



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996**

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: GP07/2019

In the matter between: -

Special Investigating Unit

Applicant

and

Cultiver Investments (PTY) LTD

1st Respondent

The Minister of the Department of
Agriculture, Land Reform and Rural
Development

2nd Respondent

The Director-General: The Department of
Agriculture, Land Reform and Rural
Development

3rd Respondent

The Department of Agriculture, Land
Reform and Rural Development

4th Respondent

JUDGMENT

Summary

Review of administrative decisions – whether the Special Investigation Unit (SIU) makes out a case for the impugned administrative decisions to be reviewed and set aside.

Held – The impugned decisions are irregular and unlawful.

Just and equitable remedy – the SIU sought just and equitable remedy in terms of s172(1)(b) of the Constitution. Whether the Tribunal has jurisdiction to grant such a remedy in light of the Constitutional Court decision in *Ledla*. The Tribunal not having been furnished with the information it requires to determine the appropriate remedial relief, directives are issued for the further conduct of the matter.

MODIBA J

INTRODUCTION

[1] Initially, the Special Investigating Unit (“SIU”) sought to review and set aside three decisions. The first is the decision by the Department of Rural Development and Land Reform (“the Department”) to appoint Cultiver Investments (Pty) Ltd (“Cultiver”) as a beneficiary on its provincial land acquisition strategy (“PLAS”) programme. The second is the decision by Maite Nkoana-Mashabane, the then Minister of Rural Development and Land Reform (“Minister Nkoana-Mashabane”) ordering that the Department conclude a lease agreement with Cultiver. The third is the lease agreement the Department and Cultiver concluded on 11 January 2019.

[2] In its heads of argument, the SIU abandoned the review of the first decision. On invitation by this Tribunal, it filed an amended notice of motion excluding the

relevant prayer. In the result, it is only the second and third decisions that are in issue in these proceedings. I collectively refer to these decisions as the impugned decisions. I individually refer to them as the second and third decision, alternatively the impugned lease agreement respectively.

[3] The SIU also seeks condonation for bringing the application late. It only seeks legal costs in the event of opposition.

[4] Surprisingly, the Department and its cited officials are not opposing the application. I will later state reasons why I frown upon the supine position the Department adopted in this application. The application is only opposed by Cultiver.

[5] The SIU derives its *locus standi* to bring this application from s 2(2)¹ read with s 4(1)(c)² and s 5(5)³ of the Special Investigating Unit and the Special Tribunals Act⁴ (“SIU Act”) as well as Proclamation R.24⁵ to investigate irregularities, malpractices, corruption and fraud in the acquisition and leasing of Mike’s Chicken and other named entities and/ or immovable properties and assets and the appointment of beneficiaries and strategic partners in the named entities which took place between January 2009 and the date of publication of the Proclamation, collect evidence regarding acts and/ or omissions which are relevant to its investigation and institute civil proceedings in a Special Tribunal or any Court of law for any relief to which the Department is entitled.⁶

[6] The SIU’s basis for the application is that the instruction by Minister Maite Nkoana-Mashabane to the Department to withdraw its opposition of the application Cultiver brought in the Polokwane High Court to compel the Department to make

¹ Please quote this provision here.

² Please quote this provision here.

³ Please quote this provision here.

⁴ Act 74 of 1996.

⁵ Published on 24 July 2017 in Government Gazette number 41000.

⁶ S 4(1)(a), (b) and (c)(i) of the SIU Act.

available to it Provincial Land Acquisition Strategy (“PLAS”) benefits is irrational and constitutes inappropriate political interference. As a result, the lease agreement the Department subsequently concluded with Cultiver is irregular.

[7] Cultiver contends that the undue delay in bringing the application should not be condoned, the impugned decisions are vaguely described and the Department has not established the evidentiary basis to sustain the SIU’s grounds of review. Cultiver also complains of irremediable and far reaching prejudice in the event that the impugned decisions are reviewed and set aside. The prejudice would extend to its 175 employees, customers and suppliers. It will have a negative effect on national food security, the national poultry supply food chain and the local economy in which its farming operations play an important role. The prejudice will also extend to the state which spent R137 million acquiring the land and assets in Mikes Chicken. The SIU has made no submissions regarding the winding up of the farming operations and for compensating Cultiver for its investment and improvements made on the land and its efforts to maintain the farming enterprise despite the State’s failure to fulfil various obligations and to facilitate the support the business it purchased required to succeed as a farming enterprise.

[8] Cultiver has noted the pending challenge to the Tribunal’s jurisdiction in terms of s 172 of the Constitution, has opted not to raise the same challenge in the present proceedings but has reserved its right to raise it in another forum, on appeal or in the event that in the pending challenge, the Tribunal is found to lack such jurisdiction. Cultiver has not crafted the jurisdiction challenge it intends to bring. It is important to note that the Tribunal’s jurisdiction over legality reviews as well as its wide powers as derived from its enabling statute, the Special Investigating Unit and Special Tribunals Act⁷ was affirmed by the Constitutional Court in *Ledla*.⁸

⁷ Act 74 of 1996.

⁸ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8.

[9] In the event that the Tribunal reviews and sets aside the impugned decisions, Cultiver seeks a just and equitable remedy in terms of s 172 of the Constitution that would enable it to retain its accrued rights in terms of the impugned lease agreement. Save for contesting Cultiver's quest not to be divested of future rights accrued from the impugned decisions, the SIU has not addressed the Tribunal on the remedy. Neither has Department as the owner of the Mikes Chicken's assets.

[10] This judgment follows the following structure: I briefly set out the background facts and the regulatory framework relied on by the SIU. Then, I consider whether the delay in bringing the application should be condoned or overlooked and whether the SIU makes out a case for the review of the impugned decisions with reference to the applicable statutory and regulatory framework. Lastly, I issue directives regarding the determination of just and equitable relief. I reserve legal costs for determination together with the just and equitable relief.

BACKGROUND FACTS

[11] On 2 May 2013, the Department and Mike's Chicken concluded an agreement for the sale of 9 immovable properties based in Farm Doornbult in Limpopo province. The immovable properties comprise chicken hatchery farms which the Department acquired as a going concern for a VAT exclusive purchase price of R137 million. The Department paid the full purchase price to Mike's Chicken. At the time, Cultiver was not a shareholder in Mike's Chicken.

[12] In terms of a shareholder agreement concluded between the Mike's Chicken, its shareholders Michael-John Nunes ("Mr Nunes") and Christiaan Jacobus Albertus Kirstein ("Mr Kirstein") and Cultiver represented by Muziwempi Twala (Mr Twala") on 12 June 2013, Cultiver acquired 80% shareholding in Mike's Chicken. Its stake was later increased to 90%. Messrs Nunes and Kirstein retained the remaining 10% shares each, later decreased to 5%. Subsequently, the Department approved Cultiver as a

PLAS beneficiary and entered into a one-year caretaker agreement with it in respect of the Mike's Chicken farm. Cultiver took occupation of Mike's Chicken farm and its operations.

[13] After these events, specifically in February 2014, the Ministerial Coordinating Committee commissioned two investigations into the acquisition of Mike's Chicken and the approval of Cultiver as a PLAS beneficiary. One is an external investigation conducted by Deloitte and Touche. The second is an internal investigation conducted by the Department. Thereafter, the Department commissioned the National Empowerment Fund ("NEF") to conduct a due diligence exercise on Mike's Chickens. Cultiver had applied for grant funding for Mike's Chicken's operations. The due diligence exercise would assist the Department to determine whether it should approve Cultiver's request for grant funding. At the time, Minister Gugile Nkwinti ("Minister Nkwinti") was the Department's incumbent Minister.

[14] The investigations Deloitte and the Department conducted found irregularities in the acquisition of Mike's Chicken and the approval of Cultiver as a PLAS beneficiary.

[15] The NEF found that Mike's Chicken is not a viable enterprise. It made recommendations regarding measures to be taken to address this. As a result, the Department declined Cultiver's application for grant funding. In the meantime, the caretaker agreement expired. The Department refused to enter into a long term lease agreement with Cultiver. Cultiver went into business rescue.

[16] In January 2017, Cultiver, its business rescue practitioner and Mike's Chicken instituted an urgent application to compel the Department to extend PLAS benefits to Cultiver. The Department opposed the application on the basis of the findings from the Deloitte, Department's and NEF investigations.

[17] On 24 July 2017, Proclamation R.24 was published, authorising the SIU to investigate the affairs of the Department including the acquisition of Mike's Chicken and the selection of its beneficiaries and partners under the PLAS programme.

[18] In February 2018, Minister Nkoana-Mashabane replaced Minister Nkwinti. During 2018, the Polokwane application which at that point had become a fully ventilated application, was referred to oral evidence. In August 2018, Cultiver's Mr Twala addressed a letter to Minister Nkoana-Mashabane to intervene in its dispute with the Department. He tendered to withdraw the Polokwane application if the Department entered into a long term lease with Cultiver. Subsequently and before the Polokwane application was heard, Minister Nkoana-Mashabane took the second decision, instructing the Department to withdraw its opposition of the Polokwane application and regularise the lease between the Department and Cultiver.

[19] On 11 January 2019, the Department concluded the impugned lease agreement with Cultiver.

[20] In March 2019, the SIU learnt of the developments described in paragraphs 18 and 19 above. After investigating the circumstances under which the impugned decisions were made, the SIU instituted the present application in November 2019.

REGULATORY FRAMEWORK

[21] The SIU relies on the regulatory framework set out below.

[22] S 10 of the Provision of Land Assistance ("PLAS") Act⁹ provides as follows:

⁹ Act 126 of 1994.

“Provision of property for land reform purposes

(1) The Minister may, from money appropriated by Parliament for the purpose of this Act-

- (a) acquire property; and
- (b) on such conditions as he or she may determine-
 - (i) make available state land administered or controlled by him or her or made available to him or her;
 - (ii) maintain, plan, develop or improve property or cause such maintenance, planning, development or improvement to be conducted by a person or body with whom or which he or she has concluded a written agreement for that purpose;
 - (iii) provide financial assistance by way of an advance, subsidy, grant or otherwise to any person for the acquisition, maintenance, planning, development or improvement of property and for capacity building, skills development, training and empowerment; or
 - (iv) in writing authorise the transfer of funds to-
 - (aa) a provincial government;
 - (bb) a municipality;
 - (cc) any other organ of state; or
 - (dd) any other person or body recognised by the Minister for such purposes,

which he or she considers suitable for the achievement of the objects of this Act, whether in general, in cases of a particular nature or in specific cases.

[23] S 15(1)(a) and (b) of the PLAS Act provides as follows:

“15 Delegation

(1) The Minister may, on such conditions as he or she may determine-

- (a) delegate to any officer in the Department of Rural Development and Land Reform any power conferred upon the Minister by this Act, except the power under section 14 to make regulations;
- (b) authorise any such officer to perform any duty imposed upon the Minister by this Act

[24] In terms of the Delegation of Authority Minister Nkoana-Mashabane signed on 23 July 2018, delegated certain powers she enjoys in terms of the PLAS Act to specified departmental officials and structures.

[25] In its preamble, the Public Finance Management Act (“PFMA”) states the objective of the PFMA as follows:

“To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.”

[26] The SIU specifically relies on the following provisions of the PFMA:

“S38 General responsibilities of accounting officers

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

(a) must ensure that that department, trading entity or constitutional institution has and maintains-

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

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

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

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

(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(c) must take effective and appropriate steps to-

(i) collect all money due to the department, trading entity or constitutional institution;

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

“S 45 Responsibilities of other officials

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

(a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;

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

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

[27] The SIU relies on the following provisions in the Constitution:

“S 1

The Republic of South Africa is one, sovereign, democratic state founded on the following values

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

“S 2

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

“S195 Basic values and principles governing public administration

195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

[28] In terms of section 172(1)(a) and (b) of the Constitution, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and may make any order that is just and equitable, including— an order limiting the retrospective effect of the declaration of invalidity or an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.¹⁰

[29] PLAS beneficiaries had to be selected and approved in accordance with the process set out in the PLAS Manual. An appropriate and viable project and emerging farmers had to be identified to ensure the success of the project and to prevent fruitless and wasteful expenditure associated with a failed land reform project. To meet this objective, the following control measures as set out in the PLAS Manual had to be complied with:

¹⁰ Section 172(1) of the Constitution.

29.1 the relevant Provincial Land Reform Office (“PRLO”) had to conduct a feasibility study in respect of each project to assess the viability, feasibility, sustainability of the project. It could commission a private entity or the provincial department of agriculture to conduct the study;

29.2 proper business plans had to be compiled in respect of the project and submitted to the Department for consideration;

29.3 a suitable emerging farmer applicant committed and dedicated to farming and with knowledge and experience of farming had to be identified in accordance with the following criteria:

29.3.1 the applicant for PLAS benefits had to complete a situational assessment questionnaire including a wealth ranking exercise tool and a skills audit tool;

29.3.2 the applicant for PLAS benefits ought to meet pro-poor guidelines;

29.3.3 the applicant for PLAS benefits who meet the prescribed criteria had to be registered on a database maintained by the PLRO;

29.3.4 as and when land became available, the applicant(s) for PLAS benefits would be allocated land in accordance with their farming experiences and skills.

[30] In line with the *Plascon Evans* rule¹¹, I determine the application on Cultiver’s version together with SIU’s version which Cultiver does not dispute. Where Cultiver barely disputes or disputes the SIU’s version on a version so far-fetched that I may not reasonably rely on it, I rely on the SIU’s version.

¹¹ See *Plascon Evans Paints Limited v Van Reibeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) and *Room Hire Co (Pty) Limited v Jeppe Street Mansions (Pty) Limited* 1949 (3) SA 1155 (T) AT 1163.

WHETHER THE DELAY IN BRINGING THE APPLICATION SHOULD BE CONDONED

[31] Unlike a review brought under the Promotion of Administrative Justice Act¹² (PAJA), there is no fixed time for bringing a review application under the principle of legality. A party which brings review proceedings in terms of the principle of legality is required to do so within a reasonable time.¹³ Determining whether a review application was brought within a reasonable time involves a two-stage enquiry.¹⁴ Firstly, it must be determined whether there was an unreasonable or undue delay and secondly, if so, whether the Tribunal should nonetheless exercise its discretion to overlook the delay.¹⁵

[32] In *Buffalo City*¹⁶, the Constitutional Court explained that the first stage involves a factual enquiry upon which a value judgment is made, having regard to all the circumstances of the matter. When determining whether the delay was unreasonable, the explanation for the delay is considered. A full explanation for and reasons for the delay ought to be set out. The explanation must cover the entire period of the delay.

[33] The second stage of the enquiry is a flexible one. It involves the evaluation of a number of factors such as the nature of the impugned decision, the Court's duty in terms of s172(1) of the Constitution to declare conduct which is inconsistent with the Constitution unconstitutional to the extent of its inconsistency, the possible consequences of setting aside the impugned decision including potential prejudice to affected parties and whether the prejudice may be ameliorated by granting a just and equitable remedy. Some of the relevant factors will require the merits of the review to be traversed. The interests of justice are an overriding factor in this enquiry.

[34] The proclamation authorising the SIU to investigate this and other projects implemented under the PLAS programme was issued in July 2018. The SIU only

¹² Act 3 of 2000.

¹³ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* para 11-12.

¹⁴ *Gqwetha v Transkei Development Corporations Ltd and Others* which was adopted in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

¹⁵ *Buffalo City Metropolitan Municipality* see fn8 at para 11-14.

¹⁶ Fn8.

became aware of the impugned decisions in March 2019. It brought this application in November 2019.

[35] In its founding affidavit, the SIU fails to give reasons for the delay. It relies on good prospects of success and the interest of justice in light of evidence of serious maladministration and blatant disregard for the rule of law which it contends points to corruption in the affairs under investigation. It also contends that there is no prejudice to Cultiver if the delay is condoned.

[36] Cultiver only opposes the application for condonation on the basis of the prejudice already dealt with in paragraph 7 of this judgment. It takes no issue with the SIU's failure to set out a full explanation for the delay. This is probably because the SIU delayed by only two months in respect of the period provided for in PAJA.

[37] In its replying affidavit, in the context of explaining the difficulties it encountered to obtain source documents that support its case, the SIU explains the resource constraints under which it is conducting investigations that fall within the scope of Proclamation R.24. In its supplementary affidavit, Cultiver did not dispute these allegations, nor did it take issue with the fact that these issues are only dealt with in reply.

[38] The Department became aware of the grounds of review in respect of the first decision 23 September 2014 when it received the report on the Deloitte investigation. The Department's investigation was finalized in December 2013. At that stage, the only decision that had been taken is the first decision. On the basis of the findings in these two investigations as well as the NEF due diligence report, the Department resisted taking the impugned (second and third) decisions. Hence it opposed the Polokwane applications.

[39] The clock against the Department could not have started running when the impugned decisions were taken in December 2018 and January 2019. On the conspectus of the evidence before the Tribunal, the Departmental officials who were aware of the impugned decisions and implemented them were not aware of the alleged grounds of review. When interviewed by the SIU, Ms Sadiki and Mr Mngwengwe

indicated that they were not aware of the issues in the Polokwane application the merits of which form the basis for the SIU's contention that the second decision is irrational.

[40] Therefore, the Department could not have instituted this application. The clock only started running against the Department when the SIU addressed an email to Ms Sadiki, Mr Mngwengwe and others in March 2019 questioning the basis on which the second decision was made.

[41] The clock only started ticking for the SIU in March 2019 when it became aware that the impugned decisions had been taken. It instituted the application approximately 8 months later. The 2 month's delay after the period prescribed in terms of the Promotion of Administrative Justice Act can hardly be taken to be unreasonable.

[42] In any event, as I find below, the serious maladministration and disregard for constitutional obligations and the rule of law justify an exercise of my discretion to overlook the delay. Any prejudice that Cultiver stands to suffer will be ameliorated by the appropriate remedy to be granted by the Tribunal.

[43] Therefore, I am satisfied that the SIU has made out a case for the delay in bringing the application to either be condoned and/or overlooked.

THE MERITS

The Second Decision

[44] The SIU contends that the second decision stands to be reviewed and set aside as it is irrational.

[45] When determining whether the second decision is irrational, I derive guidance from the principles set out below:

- 45.1 all exercise of public power must be rational;
- 45.2 the requirement of rationality obliges courts to engage in an evaluation of the relationship between the means employed to reach a decision on the one hand, and the purpose for which the power to make the decision was conferred, on the other;
- 45.3 each and every step in the process of reaching the decision must be rationally related to the outcome;
- 45.4 a failure to take into account relevant material that colours the entire process with irrationality will render the decision irrational;
- 45.5 the rationality test is the least invasive form of legal scrutiny and its applicability in respect of executive decisions flows from an acceptance and recognition of the separation of powers, not the converse.¹⁷

[46] When the second decision was taken, the Department had commissioned the Deloitte and internal investigations referenced above. On the basis of the findings from these investigations, the Department refused to extend PLAS benefits to Cultiver. Cultiver, Mike's Chicken and its business rescue practitioner sought an order in the Limpopo High Court compelling the Department to extend PLAS benefits to Cultiver. The Department opposed the application. The Department's senior counsel had addressed a legal opinion to the Department, advising it of the merits of its opposition and was of the opinion that the Department enjoyed strong prospects of success. Proclamation R.24 had been issued. The SIU had commenced its investigation into the acquisition of Mike's Chicken and the appointment of Cultiver as a PLAS beneficiary. All these events took place when Minister Nkwinti was the incumbent Minister of Rural Development and Land Reform.

[47] After Minister Nkoana-Mashabane replaced Minister Nkwinti, Mr Twala wrote to Minister Nkoana-Mashabane asking her to intervene as Cultiver would like to settle the Polokwane application on the basis that the Department acquiesce its demands.

¹⁷ See *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at para 30.

Minister Nkoana-Mashabane instructed the Department to withdraw its opposition of the Polokwane application and regularise Cultiver's occupation of the leased premises. It is unfortunate that the SIU never interviewed Minister Nkoana-Mashabane. However, this omission is not fatal to the present application as the SIU did not lie supine. Further, the omission does not sanitize the second decision in the face of the anomalous circumstances (sketched out above) under which it was made, which taints it with irrationality.

[48] The SIU immediately addressed an email to the head of Ministry Mr Mokono, copying the Acting Director General Ms Sadiki and the Chief Director: Legal Services, with reference to the merits of the Department's grounds of opposition in the Polokwane application, calling for full reasons for the second decision and threatening to impugn the lease agreement to have it set aside together with any settlement agreement subsequently concluded between the Department and Cultiver. The Departmental officials to which the email was addressed and copied did not respond to the email. Mr Mokono and Ms Sadiki only engaged the SIU after it had subpoenaed them in terms of s5(2)(b) and (c) of the SIU Act. When questioned by the SIU, Mr Mokono and Ms Sadiki confirmed that all the parties involved were aware that the SIU is investigating the matter, acted on Minister Nkoana-Mashabane's instruction without knowledge of her reasons for the second decision and were not familiar with the details of the Polokwane application and the legal opinion provided to the Department by its counsel.

[49] The departmental officials further indicated that they considered the second decision lawful due to pending amendments to the PLAS Manual and the interim arrangements that had been put in place. But the pending amendments only related to the calculation of the rental. The rest of the PLAS policy would remain in existence. As a result, Cultiver's alleged irregular appointment as a PLAS beneficiary would not be regularised by the pending amendments to the PLAS manual. As contended on behalf of the SIU, the professed ignorance of these officials indicates that they did not apply their minds when they executed the second decision. Even when legal

considerations were brought to their attention, they disregarded them in favour of the Minister's instruction and/ or political events.

[50] On the conspectus of the evidence before the Tribunal, the decision to withdraw the Polokwane application is not rationally connected to the Department's refusal to extend PLAS benefits to Cultiver and to oppose Cultiver's efforts in the Polokwane application to compel it to do so. The Polokwane application was clearly opposed on legal grounds of which the relevant departmental officials were unaware. When this was pointed out to Mr Mokono, his response that the legal opinion provided by the Department's counsel in Polokwane had been overtaken by political events also point to the irrationality of the second decision.

[51] By taking the second decision under the circumstances sketched out above, not only did Minister Nkoana-Mashabane frustrate the due process that was in progress as a result of the Polokwane application and the SIU investigation, she flouted the constitutional values that underpin public administration as set out in s195 of the Constitution by failing to act impartially, fairly, equitably and without bias.

[52] Minister Nkoana-Mashabane has since been replaced other Ministers who are not opposing the application to set aside the second decision. It is improbable that Ministers who replaced Minister Nkoana-Mashabane and the Department would not defend the second decision if it was rational and in the interest of the PLAS programme and the fiscus.

[53] Cultiver's complaint that the SIU improperly relies on affidavits adduced in the Polokwane matter, which are in any event based on hearsay evidence as the deponent Ms Archery had no direct knowledge of Cultiver's appointment does not enhance its case in these proceedings. Cultiver has put up a version in these proceedings regarding how it was appointed as a PLAS beneficiary. When Cultiver's version is considered with the SIU's undisputed allegations, it confirms the strong merits of the

Department's basis for opposing the Polokwane application. This further supports the SIU's contention and this Tribunal's finding that the second decision was irrational.

[54] In its answering affidavit deposed to by its director Mr Twala, Cultiver explains the circumstances that led to its approval as a PLAS beneficiary. In 2006, Mr Twala ventured into farming as a cattle farmer on two leased farms near Witbank, Mpumalanga. He then started small-scale chicken farming on one of the farms. He became aware of the government's PLAS programme launched in 2007, catering for emerging and commercial farmers. Through the programme, the State acquires land, lease it for a trial period and sell it to the lessee with State grant assistance if the trial is successful.

[55] In 2009, having successfully applied to be a beneficiary under the PLAS programme, Mr Twala proposed that the Department acquire a cattle farm in Delmas and lease it to him. His proposal was successful. The Department acquired and leased the farm to him. The cattle farming enterprise was successful.

[56] It is important to point out that Mr Twala's appointment as a PLAS beneficiary in respect of the lease of the Delmas farms is not an issue in these proceedings.

[57] In 2012, Mr Twala learnt of the sale of Polokwane-based Mike's Chicken farm through a friend who knew one of the owners of the chicken farm. Since he was also interested in chicken farming, his friend put him in touch with one of the owners of the chicken farm. Mr Twala subsequently travelled to Limpopo to see the farm. There, he met with the farm owners Messrs Nunes and Kirsten who confirmed that they were looking to sell either a stake in or the whole business.

[58] His contacts in the Department put him in touch with Mr Milton Tshililo ("Mr Tshililo") who was responsible for the Department's land reform programmes in Polokwane. In August 2012 Mr Twala travelled to Polokwane to meet with Mr Tshililo. He made a similar proposal to Mr Tshililo that he made when he acquired the lease of

the cattle farm in Delmas in 2009. Mr Tshililo gave him a two-paged application form to complete. He did so and delivered the completed form to the PLRO Limpopo for Mr Tshililo's attention. He followed up with Mr Tshililo by email on 12 September 2012, attaching the form and requesting that he is placed on the list for Mike's Chicken property. It appears that Mr Tshililo had not receive the form Mr Twala had delivered to his office. Subsequently Mr Tshililo asked Mr Twala to submit a business plan. Mr Tshililo later requested Mr Twala to submit a revised business plan.

[59] In May 2013, the Department informed Mr Twala that it has approved Cultiver's business plan. On 9 July 2013, the day the transfer of Mike's Chicken property took place, a brief ceremony was held at which the Department's Mr Mahlangu declared that Cultiver was responsible for the farm going forward. Subsequently, the Department's legal department concluded a one-year caretaker lease agreement with Cultiver. It was signed in January 2014, backdated to 8 July 2013.

[60] Cultiver's version is consistent with the evidence it sought discarded as hearsay evidence. Mr Twala proactively approached the Limpopo PLRO to express his interest in Mike's Chicken and request that the Department acquire it and lease it to him under the PLAS program. He evidently was not allocated the Mike's Chicken farm on the basis of his appointment as a PLAS beneficiary in respect of the Delmas farms as he was required to complete a two-paged application form which was provided to him by Mr Tshililo. He has attached this form as annexure MT7 to his answering affidavit. The form bears the title, "Application to lease agricultural state land without the option to buy". In terms of the PLAS Manual, an applicant for PLAS benefits completes a beneficiary questionnaire. The aim of the questionnaire is to assist with the assessment of the applicant. This is clearly not the form Mr Twala completed.

[61] When he completed MT7, Mr Twala only stated that he is a cattle farmer. He did not mention that he is a poultry farmer. This brings to question the basis on which his suitability to lease the Mike's Chicken farms was determined. In any event, on Cultiver's own version, Mr Twala was not properly assessed and found to meet the

prescribed criteria as a PLAS beneficiary. It is also not its version that Mr Twala or Cultiver was placed on the PLAS beneficiary database after they were duly approved as PLAS beneficiar(ies). It is unclear whether, when he followed up with Mr Tshililo and asked him to place him on the “*PLAS list*”, *he did so*. The only evidence of his approval as a PLAS beneficiary is LA3 which was signed on 17 May 2013.

[62] On Mr Twala’s version no other prescribed procedures were followed. Cultiver is also cryptic with information. It has said nothing about the NEF due diligence and the fact that the NEF did not recommend that the Department fund Mike’s Chicken’s operations. It is improbable that Mr Twala does not know the outcome of the due diligence when that endeavour was prompted by Cultiver’s application for grant funding.

[63] It is also irrelevant as contended on behalf of Cultiver that Deloitte had recommended that Cultiver’s occupation of Mike’s Chickens farm be regularised. It is clear that the Department did not accept this recommendation but instead refused to conclude a long term agreement with Cultiver based on its alleged irregular appointment as a PLAS beneficiary, amongst other factors.

[64] Cultiver’s contention that since 2013 it was in the position of a *de facto* lessee and that on a proper conspectus of all the facts and circumstances, the decision to conclude the impugned lease agreement was rational and serves the interest of the PLAS programme and the fiscus lacks merit. It is highly improbable that Mr Twala would have by-passed the Departmental officials whom he had engaged up to that point and sought Minister Nkoana-Mashabane’s intervention if the Department was in agreement that concluding a lease agreement with Cultiver served the interests of the PLAS programme and the fiscus. If it did, Minister Nkoana-Mashabane’s intervention was hardly warranted and for the reasons already stated justified.

[65] For these reasons, the second decision stands to be reviewed as it was taken irrationally.

The third decision

[66] The irrationality that underpins the second decision taints the impugned lease agreement with irregularity. Therefore, contrary to the argument advanced on behalf of Cultiver, the third decision may not escape review on the basis that the Department was simply implementing its 2013 decision to approve Cultiver as a beneficiary on the PLAS programme.

[67] Cultiver's contention that the impugned lease agreement is identical to that Mr Mngwengwe was due to sign on behalf of the Department in 2016 is also of no moment. Mr Mngwengwe had been authorised by the NLARCC on 25 May 2013 to sign the lease agreement when it approved Cultiver's appointment as a beneficiary. It is improbable that the NLARCC was aware of the alleged irregular process followed to approve Mr Twala and/ or Cultiver as a PLAS beneficiary. Further, the NLARCC's approval was conditional upon Mr Twala being confirmed not to be a lessee of a PLAS farm in Mpumalanga. On his version in these proceedings, he did not meet this condition precedent.

[68] In any event, the NLARCC decision was not implemented because the Department went as far as opposing Cultiver's efforts to enforce its purported accrued rights as a PLAS beneficiary in the Polokwane application.

[69] In the premises, I find that the conclusion of the impugned lease agreement was irregular.

REMEDY

[70] In the event that the Tribunal finds that the impugned decisions fall to be reviewed, the parties proposed consequential relief based on section 172(1)(b) of the Constitution.

[71] The Constitutional Court has since pronounced on the Tribunal's jurisdiction in respect of legality reviews in *Ledla*.¹⁸ It ruled that:

“[69] In the result, I conclude that the Special Tribunal is not a court. However, it has the power to adjudicate legality reviews.”

[72] The finding that the Tribunal is not a court raises the question whether it enjoys jurisdiction in terms of s172 of the Constitution. This is not a question I have been called upon to decide in this application.

[73] The Constitutional Court expressly recognised the Tribunal's powers to adjudicate legality reviews and its wide remedial powers in terms of the SIU Act. In this regard it stated as follows:

“[64] Therefore, it is clear from the *Group Five* decision that we must consider the legislation establishing the Special Tribunal to determine whether it is empowered to make findings in respect of a legality review.

“[65] In this regard we must consider the provisions of the SIU Act. The relevant section in the case of the Special Tribunal is section 8(2) of the SIU Act which provides:

“A Special Tribunal shall have jurisdiction to adjudicate upon any civil proceedings brought before it by a Special Investigating Unit in its own name or on behalf of a State institution or any interested party as defined

¹⁸ Add citation.

by the regulations, emanating from the investigation by such Special Investigating Unit.”

“[66] ...there is no provision in the SIU Act which limits the powers of the Special Tribunal like section 62 of the Competition Act. The Special Tribunal’s power of legality reviews emanates from its broad remedial powers in section 8 of the SIU Act. The wide language employed in that section (“*any* civil proceedings”) points to the power of legality review not being excluded from its power to adjudicate civil proceedings.¹⁹

“[65] Secondly, the preamble of the SIU Act and section 4 make it abundantly clear that the Act has as its objective, amongst others, the establishment of structures, including the Special Tribunal, to address the rampant corruption in all forms of malfeasance in our country. The preamble of the SIU Act outlines its purpose as to —

“provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions; to provide for the revenue and expenditure of Special Investigating Units; to provide for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto.”

“[66] The functions of the SIU are set out in section 4(1)(c) of the SIU Act as follows:

“to institute and conduct civil proceedings in a Special Tribunal or any court of law for—

¹⁹ My emphasis.

- (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;
- (ii) any relief relevant to any investigation; or
- (iii) any relief relevant to the interests of a Special Investigating Unit.”

“[67] From the preamble and section 4 of the SIU Act, it is clear that the legislative intention was to cast a wide net over the scope of the proceedings the Special Tribunal is empowered to adjudicate upon. Therefore, a legality review is not excluded from the ambit of the jurisdiction of the Special Tribunal as there is no carve-out of the powers of the Special Tribunal to adjudicate over civil proceedings.

“[68] ... Accordingly, the Special Tribunal has the jurisdiction to adjudicate reviews brought by the SIU and to grant an order setting aside an unlawful procurement contract.

[74] For the reasons set out below, it is prudent that I invite the parties to address me on the Tribunal remedial powers in terms of s8(2) of the SIU Act with reference to the judgment in *Ledla* and call on the Department to place before the Tribunal the relevant information at its disposal to craft the appropriate remedy.

[75] In terms of s4(1)(c) of the SIU Act, the consequential relief at the Tribunal’s disposal is not limited to the recovery of damages a state institution may suffer. It extends to its prevention. Here lies my concern in respect of the information the SIU and Cultiver have placed before the Tribunal to determine consequential relief.

[76] The SIU seeks the impugned lease agreement set aside. However, it has sought no relief to address Mike’s Chicken and Cultiver’s continued occupation of the

properties from which the Mike's Chicken farm operates. It has also not placed any information before the Tribunal to determine a suitable remedy to give effect to the Tribunal's decision to review and whether it is appropriate to set aside the impugned decisions. The effect of these omissions is that Cultiver and Mike's Chicken will be in unlawful occupation of the leased premises and possession of any movable assets the State acquired when it purchased Mike's Chicken. This scenario is untenable as it exposes the Department to potential loss. It may render Cultiver and Mike's Chicken, its employees and stakeholders to the potential prejudice Cultiver has complained of.

[77] Cultiver has made bald allegations regarding the prejudice various stakeholders would suffer if the lease agreement is set aside. For example, it complains about prejudice to the national poultry supply chain and the local economy in which Mike's Chicken operates but has placed no information before the Tribunal to support these claims.

[78] Cultiver contends that it should not be divested of the rights it acquired from the impugned lease agreement. But, at all material times since the Polokwane application was instituted, Mike's Chicken was in business rescue because the Department had refused to fund its operations. Inexplicably, its business has turned around and it is yielding a profit. However, it probably remains in business rescue because it has not placed any evidence before the Tribunal confirming that it has been discharged from business rescue. Its business rescue practitioner has not confirmed its changed legal status and financial position in these proceedings.

[79] I am therefore unable to rely on the evidence disclose by Cultiver regarding the appropriate consequential relief.

[80] The Department has a duty in terms of the PLAS manual to monitor Mike's Chicken's performance in order to safeguard the state's investment into the Mike's

Chicken enterprise and the State owned assets it uses. It has not placed any information before the Tribunal in this regard. The Tribunal frowns upon the indifference displayed by the Department by not entering the fray to address the Tribunal on an appropriate remedy to prevent loss to the state as envisaged in s4(1)(c) of the SIU Act. Since the Department was impugning Cultiver's rights in the Polokwane application, the supine position it has adopted in these proceedings is most bizarre. At the very least, it ought to address the Tribunal on whether not setting aside the impugned agreement serves the objectives of the PLAS programme and if not, what is the most appropriate relief that would do so.

[81] For these reasons, the Tribunal has not been placed with sufficient information to give effect to its order to review the impugned decisions by determining whether it should set the impugned lease agreement aside and the suitable remedy to it should order to accommodate the interests of all the parties but most importantly to ensure that the State does not suffer loss as a result of the Tribunal's order.

[82] The further conduct of the matter to address the issues raised above will be determined at a case management meeting to be convened with the parties.

COST

[83] Costs are reserved for determination together with the appropriate redial relief.

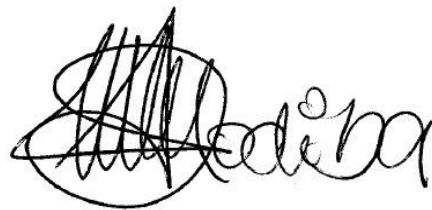
DELAY IN HANDING DOWN THIS JUDGMENT

[84] The delay in handing down is judgment is acknowledged and greatly regretted. It is occasioned by severe resource constraints, the most serious of which is judicial resources under which the Tribunal functions. The Tribunal apologises for any prejudice the parties may have suffered as a result of the delay in handing down this judgment.

[85] In the premises, the following order is made:

ORDER

1. The decision of the Minister of Rural Development and Land Reform to order the lease agreement referred to in (2) below is declared irregular and unlawful;
2. The lease agreement entered into between the Department of Rural Development and Land Reform and the first respondent dated 11 January 2019 is declared irregular and unlawful;
3. The Tribunal Registrar is directed to convene a case management meeting with the parties to determine the further conduct of the matter for the determination of the appropriate consequential remedy in terms of s4(1)(c) read with s8(2) of the SIU Act.



JUDGE L T MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the Applicants:	Adv. RJ Raath SC, assisted by Adv. D Mtsweni
Attorney for the Applicants:	Ms. S Zondi, Office of the State Attorney, Pretoria

Counsel for the 1st respondent:	Adv. S Stein SC, assisted by Adv. IB Currie
Attorney the 1 st respondent:	Mr. Alex Elliott, Elliott Attorneys T/A Blackbox Law
Date of hearing:	16 May 2022
Date of judgment:	19 April 2023

Mode of delivery: *this judgment is handed down by sending it by email to the parties' legal representatives, loading on Caselines and release to SAFLII and AFRICALII. The date and time for delivery is deemed to be 10 am.*