IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO: 722/2022

Dates heard: 24 November 2022

Date delivered: 28 February 2023

In the matter between

NELSON MANDELA BAY MUNICIPALITY	Applicant
and	
SPECIAL INVESTIGATION UNIT	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent

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JUDGMENT

KRüGER AJ:

Introduction

[1] The national state of disaster declared by the Minister of Co-operative Government and Traditional Affairs in terms of the Disaster Management Act 57

of 2002 on 15 March 2020[1] to curb the spread of the SARSCoV-2 or Coronavirus Disease 2019 (Covid-19) impacted on every aspect of public and private life.

[2] Among other things, the established rules for the procurement of goods and services by organs of state were adapted to allow the procurement of goods and services in an efficient manner to combat the spread of the virus. This relaxation of the legal requirements opened the door to opportunists, both in- and outside organs of state, to take advantage of the less rigorous processes for their own financial benefit.

[3] The threat posed to the public purse by abuse of the relaxation of legal requirements for procurement did not escape the attention of the President of South Africa. Exercising his powers under the Special Investigations Unit and Special Tribunals Act 74 of 1996 ('the SIU Act'), the President issued Proclamation 23 of 2020 on 23 July 2020[2] to refer unfair, unlawful or fraudulent procurement of goods and services, in contravention of the law and guidelines, and improper conduct by state officials during or in relation to the national state of disaster, to the Special Investigations Unit ('SIU') for investigation in terms of section 4(1)(f) of the Act. The referral also included a mandate to recover any losses suffered by state institutions.

[4] Following a report to the SIU by a whistle-blower, the SIU launched an investigation into the procurement by the applicant, Nelson Mandela Bay Municipality ('the applicant' or 'NMBM') of material and services for the construction of 2000 toilets and standpipes with aerators from HT Pelatona Projects (Pty) Ltd ('Pelatona'), utilising emergency procurement processes during the state of disaster. On 10 December 2021, the SIU presented its report in relation to its Proclamation 23 investigation to the President, including its findings and recommendations regarding the applicant's agreement with Pelatona.

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[1] GN 313 in *Government Gazette* 43096 of 15 March 2020.
[2] The proclamation was published in *Government Gazette* 43546 of 23 July 2020.

[5] This application by the NMBM, brought in its own interest, that of its council members and employees and in the interest of the public, is directed at reviewing and setting aside the findings and recommendations of the SIU contained in its the report to the President as it relates to the applicant's appointment of Pelatona during the national state of disaster.

[6] The SIU, cited as the first respondent, gave notice of opposition and filed its answering affidavit on 3 June 2022. It is common cause that the answering affidavit was filed out of time and without an application for condonation. The President, cited as second respondent, did not file any notice in response to the application.

Points *in limine*

[7] The applicant raised two points *in limine*, as did the first respondent.[3] The first related to the lack of authority on the part of the deponent of the SIU to attest to the answering affidavit. The second point *in limine* pertained to the failure of the first respondent to apply for condonation for the late filing of its answering affidavit. If I were to uphold either of the applicant's preliminary points, the opposition of the first respondent would fall away and the application would be determined on the founding papers alone. I thus consider these at the outset, starting with second point raised by the applicant.

[8] Mr *Ford*, who appeared for the NMBM with Ms *Patel*, submitted that the failure on the part of SIU to file a substantive condonation application for the late filing of its answering affidavit meant that its answering affidavit was not properly before this court and should thus not be considered. He further submitted that the explanation provided by the first respondent for the delay was incomplete and fell short of the legal standard set for an indulgence of this nature in *Uitenhage Transitional Local Council v South African Revenue Service.*[4]

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[3] The first respondent's points *in limine* related to a lack of jurisdiction on the part of the court to hear the application and the incompetence of the review challenge based on both legality and the Promotion of Administrative Justice Act 3 of 2000.

[4] 2004 (1) SA 293 (SCA) para 6.

[9]Mr *Ncongwane*, who appeared for the first respondent with Mr *Sekwakweng*, submitted that the SIU provided a sufficient and reasonable explanation for the delay in the filing of the answering affidavit in that affidavit itself. He argued that courts focus on the reasons provided rather than placing emphasis on a separate and specifically named interlocutory application to seek condonation. In his view, the explanation for the delay by the first respondent was reasonable and justified condonation to be granted.

[10] It is apposite to consider the contentions of the first respondent pertinently:

a) The deponent for the first respondent explained that the protracted process for the appointment of counsel by the state attorney and the challenges faced in obtaining information and finalisation of the answering affidavit meant that it filed its answering affidavit late.

b) It was explained that counsel for the first respondent was appointed on 12 April 2022 after notice of opposition was filed on 4 April 2022. The consultation with legal team took place on 21 April 2022. At this consultation, it was discovered that further information, and in particular the full SIU report submitted to the President, had to be obtained. This information was supplied on 22 April 2022, leading to a realisation that more information was required which was then requested from the investigators of the SIU.

c) On 26 April 2022, the state attorney requested an extension to file the answering affidavit from the applicant's attorneys. It was agreed that the first respondent would file its answering affidavit by 6 May 2022.

d) The information that formed the subject of the second request for more information reached counsel on 9 May 2022. A draft of the answering affidavit was finalised on 19 May 2022 and sent to the deponent for the first respondent for his consideration.

e) On 19 May 2022, the state attorney addressed a letter to the applicant's attorneys, indicating that the first respondent intended to file the answering affidavit by 26 May 2022. For the first respondent, it was submitted that the municipal employees from whom the SIU sought confirmatory affidavits refused to attest to these affidavits, citing that they were directed not to sign any court documents without prior approval by a senior municipal official. Despite attempts by the SIU's chief investigator, the employees refused to attest to the affidavits.

f) The answering affidavit was filed on 3 June 2022 without the confirmatory affidavits of the municipal employees and without an application for condonation for its late filing.

[11] It was submitted for the first respondent that the delay in the filing of the affidavit was not inordinately long and that the applicant did not stand to suffer significant prejudice as a result of the delay. Given the importance of the case and the interest in finalisation of the matter, it was contended that the full and reasonable explanation provided, justified condonation to be granted. The absence of an application for condonation before the court, it was contended, was merely technical.

[12] The deponent for the applicant admitted that the attorneys for the applicant agreed to an extension of the due date of the answering affidavit to 6 May 2022. On that date, the first respondent did not file its answering affidavit, nor did it communicate with the attorneys for the applicant to seek a further extension.

[13] For the applicant, it was submitted that the first respondent's attorneys only directed a letter to it after receiving a notice from the Registrar informing them of the date on which the application was to be heard on the unopposed roll. The applicant explained that this came about in the following manner: a week after the date on which it was agreed that the first respondent would submit its answering affidavit, on 13 May 2022, the applicant's attorneys informed the state attorney that it would seek, on 16 May 2022, to have the matter enrolled on the uncontested roll. No response was received. On 18 May 2022, the applicant's attorneys requested a date from the Registrar for the enrolment of the matter on the uncontested roll. On 19 May 2022, the Registrar set the matter down for 14 June 2022 and informed both sets of attorneys accordingly. It was only thereafter that the state attorney contacted the applicant's attorneys to inform them that 'unforeseen circumstances' had prevented the finalisation of the affidavit which it undertook to file by 26 May 2022 with a condonation application. The applicant received the answering affidavit from the first respondent on 3 June 2022, but without any condonation application.

Should condonation be granted?

[14] The first respondent did not file an application on notice for condonation as required by rule 27. It thus stands to be determined whether any other basis exists on which condonation could be granted and whether the explanation in the answering affidavit is sufficient to constitute a basis for condonation to be granted.

[15] In *Botha t/a Tax Consulting SA v Renwick,*[5] Du Bruyn AJ was faced with an application for condonation where the applicant did not clearly indicate whether the application was made in terms of rule 27 or in reliance on the court's inherent power to regulate its own processes. Of this, the court stated:

> 'It is submitted by the author of *Erasmus Superior Court Practice* that rule 27 does not affect the inherent power of the High Court to protect and regulate its own process. This created the impression that it would be competent for this court to decide the condonation under rule 27 or by invoking its inherent power to regulate its own process. However, a court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. In *Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products and Others* [2020] 81 (2 July 2020) the appellant, with reference to rule 47, argued that where there is a *lacuna* in the rules of court, section 173 of the Constitution should be invoked so as to ensure that the proceedings are fair. The Supreme Court of Appeal held that –
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> "[s]ection 173 recognises the inherent power that superior courts have to regulate their own processes. The Constitutional Court in *Molaudzi v The State* stated as follows in relation to the application of s 173 of the Constitution:
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> '...This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties...'
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> Although the foregoing *dicta* were expressed in a criminal law context, they are unquestionably equally apposite in the context of civil proceedings, given that the Constitution, as the supreme law, applies to all areas of law.'[6]

[16] From the above it is evident that the only route to condonation is by way of an application in terms of rule 27. It is not open to the court to find a way to condone the first respondent's non-compliance outside the frame of that rule.

[17] The first respondent knew that it had to apply for condonation and communicated this on 19 May 2022 to the applicant's attorneys. When it failed to bring the application for condonation, it did so at its peril. As a result of its non-

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[5] Unreported judgment (GJ case number 2019/35217, 13 April 2021).
[6] Para 15. The 2021 Service Update of *Erasmus Superior Court Practice* withdrew the submission referred to in the opening sentence of the quoted paragraph.

compliance with the rules, neither its answering affidavit nor its explanation for the delay was properly placed before the court. Those cannot be considered.

[18] Even if I am wrong in excluding the inherent power of the court to regulate its process to grant condonation in the absence of an application for condonation and an affidavit in support thereof, I am not satisfied that the first respondent has shown 'good cause' warranting condonation to be granted.

[19] While 'good cause' has not been defined by our courts, several requirements have crystallised from precedent. These have been helpfully summarised in *Botha t/a Tax Consulting SA v Renwick* as follows:

> '[i] The applicant must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives.
> [ii] The applicant must satisfy the court that the explanation of the default is reasonable, bona fide and not patently unfounded.
> [iii] The applicant's explanation of the default must cover the entire period of the delay.
> [iv] The applicant's claim or defence, as the case may be, and the facts upon which the applicant relies for such claim or defence must be set out briefly, yet sufficiently full to persuade the court that what is alleged, if proved, will constitute a well-founded claim or bona fide defence.
> [v] The court is entitled to overlook, in proper cases, non-compliance with its rules which does not work any substantial prejudice to the other party.'[7]

[20] The first respondent's explanation for the late filing of its answering affidavit related to the processes followed by the state attorney for the appointment of counsel, the need to obtain additional information from SIU investigators and failed attempts to obtain confirmatory affidavits from municipal employees. It broadly covered the time of the delay without specific details. What was absent, was an explanation for its inaction after receiving communication from the applicant on 13 May 2022 to inform it that the matter would be enrolled on the unopposed roll. More pertinent was the absence of an explanation for its sudden communication to the applicant's attorneys after notice of enrolment was dispatched by the Registrar and its failure to bring the application for condonation as undertaken. The first respondent's silence on these aspects is telling and, in my view, not reasonable in the circumstances.

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[7] Para 27.

[21] While there may be instances where courts may be entitled to overlook non-compliance with its rules, this instance, in my view, is not one of those. The first respondent failed to adhere to the rules and its undertakings to the applicant, and it failed to take the court into its confidence by making a full disclosure of the reason for the delay. Its non-compliance cannot be overlooked. This review application is thus determined on the basis of founding papers of the applicant.

[22] My finding on the condonation issue raised *in limine* by the applicant makes it unnecessary to deal with the applicant's second point *in limine* questioning the authority of the deponent of the first respondent to attest to the answering affidavit, as well as the points raised by the first respondent.

[23] To contextualise the review application, I outline the mandate of the SIU as set out in the Special Investigations Units and Special Tribunals Act and the status and effect of its reports as interpreted by the courts.

The SIU mandate and the effect of its reports

[24] The SIU Act empowers the President to refer, by proclamation, any matter of maladministration in connection with any state institution, state assets or public money and conduct that may seriously harm the public interest to a special investigation unit in existence, or to a unit to be established.[8]

[25] Section 4(1) of the Act sets out the functions of the SIU in respect of any referred matter. It empowers the SIU to investigate all allegations regarding the matter referred to it, to collect evidence, to pursue civil litigation in a court or in a Special Tribunal to recoup or prevent damages or to obtain necessary relief, and to refer evidence indicative of an offence to the relevant prosecuting authority. Additionally, the SIU is required to report on the progress of its investigation to the President, and on conclusion of its investigation submit a final report to the President. The SIU is not required to make recommendations.[9] However, any findings or recommendations it may make are not binding on the President, or

[8] Section 2.
[9] Section 4(g) refers only to the submission of a report to the President on conclusion of the investigation.

determinative of the matter under investigation, nor do these have any direct external effect.[10]

[26] A special investigation unit is a creature of statute and must operate within the four corners of its empowering legislation.[11] The very purpose of an investigation by such a unit, as determined by the SIU Act, is to expose maladministration, corruption and malfeasance in or by state institutions to protect the public purse and the public from serious harm.[12] In my view, it exercises a public function. To this one can add that a special investigation unit is an organ of state. It meets the requirements of the definition of an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996.[13]

The pathway to review

[27] The applicant based its review application on both the principle of legality and the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Under the principle of legality, the applicant submitted that the report was irrational and arbitrary, and influenced by material errors of law. Under PAJA, the applicant raised a number of different grounds provided for in section 6(2), including that the action taken by the SIU was materially influenced by errors of law, that irrelevant considerations were taken into account and relevant considerations ignored, that the SIU acted arbitrarily and capriciously and beyond the scope of its powers, and that it acted unreasonably and otherwise unconstitutionally and unlawfully.

[28] The municipality is an organ of state as defined by section 239 of the Constitution, as is the SIU in performing its statutory functions.[14]

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[10] *Masuku v Special Investigating Unit and Others* (P53372/2020) [2021] ZAGPPHC 273 (12 April 2021) paras 4,16-17. *Mphaphuli Consulting (Pty) Ltd v Special Investigating Unit* [2022] JOL 52444 (LP) para 39.

[11] *Special Investigating Unit v Nadasen* 2002 (1) SA 605 (SCA) para 5.

[12] Section 4(2) of the SIU Act. See also the preamble to the Act.

[13] This section defines an organ of state as any institution 'exercising a public power or performing a public function in terms of any legislation'.

[14] See para 26 above.

[29] In *Maholisa NO v Phetoe NO*[15] the Supreme Court of Appeal clarified that the pathway to review where one organ of state seeks review of the decision of another is the legality principle rather than PAJA.

[30] In *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd,*[16] the Constitutional Court held that that the constitutional protection of rights, including the right to just administrative action to which PAJA gives effect, accrues to private persons and not to organs of state. Thus, in *Gijima* it was held that an organ of state had to rely on the principle of legality for self-review. Following that logic, the SCA in *Mapholisa* held that PAJA as the pathway to review for one organ of state to review the decision of another was not appropriate as the organ of state seeking review was not a holder of the human right to just administrative action. The appropriate pathway to review is thus the principle of legality.

[31] There is an exception to this rule which permits an organ of state to rely on PAJA in the review of the action of another organ of state, as explained in *Compare Wellness Medical Scheme v Registrar of Medical Schemes*[17] and confirmed in *Mapholisa.*[18] An organ of state may rely on PAJA for the review of administrative action where it does so in the public interest rather than in its own interest.

[32] While the applicant in this matter indicated that it sought review of the report not only in its own interest but also in the public interest in asserting standing, that does not mean that the PAJA pathway to review was opened. For reliance to be placed on PAJA, that which an applicant seeks to review must meet constitute 'administrative action' as defined in PAJA. This requires, among other things, the decision in question, 'to have a direct external legal effect.'[19]

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[15] (163/2021) [2022] ZASCA 168 (30 November 2022) para 21.
[16] 2018 (2) SA 23 (CC) paras 18 – 31. See also *Special Investigation Unit v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA) paras 24-25.
[17] 2021 (1) SA 15 (SCA) para 20. *Hunter v Financial Sector Conduct Authority* 2018 (6) SA 348 (CC) para 91.
[18] *Mapholisa* para 20.
[19] Section 1 of PAJA.

[33] The report of the SIU is not binding on the President or determinative of the matter under investigation, nor does it have any direct external effect.[20] However, legality review is not precluded in respect of the exercise of power or a decision that does not have an external or legal effect.[21]

[34] The appropriate pathway to review in this instance is thus the principle of legality.

[35] The applicant set out its grounds for review in terms of PAJA to include the contention that the SIU acted beyond the remit of its powers. Under the common law, the argument would be that the SIU acted *ultra vires.* I comment on all the grounds raised irrespective of the basis on which it was argued or raised by the applicant.

Prejudice as a pre-requisite for legality review

[36] In the absence of finality to the report of the SIU, one of 'obstacles to judicial redress'[22] for review in terms of the common law, is that of prejdice. An applicant for review must establish 'prejudice of some kind' resulting from the impugned action.[23] An applicant is required to allege that he/she has suffered prejudice as a result of the unlawful action/decision on the part of the respondent.[24] However, prejudice will be assumed where unlawfulness has been proven.[25]

[37] Holmes JA in *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality,*[26] recently endorsed by the Plasket JA in *Rhino Oil and Gas Exploration South Africa v Normandien Farms (Pty) Ltd,*[27] explained the rationale for the requirement of

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[20] *Masuku v Special Investigating Unit and Others* (P53372/2020) [2021] ZAGPPHC 273 (12 April 2021) paras 4,16-17. *Mphaphuli Consulting (Pty) Ltd v Special Investigating Unit* [2022] JOL 52444 (LP) para 39.
[21] *Electronic Media Network v eTV* 2017 (9) BCLR 1108 (CC) para 122, and relied upon in *Masuku* para 4.
[22] C Hoexter *Administrative Law in South Africa* 2nd ed (2018) 583-584.
[23] L Baxter *Administrative Law* (1984) 718 termed it thus: '... the courts will not grant relief where, though unlawfulness has been established, the complainant has suffered no adverse effects''.
[24] Ibid.
[25] Baxter 718 and the authorities cited at footnote 325.
[26] 1961 (4) SA 402 (A) 407H-408A.
[27] 2019 (6) SA 400 (SCA).

prejudice as a prerequisite for setting a decision or action aside on review as follows:

> 'Now I think it is clear that the Court will not interfere on review with the decision of a quasi-judicial tribunal where that has been an irregularity, in satisfied that the complaining party has suffered no prejudice. ...In principle it seems to me that the Court should likewise not interfere in the present case at the instance of the Council, whatever the precise nature of the present proceedings, since it is clear that there has been no prejudice to the public interest which the Council represents. The underlying principle is that the Court is disinterested in academic situations.'

[38] In *Rhino Oil,* Plasket JA held that the challenge of the applicant for review in that matter was premature since the applicant did not suffer any prejudice as a result of the exercise of public power it sought to review. The report in that matter was not ripe for review.[28]

[39] In its founding papers, the applicant contended that the SIU report contained 'adverse findings' against it. No elaboration was provided. In oral argument, Mr *Ford* submitted with reference to *Masuku v Special Investigating Unit,* that the act of investigating and the expression of opinions in a report are inherently prejudicial despite lacking finality.[29] The report, he contended, suggested that the municipality and its officials were corrupt in the procurement of services from Pelatona.

[40] It is necessary to provide some detail regarding the application in *Masuku* and the court's reasoning in relation to the reviewability of the report in the absence of the finality of the findings:

a) Dr Bandile Masuku was the Member of the Executive Council for Health for the Gauteng Province prior to his removal form this position by the Premier of the province. It was common cause in that matter that Masuku was removed from his position on the strength of the SIU report pointing to dereliction of duties on his part as the political head of the provincial department of health. Dr Masuku approached the court to have the report of the SIU reviewed and set aside.

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[28] *Rhino Oil* paras 30-34. Reliance was placed on *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality* supra and on *Jockey Club of South Africa v Feldman* 1942 AD 340 at 359.

[29] In *Mthembu v Special Investigating Unit and Another* (21441/2022) [2023] ZAGPPHC (2 February 2023) para 8, Lukhaimane AJ relied on *Masuku* to hold that the SIU report before it in the form of a letter to Eskom, the second respondent, was reviewable because it 'could be deleterious to ....the interests of persons implicated in the investigation] and of importance to the general public inasmuch as they had an interest in the conduct of public officials'.

b) In determining whether the report was reviewable the full court in *Masuku* relied on the dictum of Harms JA in *Special Investigating Unit v Nadasen*,[30] in which the Supreme Court of Appeal held that a special investigating unit is similar to a commission of enquiry which, like the SIU, does not make binding findings. Significantly, the full court referred to the SCA's view that an investigation of the SIU has a similarly 'invasive nature .... [which] ... can easily make important inroads upon basic rights of individuals'.[31] This, the court remarked, provides justification for 'keeping such an entity within bounds'.

c) The court in *Masuku* pertinently distinguished the position of the applicant before it from the applicant for review in *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd.*[32] It explained that

> 'There can be no doubt that the SIU report has had prejudicial consequences for Dr Masuku, as evidenced by his loss of office, unlike the position in which N found itself in Rhino. But the example of Dr Masuku goes beyond his personal mishap; it is a significant illustration that should a report of a statutory body, (even when no decision-making authority can be compelled to adopt it,) express criticism of a person implicated in its realm of activity, material harm can flow therefrom. It is therefore wholly appropriate, as a matter of principle and of policy, that accountability for its actions should be recognised and, thus, the ripeness of the report to be reviewed under the expanding scope of the principle of legality is demonstrated.
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> Dr Masuku[s'] ... grievance is a shattered reputation.
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> In my view, policy considerations are pertinent to answer the question about what form of remedy is appropriate. The criticism of Dr Masuku is about his role as an MEC; ie, a role performed by him in public life in the governing of the province. This factor decisively tips any balance in the direction of a public law remedy. Accordingly, on that premise the conduct of the SIU should be held accountable by way of review. The report of the SIU, albeit "non-final", is an exercise of public power for which it can be held accountable on the test for rationality.'[33]

[41] The conclusion of the full court in *Masuku* was that the applicant before it suffered prejudice as a result of the criticism of him in the SIU report resulting in his removal as MEC. *Masuku* thus recognises that material harm can flow from a report of an institution such as the SIU.

[42] I do not read *Masuku* to conclude that every report of the SIU is *per se* reviewable because reports of the SIU necessarily are prejudicial to the institution or person investigated. More is required. In order to clear the first hurdle, the NMBM has to establish prejudice to it.

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[30] 2002 (1) SA 605 (SCA) para 5.
[31] *Masuku* para 25
[32] 2019 (6) SA 400 (SCA).
[33] Para 28, 30.

Is the SIU report prejudicial to the applicant?

[43] The SIU presented its report in terms of Proclamation 23 to the President on 10 December 2021. The report includes the following section, the subject of this review application, which I quote *verbatim* in full, in relation to the applicant and its procurement agreement with Pelatona during the national state of disaster:

> **'8.3.3. Nelson Mandela Bay Metropolitan Municipality ("NMBMM")**
> **8.3.3.1 HT Paletona Projects (Pty) Ltd**
> **a) Nature of Allegation**
> On 26 August 2020, the SIU, through a whistle-blower received an allegation about irregularities at the NMBMM. The allegations relate to the infrastructure projects which were implemented to assist the NMBMM to curb the spread of the pandemic during the Covid-19 Disaster period. It was alleged that the NMBMM received an approval from NT for the reallocation of uncommitted funds allocated in the 2019/2020 financial year to support the alleviation of the declared disaster on Covid-19. It was alleged that the former City Manager Ms Noxolo Nqwasi ("Ms Nqwazi"), forwarded the name of the company HT Paletona Projects (Pty) Ltd ("Paletona"), to be utilised for various projects.
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> Paletona is the allegedly from Welkom in the Free State Province and it was appointed for the construction of 2 000 toilets meant for the informal settlement which were never delivered. The whistle-blower further alleged that the prices for the construction of the toilets were inflated and that a company outside the Eastern Cape Province was appointed to provide chemical toilets to NMBMM informal settlement communities. The whistle-blower also alleged that there was collusion between the service provider and Ms Nqwazi.
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> **b) Summary of findings**
> The SIU investigation found that the goods and services rendered by Paletona related to various projects which involved the construction of 2000 erven of toilets, stand pipes and 2 000 aerators for informal settlements within the jurisdiction of the NMBMM. The total value of the 'fixed price' contract is R 24 600 000 (exclusive of VAT). The SIU investigation has established that the memorandum motivating for the appointment of Paletona resulted in the appointment of the latter on 17 April 2020. It has also been found that Paletona was appointed before the award letter which was only issued on 28 April 2020.
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> The declaration of a Disaster Management period as a consequence of the outbreak of Covid-19 pandemic was used to circumvent proper procurement processes and a non-existent emergency situation with was relied upon. From the date of appointment of Paletona, only 200 erven of toilets, standpipes and aerators for the informal settlements have been built. Paletona was appointed following Municipal SCM Regulation 36(i) and (v), this regulation is cases of emergencies. After the appointment of Paletona refer to service provider submitted their quotations. The SIU viewed the submission of the two quotations of irregular since Paletona was already appointed.
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> **c) Steps taken**
> **<u>Disciplinary action</u>**
> The SIU referred two letter recommending disciplinary action against an Acting executive Director: Human Settlements, Mr Mvuleni Mapu ("Mr Mapu") and Acting City Manager, Ms Noxolo Nqwazi ("Ms Nqwazi") both of the NMBMM on 31 March 2021. The NMBMM informed the SIU that Mr Mapu was suspended and later came back to the office. In respect of Ms Nqwazi, the NMBMM advised that they are awaiting Council resolution.
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> **<u>Civil litigation</u>**
> The SIU issued a letter to the NMBMM to stop paying HT Paletona which was effected by NMBMM. HT Paletona approached the High Court to force NMBMM to pay the money owed

to them. The SIU applied to join the proceedings to oppose the application. The matter was heard on 19 August 2021 and judgement is reserved.'

[44] An 'allegation', according to the *Oxford English Dictionary* is 'an unproved claim or assertion'. It cannot be said that the recording and reporting of an unproven claim in the report was prejudicial to the applicant.

[45] In order for the SIU to carry out its mandate to investigate *all allegations* regarding the matter referred to it, it must, in the report which it is obliged to present to the President, provide details of that which was reported to it. The allegations recorded in the report by the SIU do not reflect the SIU's conclusions, but rather set out that which triggered its investigation.

[46] The applicant took issue with the finding that it appointed Pelatona on 17 April 2020 prior to the appointment letter issued on 28 April 2020. In the view of the applicant that finding, which it submitted was suggestive of irregularity on the part of municipal employees was 'patently wrong'.

[47] In its founding affidavit and in argument it provided its version of the facts indicating that the letter of 17 April 2020 to Pelatona communicated its provisional appointment in accordance with emergency procurement regulations. The final letter of appointment, on the applicant's version, followed only after the conditions for appointment were met. The applicant pertinently noted that the report did not find any unlawful or irregular conduct on the part of its officials.

[48] The applicant further contended that there was no factual basis or reason provided for the SIU's finding that the 'Disaster Management period as a consequence of the outbreak of Covid-19 pandemic was used to circumvent proper procurement processes and a non-existent emergency situation with was relied upon'. This 'generalised finding,' according to the applicant, was not based on any particular statutory provisions and did not identify particular officials responsible for wrongdoing.

[49] The applicant submitted that the finding that only 200 toilets, standpipes and aerators were completed revealed no wrongdoing.

[50] It was submitted for the applicant that Pelatona was appointed in accordance with emergency procurement regulations was factually correct. The applicant, however, questioned the relevance of the finding in the absence of any finding that an emergency did not exist. It contended that the pandemic created an emergency situation and that the declaration of a national state of disaster and that the regulatory framework thereunder permitted a deviation from the usual procurement process.

[51] The applicant submitted that the finding that two quotations were received after the appointment of Pelatona was irregular, was without basis. It submitted that the date of appointment of Pelatona as found by the SIU was incorrect. In particular, the applicant noted that the finding disclosed no irregularity.

[52] Insofar as the 'steps taken' were concerned, the applicant contended that the report referred to the letters addressed to the applicant in respect of its officials Mr Mapu and Ms Nqwazi. It submitted that neither the letters nor the report made conclusive findings of irregular conduct or wrongful action on the part of either official did not make definitive findings against these officials. The municipality contended that the recommendation of disciplinary action against these officials was 'utterly unjustified'.

[53] Thus, on the version of the applicant, the report was merely suggestive of improper or unlawful conduct. No other clear findings of unlawfulness or improper conduct were made or complained of by the applicant.

[54] In my view, a suggestion of impropriety as complained of by the applicant as prejudicial, is clearly distinguishable from the real prejudice to the reputation of the applicant in *Masuku.*

[55] On the applicant's version, it suffered financially as a result of the directives of the SIU to it stop payments to Pelatona and to stop the implementation of the

contract. The NMBM had to return unspent funds in the amount of R 20 000 000 to the National Treasury. While this most certainly was prejudicial to the applicant, it cannot be said that the consequence followed from the SIU report. The SIU required undertakings from the NMBM and did not issue directives.

[56] No explicit findings of unlawful conduct were recorded in the report. In my view the suggestion of impropriety in the report is not prejudicial to the applicant. But I nonetheless accept that establishing unlawfulness in the exercise of its power by the SIU will lead to the assumption of prejudice, and therefore turn to consider whether that has been established.

The applicant's case for review

[57] The applicant's submission was that it had a particular mandate to take steps to prevent the spread of the Coronavirus. It established the DMC which devised a plan to deal with the pandemic, including a dedensification strategy which involved moving persons from densely populated informal settlements to serviced municipal-owned stands outside these area.

[58] The applicant's plan was presented to the provincial government, and the applicant applied for, and was awarded, funding to provide emergency relief for the purpose of curbing the spread of the Coronavirus from the National Treasury.

[59] A memorandum motivating for the construction of singular toilets and standpipes with aerators was prepared and approved, following which the applicant appointed Pelatona for the project in accordance with Regulation 36, applicable during emergencies.[34]

[34] The applicant relied on the Regulations issued in terms of the Disaster Management Act 57 of 2000 published by the Minister of Cooperative Government and Traditional Affairs as amended on 16 April 2020 (GN R465 in *Government Gazette* 43232) and the Directives published by the Minister of Human Settlements, Water and Sanitation under the Disaster Management Act (GN R 464 in *Government Gazette* 43231) as well as relevant National Treasury directives, including Circular 100 in terms of the Municipal Finance Management Act 56 of 2003, Municipal Supply Chain Management Regulations published in terms of the Local Government: Municipal Finance Management Act as amended on 20 January 2017 (GN R 31 in *Government Gazette* 40553) and the Nelson Mandela Bay Municipal Supply Chain Management Policy which mirrors the national regulations.

[60] The applicant specifically contended that the Circular 100 permitted procurement of goods and services not listed in the Annexure by means of Regulation 36. Further, it submitted that the Directives of the Minister of Water and Sanitation, published on 15 April 2020 particularly authorised the emergency procurement of water and sanitation equipment for communities without sanitation.

[61] As such, the applicant submitted that the SIU's suggestion of impropriety was irrational and arbitrary, and influenced by material errors of law and must be set aside.

[62] The applicant set out its different grounds of review without much particularity. So, for example, it contended that the SIU report was irrational, but it did so without pinpointing which aspects thereof were irrational and in what way.

Legality review considered

[63] Judicial review is concerned with the legality of a decision and not with its 'rectitude'.[35] In order words, the concern is not whether the SIU 'got it right or wrong' but whether it exercised its powers in accordance with the principle of legality.

[64] Legality review which gains its force from the rule of law as a founding value of the Constitution,[36] includes all the common law grounds for review.[37] So, the applicant's challenges based on rationality, non-arbitrariness and on the assertion that the report was influenced by material errors of law or that it was not sanctioned by the empowering legislation, must be considered to determine whether the SIU acted lawfully or not.

[65] In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa*, Chaskalson P (as he then

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[35] Baxter 452. See also *Mbina-Mtembu v Public Protector* paras 10-11.
[36] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 83.
[37] *Mbina-Mthembu v Public Protector* 2019 (6) SA 534 (ECB) para 13. These have by-and-large have been codified in PAJA, with the addition of further grounds.

was) explained rationality and non-arbitrariness as an incident of the rule of law as follows:

> 'It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.
>
> The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.'

[66] Of the rationality standard, the Constitutional Court in *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd*[38] the court recently remarked:

> 'That standard is not about the cogency of reasons furnished for a particular decision. Instead, it is all about whether there was a rational connection between 'the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.
>
> ....
>
> ... If there is such connection, the review challenge based on this ground must fail, regardless of the cogency of reasons furnished for the decision in question. This is because rationality is the lowest threshold required for the exercise of public power.'

[67] In conducting the investigation into and presenting the report to the President on the procurement of goods and services from Pelatona during the national state of disaster, the SIU acted in terms of the SIU Act and Proclamation 23. This was not challenged by the applicant.

[68] The SIU conducted the investigation to determine whether procurement of goods and services by the applicant from Pelatona during the national state of disaster was done in breach of the relevant legal framework. The purpose of a SIU investigation is to expose maladministration and corruption in state institutions in the public interest. In reporting to the President, the SIU expresses a view regarding the matter it investigated based on the evidence it gathered.

[69] The SIU received an unproven complaint about the agreement between the applicant and Pelatona. It investigated this complaint and presented its findings

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[38] 2023 (1) SA 1 (CC) paras 57 and 60.

in its report to the President. As such it acted in accordance with purpose for which its powers were given, and thus rationally. In my view, SIU's report meets the low threshold as set out in *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd.*

[70] While the applicant did not provide specific details regarding the errors of law which materially influenced the SIU report, it can be inferred that its case is that the legal framework set out in its application regulated the procurement of Pelatona's services and that it complied with that framework.

[71] The applicant's reliance on the directions of 15 April 2020 of the Minister of Water and Sanitation as permitting emergency procurement of water and sanitation equipment, was misplaced. Those directions established the National Disaster Water Command Centre and empowered it to coordinate the procurement of goods and services at a national level. The directions empowered the National Disaster Water Command Centre to utilise emergency procurement measures and not individual municipalities.

[72] The applicant's version of the regulatory framework did not pertinently address a crucial part of the measures put in place by the regulations issued by the Minister of Cooperative Government and Traditional Affairs under the Disaster Management Act. The regulations in place at the time were amended on 25 March 2020 to restrict the movement of persons and goods, and to direct business operations to cease. The regulations only permitted 'essential services' as restrictedly defined therein, to be performed. While I make no finding as to whether the agreement with Pelatona was for essential services or not, it is important to note that an interpretation of the regulatory framework could exclude construction.

[73] In my view, the applicant has not established that the report was materially influenced by errors of law.

[74] I briefly deal with the argument that the SIU acted beyond the scope of its powers. The SIU report included recommendations which the Act does not

include. In *Masuku,*[39] Sutherland ADJP commented as follows on the recommendations made by the SIU with which I fully agree:

> 'If the term "recommendation" is understood as a term of art to identify the expression of public power; eg, as exercised by the Public Protector, plainly the SIU lacks such a power. However, it is inescapable that an investigator must form an *opinion* about the material gathered. The very act of enquiring, interviewing and searching is driven by a perception of a perceived pattern of conduct, however tentatively held, which is tested by the investigation. When furnishing a report, an express obligation on the SIU, it is obvious that the material must be ordered and rendered coherent to substantiate an opinion on what has been discovered or not discovered. In my view, the recommendations of the SIU must be understood in this sense; a legitimate comment on whether any official had been culpable of improper activity.'

[75] Further, I am not convinced that it can be said that the SIU issued directives to the applicant to cease payments or stop the implementation of the contract. The SIU sought undertakings from the applicant which it provided. However, even if the request for undertakings under a threat of an approach to the Special Tribunal can be construed as a directive, the report under review merely recorded what had happened before and did not contain any directive to the municipality itself.

[76] The report of the SIU is not a model of clarity. It was poorly drafted and contained errors of fact. It lacked detail and was not coherent. However, the SIU conducted its investigation within its mandate and it reported thereon as required.

[77] The applicant's challenge to the report was based simply on its aversion or dislike of the findings in the report. That is not a reason for the report to be set aside.

[78] The applicant's challenges to the report were couched in general terms and as such of little assistance to the court. While the first respondent did not conduct itself in exemplary fashion in these proceedings, I do not think it should shoulder the costs of the applicant.

[79] I make the following order:

a) The application is dismissed.

b) There is no order as to costs.

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[39] *Masuku* para 29.

Rkrüger

R KRüGER AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:	Adv *B Ford SC* and Adv *S Patel*
Instructed by:	Kuban Chetty Inc, Gqeberha
For the First Respondent:	Adv *Ncongwane SC* and Adv *MD Sekwakeng*
Instructed by:	State Attorney, Gqeberha
For the Second Respondent:	No appearance