropolitan Council*²² is no authority for a general principle that a public authority empowered by statute to contract may always exercise its contractual rights without regard to public duties of fairness. More importantly, the court in *Logbro* stressed the distinguishing factors in that case that underpinned the court’s decision. It noted that the tender and employment cases were not relevant to the facts in *Cape Metropolitan Council* because of the equal power of the contracting parties in that case.”²³

[58] The notion of fairness and the principles of legitimate expectation, which are key to the concept of public law existed even before the current constitutional era.²⁴

[59] In a separate but concurring judgment in *SANParks*, Navsa JA with Davis AJA, emphasised the principle set out in *Logbro* and said:

“... [N]otwithstanding a contractual right of the provincial government to withdraw a tender, the relationship between the public authority and the private tendering party was governed by the principle of administrative law.”²⁵

[60] In dealing with the test to determine whether to apply administrative or contractual principles in a controversy involving an organ of state and a private entity, Navsa JA said:

“There is no bright-line test for determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party. However, there are indicators. One might rightly ask whether coercive state power can be brought to bear by a state organ on the private party. Further, one will be constrained to consider whether the public interest is affected by the exercise of the contractual right. In *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA),

21 *Logbro* above n 15 at para 7.

22 *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* [2001] ZASCA 56; 2001 (3) SA 1013 (SCA).

23 *SANParks* above n 17 at para 25.

24 See *Lunt v The University of Cape Town and Another* 1989 (2) SA 438 (C).

25 *SANParks* above n 17 at para 35.

this court considered whether the grant by the provincial authority of a servitude in relation to the relevant part of the foreshore of a dam constituted administrative action. In that case the right to a servitude was claimed in terms of a contract concluded decades before with the provincial authority's predecessor. This court, in rejecting the claim as being purely contractual, said the following:

'A decision by the first respondent to grant, in perpetuity, a right over part of the foreshore to one property owner to the exclusion of all other persons, significantly curtails access to that resource by the public. In my view, for the reasons which follow, the decision to grant the servitude can and must be classified as administrative action'²⁶

[61] In concluding that the administrative law principle found application on the facts and the circumstances of that case, Navsa JA held:

"Proportionality is a constitutional watchword, the exercise of which, can be employed in adjudicating whether to import administrative law principles into cases involving an organ of state and a private party. In the present case, as demonstrated by our colleague, those indicators compel the conclusion reached by her, namely, that Parkscape and its members had a legitimate expectation to be consulted before the decision to vary the lease was made. The application of the administrative law principle that parties affected by a decision of an organ of state in this case can hardly be said to place a disproportionate burden on SANParks."²⁷

[62] Rogers AJA, in the minority judgment in *SANParks*, adopted a different approach to the majority's decision. Although the learned Judge agreed with the majority's decision that the lease agreement was an exercise of public power, he, to the contrary, held that:

"However, once the contract came into existence, a commercial contract in which DWAF did not negotiate from a position of superiority, the exercise of its contractual rights was in my view a private matter."²⁸

[63] The learned Judge further held that the only relevant "power" which SANParks had was the contractual power contained in clause 10.5 of the lease agreement. This clause was found not to be "a governmental power masquerading

²⁶ Id at para 37.

²⁷ Id at para 39.

²⁸ Id at para 63.

as a contractual power". It was found to be a "narrow contractual provision applicable to [the] particular commercial lease."²⁹

[64] As stated above the decision of the SAPS to accept MTN's proposal was an administration action as envisaged under PAJA. The question that then follows is whether such action is reviewable.

[65] In my view, the SAPS committed a material and reviewable irregularity when it compared Vodacom's network availability with MTN's network coverage. The incorrect and wrongful comparison was highlight to the SAPS before making the impugned decision by its Legal Division. In alerting the decision maker about the wrongful comparison the SAPS' Legal Division stated the following:

"Vodacom indicated that the national network coverage is also 99%, but that this declined to 86% owing to load shedding. This office finds it strange that load shedding is only affecting Vodacom and not the other service providers. Load shedding should equally affect all service providers. It appears that the issue pertaining to load shedding was only addressed by Vodacom and not by MTN or other service providers. If the issue of load shedding is not considered, the national network coverage for both MTN and Vodacom are both at 99% which would as a necessary implication affect the ranking of the service providers."

[66] Despite the above advice the SAPS proceeded with the comparison and produced the unfair impugned decision. This means irrelevant considerations were taken into account in arriving at the conclusion that MTN's proposal should be accepted. These are two distinct and entirely different measurements. The decision is thus reviewable for this reason alone.

[67] The decision is further reviewable because contrary to the express prohibition by the Transversal Agreement in clause 5.1.1.7, the SAPS accepted a proposal on category 1A that exceeded the sum of R500.00. It is common cause that Vodacom offered lowest price and submitted the same network coverage as that of MTN.

²⁹Id at para 78.

[68] The decision is further vitiated by the post-award contracts. In breach of the mandatory provisions of the Transversal Agreement the SAPS and MTN did not sign and attach the accepted Proposal to the Participate Agreement as required by the Treasury. A different and new proposal was attached to the Participation Agreement. The SAPS also enacted Implementation Protocol that permitted it to procure different products from MTN at a higher price.

[69] In my view, even if the acceptance of MTN's proposal was to be regarded as part of the Transversal Agreement, the relationship between SAPS, Vodacom and the others would continue to be covered by the principle of administrative justice by virtue of the nature of the agreement. In this respect it is clear from the analysis of the facts and the circumstances of this case that the SAPS' decision affects public interest. As pointed out earlier a significant amount out of the public purse is to be spent on the project.

[70] In the circumstances, Vodacom has successfully made out a case to review and set aside the SAPS' administrative action in terms section 6(2) of PAJA. What remains for determination is the issue of the remedy? In my view, the most appropriate remedy in the circumstances of this case is the remittal of the matter to the SAPS for reconsideration.

Order

[71] In the premises the following order is made:

1. The period for instituting proceedings as set out in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is extended to the extent necessary in terms of section 9(2) of PAJA.
2. The decision of the First Respondent to accept the Proposal submitted by Second Respondent for mobile offerings in Category 1A (Mobile Services with a Mobile Device) and or Category 1B (Mobile Services without a Mobile Device) and Category 2 (bulk sms services) under the

Master Transversal Agreement RT15-2021 is reviewed and set aside.

3. The decision of the First Respondent to accept the Proposal submitted by Applicant for mobile offerings in Category 1C (Mobile Device without a sim card) and Category 2 (USSD services only) under the Master Transversal Agreement RT15-2021 is reviewed and set aside.
4. The matter is remitted to the First Respondent for reconsideration and determination.
5. The First Respondent shall complete the reconsideration process within a period of 4 (four) weeks from the date of this order.
6. The First and Second Respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

E MOLAHLEHI

Judge of the High Court of South
Africa, Gauteng Division

Representations:

Counsels for the applicant: Carol Steinberg SC

And Michael Dafel

And Tizi Mpulo-Merafe

Instructed by: Adams & Adams Attorneys

Counsels for the First Respondents: Chris Erasmus SC

And Ofentse Motlhasedi

Instructed by: The State Attorneys

Counsels for the second Respondent: Hamilton Maenetje SC

And

Lebogang Kutumela

Instructed by:

Werksmans Attorneys

Hearing date: 22-23 November 2022

Delivered: 17 March 2023