



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE
SPECIAL INVESTIGATING UNITS AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: KN/01/2021

In the matter between:

Special Investigating Unit

Applicant

and

Member of The Executive Council For
The Department of Transport,
Kwazulu-Natal

First Respondent

Nexor 312 (Proprietary) Limited
Trading As V N A Consulting

Second Respondent

Summary

Administrative Law – legality review – unreasonable delay – whether the Department of Transport, Kwa Zulu Natal irregularly awarded a tender to Nexor 312 (Pty) Ltd and whether the tender falls to be reviewed and set aside – whether the Special Investigating Unit's report into the awarding of this tender is irrational and falls to be reviewed and set aside.

JUDGMENT

MODIBA J:**INTRODUCTION**

[1] The Special Investigating Unit (“the SIU”) as applicant, seeks to review and set aside the first respondent’s 26 April 2018 decision to award a tender to Nexor 312 (Pty) Ltd Trading as VNA Consulting (‘Nexor’), the second respondent for the provision of an Infrastructure Delivery Management System (“IDMS”) and a Road Asset Management System (“RAMS”) in line with the Division of Revenue Act (“DoRA”) requirements (“the tender”). It also seeks an order that Nexor repays the SIU, alternatively National Treasury an amount of R25 412 700,00 and an amount of R44 228 652,00. In the alternative, the SIU seeks an order for just and equitable relief in terms of which Nexor accounts for all amounts paid to it under the tender, by rendering a full account of all payments it received under the tender and its reasonable expenses supported by necessary vouchers, provides a reconciliation of the said amounts and pays to the SIU alternatively, National Treasury whatever profits Nexor earned “*upon debatement of the account*”. In the further alternative, the SIU prays that the Tribunal grant such relief as it deems just and equitable in the circumstances.

[2] For convenience, I refer to the applicant as the SIU. I refer to the first respondent as the MEC. Where it is necessary to refer to the Department of Transport, Kwa Zulu Natal, I refer to it as DOT. I refer to the second respondent as Nexor. I refer to this application as the review application.

[3] Proclamation R.36 issued by the President of the Republic of South Africa (“the President”) on 18 December 2018, authorises the SIU to investigate the process that led to the awarding of the tender. The SIU contends that when it investigated the process that led to the awarding of the tender, it found various irregularities. It grounds its case on the alleged irregularities. It contends that when it awarded the tender, DOT contravened various procurement statutory provisions and regulations. As a result, the procurement process breaches section 217 of the Constitution which provides that when an organ of state procures goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive, and cost effective. It also contends that when it submitted its claims for various services, Nexor exaggerated them and/ or claimed for services not rendered.

[4] Nexor vigorously opposes the application on various grounds. It has raised various points *in limine*. It also opposes the application on the merits. It contends that the tender was adjudicated following a lawful tender process.

[5] The MEC initially filed a notice to abide. When the application was ripe and enrolled for hearing in April 2023, the MEC changed his decision and decided to file opposing papers. He successfully sought a postponement for that purpose. He was ordered to pay Nexor's wasted costs on a punitive scale. The SIU's wasted costs if any, were reserved for determination with the review application.

[6] Nexor had brought an application to compel the filing of additional material that purportedly form part of the record of the impugned tender. The SIU partially complied with Nexor's request for the material after Nexor had instituted the application to compel, disclosing only those documents it contends it has in its possession. It also filed an explanatory affidavit in which it only opposes the costs of the application. Nexor seeks such costs on a punitive scale. As a result, the costs of that application were reserved. They stand to be determined in this application.

[7] Not only did the MEC file opposing papers, but he also filed a counterapplication. He seeks an order reviewing the SIU's report on the investigation into the procurement process that led to the awarding of the tender reviewed and set aside. Nexor does not oppose the counterapplication. The SIU does. I will deal with the MEC's grounds of review and the SIU's grounds of opposition at the appropriate time. I conveniently refer to this application as the counterapplication.

[8] This judgment follows the following structure. I first deal with the review application. I start by outlining the history of the impugned procurement process. Then, I outline the SIU's grounds of review and MEC's points *in limine* and grounds of opposition. I then outline the constitutional, statutory, and regulatory provision relied on by the SIU. The SIU delayed bringing the application. It seeks an order condoning the delay. Regrettably, for the SIU, I find that it fails to make out a proper case for condonation. I then consider whether the delay can be disregarded in the interests of justice. The latter enquiry

requires that I traverse the merits. Again, regrettably for the SIU, since I find that it lacks prospects of success on the merits, I also find that it would not serve the interests of justice to overlook the delay. I then consider the costs of the review application.

[9] Secondly, I consider the counterapplication. It is also brought late. The MEC seeks condonation, alternatively that the delay is condoned in the interests of justice. Regrettably, the counterapplication stands to suffer the same fate as the review application. As I find in this judgment, a proper case for an order for condonation is not made out. I also find that it would not serve the interests of justice to overlook the delay.

[10] Although I dismiss both the review application and counterapplication for the reason that the SIU and the MEC delayed bringing these applications, I consider all the issues that arise in these applications to avoid any of the issues being considered by the appeal court for the first time should any of the unsuccessful parties resort to an appeal.¹

[11] Lastly, I consider the question of costs. In doing so, I first deal with the costs of the review application, followed by the costs of the counterapplication as well as the SIU's reserved costs of 18 April 2023. Then, I deal with the reserved costs of Nexor's application to compel. An order concludes the judgment.

REVIEW APPLICATION

[12] In its answering affidavit, Nexor elaborately deals with the history of the procurement process. In reply, save for taking issue with the way Nexor obtained documents from DOT and for relying on inadmissible hearsay, the SIU does not raise a material dispute on the history of the tender as set out by Nexor. There is no merit in SIU's objection to the admissibility of this evidence. It is based on an affidavit a DOT official, Mr Thabang Nkosi furnished to Nexor. It is an annexure to Nexor's answering affidavit. But more importantly, when he entered the fray, the MEC confirmed it. Therefore, this evidence is perfectly admissible. The version of Nexor and the MEC

¹ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) ([2012] 2 All SA 345; 2012 (6) BCLR 613; [2012] ZASCA 15) para 49; *Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others* 2019 (3) SA 97 (SCA) para 33; *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA) para 21.

regarding the history of the tender places some of the grounds of review relied on by the SIU, which I deal with later in this judgment in dispute. In line with the seminal Plascon Evan's rule, to the extent not seriously disputed by the SIU, the version of Nexor and the MEC is determinative of the factual issues that arise in this application.

[13] Nexor alleges that in January 2013, an independent service provider named, Moteko, provided DOT with a *status quo* report in respect of all [DOT's] current and pending projects. On 29 April 2015, a DOT official, Mr. S.S. Nkosi, approved a financial analysis on the use of consultants for the Transport Information Research Services ("TIRS"). The analysis reflected, *inter alia*, that the DOT expended 15% or R900 million per annum on professional fees and that the implementation of the proposed IDMS and RAMS model would reduce this bill by more than 10% or at least R100 million per annum. The proposal was founded on the consideration that DOT did not have the necessary in-house skills to meet the requirements of the proposed model.

[14] On 15 August 2016, DOT undertook a skills audit or analysis a view to identifying the shortage of professional skills within its establishment. On 9 November 2016 a detailed submission was made to the DOT Bid Specification Committee ("BSC") for the appointment of a service provider for the provision of an IDMS and RAMS for DOT. The submission reflected the reciprocal inter-relationship between the IDMS and RAMS and the lack of capacity within DOT to fulfil the services required. Details of the proposed budget were set out therein. BSC approved the submission.

[15] Subsequently, a tender was advertised. I conveniently refer to this tender as the original tender. The advertisement attracted 3 bids from two entities and Nexor.

[16] On 21 June 2017, a day before the closing date of the original tender, DOT received a letter from National Treasury raising concerns as to whether the original tender was biased and crafted to benefit certain bidders. DOT replied to National Treasury on 5 July 2017, addressing National Treasury's concerns and making an undertaking to re-advertise the tender, taking the National Treasury's concerns into account.

[17] On 31 July 2017 the DOT's Bid Adjudication Committee ("BAC") approved the cancellation of the original tender and authorised the advertisement of an amended tender, considering the concerns raised by National Treasury. Subsequently, DOT sent

the amended tender to National Treasury. National Treasury confirmed that it had no further concerns in relation to the reissued tender. DOT advertised the amended tender on 18 August 2017. This is the tender impugned in these proceedings.

[18] 9 tenderers, including Nexor, submitted bids in response to the tender. DOT's Technical Bid Evaluation Committee ("TBEC") evaluated the bids on 13 March 2018. The evaluation was undertaken in accordance with the scoresheet that was incorporated in the tender document. According to the minutes of TBEC's 13 March 2018 meeting, 5 bids of the 9 bids were disqualified as being non-responsive. As a result, only the remaining 4 bids were assessed for functionality. Of these 4 bids, only 2 [one being Nexor's] met the 70% threshold for functionality and were assessed for preference points.

[19] TBEC met again on 19 March 2018 and noted that the other bidder who met the functionality threshold did not price certain items specified in the pricing schedule. Its bid pricing schedule was accordingly incomplete and deemed non-responsive. This left Nexor's bid uncontested. The tender was awarded to Nexor because its bid met all the tender requirements. DOT advertised the awarding of the tender to Nexor in the Government Tender Bulletin on 6 April 2018. No appeals were noted against the awarding of the tender. DOT addressed a letter of award to Nexor on 18 April 2018.

[20] On 23 April 2018, the Consulting Engineers Council of South Africa ("CESA") addressed a letter dated 23 April 2018 to DOT querying the awarding of the tender to Nexor on the basis that it is not listed as one of the entities that bid for the tender. DOT responded to CESA that Nexor is listed by its trading name VNA Consulting. CESA addressed no further correspondence to DOT. It also did not apply for the review of the tender.

[21] On 26 April 2018, DOT concluded a contract with Nexor pursuant to the awarding of the tender. Nexor proceeding to fulfil its obligations in terms of the contract. At no stage did the DOT document any material complaint with Nexor regarding lack of compliance with its obligations under the contract. On 4 June 2021 National Treasury addressed a letter to DOT noting its great success with its implementation of the IDMS programme.

Grounds of review and grounds of opposition

[22] The SIU relies on the following grounds of review.

- 22.1 DOT officials involved in the procurement process for the award of the tender acted in contravention of prescribed legislation, policies and procedures.
- 22.2 The pairing of the IDMS program with the RAM resulted in only one tenderer allegedly meeting all the needs required. This resulted in contravention of Sections 38 and 45 of the PFMA and, thus a contravention of Section 217(1) of the Constitution.
- 22.3 National Treasury raised concerns with the tender advertisement whereafter the advertisement was withdrawn. The concerns were not adequately addressed before re-advertisement to the extent that the proof of ownership of equipment and condition of eligibility that service providers must have their head office in KwaZulu Natal where preference will be given to tenderers operating within KwaZulu-Natal having an established base in KwaZulu-Natal Province (for the past 5 years) remained in the qualification criteria contained in C3.11.1 of the amended tender.
- 22.4 There was no gap analysis conducted to establish whether DOT has the requisite skills to implement the project as required in terms of the prevailing Treasury Instructions.
- 22.5 The score sheet and evaluation criteria were predetermined. The scoresheet and the scoring criteria were developed by Mr Thabang Nkosi, a DOT Supply Chain Management ("SCM") official and given to TBEC.
- 22.6 The Auditor-General of South Africa ("AGSA") also found that the tender was irregularly awarded to Nexor.
- 22.7 In December 2018, Nexor irregularly claimed payment in the amount of R25 412 700 for bridges and culverts. Since the inspection of bridges formed part of the project scope, Nexor double-charged DOT for this item.
- 22.8 Nexor irregularly claimed payment in an amount of R44 228

652 for the period 26 March 2020 to 30 April 2020 under circumstances where it did not render any services under the contract because DOT has suspended the services because of the Covid-19 level 5 lockdown.

[23] For reasons I consider at a pertinent point in this judgment, Nexor contends that there is no merit to these grounds of review. Both respondents have also raised several points in *limine*. I consider DOT's under the counter application because they relate to that application. I list Nexor's below:

23.1 whether the SIU is entitled to any relief under the Promotion of Administrative Justice Act² ("PAJA").

23.2 whether the SIU is entitled to any relief under the principle of legality.

23.3 whether the SIU delayed to bring the review application.

23.4 whether certain allegations by the SIU stand to be struck out as inadmissible evidence.

Applicable constitutional, statutory, and regulatory provisions

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

The Constitution of the Republic of South Africa Act, No.108 of 1996

[25] Section 173 which provides as follows:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[26] Section 217 which provides as follows:

² Act 3 of 2000.

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

The Public Finance Management Act, No. 1 of 1999

[27] Section 38(1)(a) which provides as follows:

“(1) The accounting officer for a department, trading entity or constitution 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, and cost-effective.”

[28] Section 1 provides as follows:

“Irregular expenditure means expenditure other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including:

(a) this act or

(b)

(c) any provincial legislation providing for procurement procedures in that provincial government.

Fruitless and wasteful expenditure means expenditure which was made in vain and would have been avoided had reasonable care been exercised.

Unauthorised expenditure means:

- (a) over-spending of a vote or a main division within a vote;
- (b) expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division.”

[29] Section 45 provides as follows:

“45. Responsibilities of other officials

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;
- (d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 44; and
- (e) is responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility.”

[30] Section 76(4)(c) provides as follows:

“76 Treasury regulations and instructions

- (4) The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning-

- (a)
- (b)
- (c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive, and cost-effective”

The Preferential Procurement Regulations, 2017

[31] Item 5 provides as follows:

“5 Tenders to be evaluated on functionality

- (1) An organ of state must state in the tender documents if the tender will be evaluated on functionality.
- (2) The evaluation criteria for measuring functionality must be objective.
- (3) The tender documents must specify-
 - (a) the evaluation criteria for measuring functionality;
 - (b) the points for each criteria and, if any, each sub criterion; and
 - (c) the minimum qualifying score for functionality.”

The Treasury Regulations

[32] Regulation 16A.4 regulates the establishment of supply chain management units. It provides as follows:

“16A.4.1 The accounting officer or accounting authority must establish a separate supply chain management unit within the office of that institution's chief financial officer, to implement the institution's supply chain management system”

The KZN DoT Supply Chain Management Policy

[33] Item 15 deal with bid specifications. It provides as follows:

“15. Specifications:

15.1 must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services.

15.2 must consider any accepted standards such as those issued by Standards South Africa, the International Standards Organisation, or an authority accredited or recognised by the South African National Accreditation System with which the equipment or material or workmanship should comply.

15.3 must, where possible, be described in terms of performance required rather than in terms of descriptive characteristics for design.

15.4 may not create trade barriers in contract requirements in the forms of specifications, plans, drawings, designs, testing and test methods, packaging, marking, or labelling of conformity certification.

15.5 may not refer to any particular trademark, name, patent, design, type, specific origin, or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work, in which case such reference must be accompanied by the word "equivalent".

15.6 must indicate functionality criteria (where required) and the PPPFA points system to be utilised; and

15.7 must be approved by the SSC and SAC In terms of the General Delegations of Authority prior to publication of the invitation for bids.”

National Treasury Guidelines and Practice Notes

[34] The SIU also relies on various National Treasury Guidelines and Practice Notes. Given the basis on which I determine the review application, save for the General Procurement Guidelines, I do not consider it necessary to delve into these.

[35] The General Procurement Guidelines stipulate five (5) pillars of procurement namely:

35.1 value for money:

35.1.1 This is an essential test against which a department must justify a procurement outcome. Price alone is often not a reliable indicator and departments will not necessarily obtain the best value for money by accepting the lowest price offer that meets mandatory requirements. Best value for money means the best available outcome when all relevant costs and benefits over the procurement cycle are considered.

35.1.2 The procurement function itself must also provide value for money and must be carried out in a cost-effective way. Procurement organisations, whether centrally located or devolved to individual departments, should:

- (a) avoid any unnecessary costs and delays for themselves or suppliers;
- (b) monitor the supply arrangements and reconsider them if they cease to provide the expected benefits; and
- (c) ensure continuous improvement in the efficiency of internal processes and systems.

35.1.3 open and effective competition;

35.1.4 ethics and fair dealing;

35.1.5 accountability and reporting; and

35.1.6 equity.

Nexor's application to strike out

[36] Nexor seeks several material in the SIU's founding affidavit struck out. They are as follows: 36.1 Paragraph 46 to 49 – the facts alleged in this paragraph are common cause between the parties. They are a truncated evidence Mr Thabang Nkosi set out in an affidavit he furnished to Nexor, which the latter attached to its answering affidavit. Therefore, Nexor's request stands to be dismissed.

36.2 Paragraphs 66.5 to 66.6 fall to be struck out. The source of these facts is not identified, and the depositor's affidavit is not filed and/or referenced in SIU's founding affidavit.

36.3 No proper case is made out for striking out the rest of the sub paragraphs in paragraph 66. The facts set out in the relevant affidavits do not sustain the SIU's case on the basis of the Plascon Evan's rule. According to Nexor, pairing IDMS and RAMS is consistent with national government policy. The SIU's has not seriously disputed this.

36.4 Paragraphs 72.5 and 72.6 – there are no paragraphs in the founding and supplementary founding affidavits that bear these numbers. The SIU takes no issue with the numbering. It used the same number reference in its heads of argument. It appears the relevant paragraphs are 75 and 76. They deal with payments Nexor received from DOT in respect of Invoice No. IDMS 007 for Bridges and Culverts. The SIU's response to Nexor's attacked is simply that this is what its investigation revealed. The payments themselves are not in dispute between the parties. It is the reason for the payments that is contested. I consider this dispute in the relevant section in this judgment. Therefore, a request for the striking out on these paragraphs is refused.

36.5 AGSA's Report: Annexure VM 29 – Nexor wants it struck out because it has not been sworn to and contains opinion evidence. But, it has not identified the relevant parts of AGSA's report which contain opinion evidence. SIU correctly contests this request on the basis that the report is a public document. However, AGSA's findings and recommendations are not binding on this Tribunal. Further, any opinion evidence contained in AGSA's report sought to be relied on by the SIU is inadmissible. Thus, Nexor has not made out a proper case for the report to be struck out.

36.6 Nexor seeks paragraph 68 in the founding affidavit where the allegation regarding the irregular payment of bridges and culverts is made on the basis that it constitutes opinion evidence by AGSA. It also seeks the allegations in paragraphs 69 to 72 of the founding affidavit on the basis that the deponent to the SIU's founding affidavit lacks the necessary expertise to express the opinion he makes in these paragraphs. These paragraphs fall to be struck for the reasons set out by Nexor.

[37] There is material Nexor seeks struck out on the basis that the SIU attached it without identifying the specific extracts thereof in which it places reliance. This

Tribunal's decision on costs ought to adequately address any prejudice Nexor stands to suffer as a result. Thus, the request is refused.

PAJA and the Principle of Legality

[38] As already indicated, the review application turns on the SIU's delay in bringing it. Therefore, engaging elaborately with the other points in *limine* raised by Nexor will not add much value to this judgment. In any event, the points in *limine* outlined in 23.1 and 23.2 above lack merit. It has become trite as held in *Gijima Holdings*³, that since an organ of state lacks the right to just administrative action, it may not bring a review application in terms of PAJA. In terms of the Constitutional Court judgment in *Ledla*⁴, the Tribunal lacks constitutional jurisdiction as it is not a court. However, its powers in terms of section 8 of its enabling statute are wide enough to incorporate legality reviews. I therefore adjudicate the review application based on the *dicta* in these two judgments.

The delay in bringing the application

[39] I resort to the principles outlined below to determine whether the SIU delayed bringing the review application.

[40] Unlike a review brought under PAJA, there is no fixed time specified for bringing the review 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.⁵ Determining whether a review application was brought within a reasonable time involves a two-stage enquiry.⁶ 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 and determine the merits of the application.⁷

³ *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

⁴ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* 2023 (2) SACR 1 (CC).

⁵ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC)11-12.

⁶ *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).

⁷ *Buffalo City Metropolitan Municipality* see fn8 at para 11-14.

[41] In *Buffalo City*⁸, 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 and reasons for the delay ought to be set out. The explanation must cover the entirety of the delay.

[42] The second stage of the enquiry into the reasonableness of the delay is a flexible one. It involves a legal evaluation taking into account a number of factors such as the nature of the impugned decision, the Tribunal's duty in terms of section 8 of its enabling statute to review and set aside an unlawfully awarded tender, the possible consequences of setting aside the impugned decision including potential prejudice to affected parties and whether such may be ameliorated by the court's power to grant a just and equitable remedy. The interests of justice are an overriding factor in this enquiry. Some of the relevant factors will require the merits of the review to be traversed.

[43] Since the SIU seeks condonation for the delay, I also consider whether it has made out a proper case for such an order. The factors that need to be considered when granting condonation are as follows :

- 43.1 The nature of the relief sought.
- 43.2 The extent and cause of the delay.
- 43.3 The effect of the delay on the administration of justice and other litigants.
- 43.4 The reasonableness of the explanation for the delay.
- 43.5 The importance of the issue to be raised.
- 43.6 The prospects of success.

⁸ Fn8.

[44] Proclamation R.36 of 2018 was issued on 18 December 2018. The SIU only instituted the present application on 25 March 2021. This is two years and three months after the proclamation was issued. In its founding affidavit, the SIU fails to explain the delay. At that stage, it had made no application for condonation. It only addressed the issue in reply to the second respondent's point in *limine*.

[45] When the SIU ultimately explained the delay, it said that the investigation began in February 2019 because most SIU members were on leave during December 2018 and January 2019. It explains that several other factors caused the delay. They are as follows:

45.1 SIU investigations are by their very nature protracted.

45.2 Lack of cooperation from the DOT its officials who are in league with Nexor and are themselves subject to disciplinary proceedings.

45.3 The declaration of the state of national disaster in March 2020.

[46] Considering the activities the SIU undertook to investigate the tender, it does not support its contention that its investigation into the tender was protracted. The SIU largely relied on the findings AGSA made in the Final Management Report dated 29 July 2019. When it conducted its own investigations, it interviewed several DOT officials. During these interviews, it largely focused on AGSA's findings. It also studied invoices. It discloses that it called for and studied bank accounts but fails to take the Tribunal into its confidence regarding its findings. The bank accounts could not have caused the delay because the SIU does not rely on them in this application. As contended on behalf of Nexor, AGSA's findings constitute inadmissible opinion evidence. They are also not binding on this Tribunal.

[47] The DOT disciplinary proceedings against implicated officials could also not have caused a delay because they emanated from the recommendations the SIU made in its investigative report.

[48] The SIU fails to explain in what manner the Covid-19 pandemic contributed to the delay. The hard lockdown proclaimed in response to the Covid 19 pandemic only endured for approximately three weeks.

[49] Therefore, the SIU's explanation is not only scanty, but it also provides no reasons on which to find that the delay was justified. But even more seriously, the SIU fails to fully account for the period of the delay. In the absence of a full explanation, it is impossible to determine whether the delay was reasonable. I am therefore constrained to find that the delay was unreasonable.

[50] From the facts made available or objectively available factors, there must be a basis for a court to exercise its discretion to overlook the delay. For reasons set out below, I find that the circumstances of the review are not proper for the exercise of my discretion to overlook the delay.

[51] The rule against delay in instituting review proceedings is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. It serves to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.⁹ Once a decision (such as the awarding of a tender) is taken, actions taken on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

[52] When considering whether to overlook the delay, courts are guided by the following considerations:

52.1 potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision.

⁹ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35 at [73].

52.2 whether the Tribunal's power to grant a just and equitable remedy and this ought to be considered.

52.3 the nature of the impugned decision. This, requires a consideration of the merits of the legal challenge against that decision.

52.4 the conduct of an applicant.

[53] The SIU badly alleges that none of the respondents would suffer prejudice if the tender is reviewed and set aside. I find that the potential prejudice to the DOT, Nexor and its directors, subcontractors and employees is huge. Potential prejudice substantially lies in the DOT, its official and Nexor and its officials being implicated in an irregular tender on grounds that are devoid of merit. This may cause an enduring blot on the professional and organization profiles of these parties. Nexor also contends that the post- implementation unravelling of a major infrastructure project worth billions of dollars, implemented over 5 years will undoubtedly be time consuming.

[54] Within six months of the tender being awarded, the Proclamation authorizing the SIU to investigate it was issued. The tender period was five years. The SIU did not consider it necessary to mitigate potential loss to the state by interdicting the implementation of the tender. It only attempted to get DOT to terminate the contract with Nexor on 1 July 2021. When Nexor protested, if the SIU was confident of its case, it would have still sought to interdict the further implementation of the tender. It did not do so. In the meantime, Nexor continued to incur expenses and employ resources to meet its obligations in terms of the tender. Similarly, DOT met its obligations to Nexor including making payments. The tender expired by effluxion of time in March 2023. The prejudice that Nexor and DOT stands to suffer is blatant.

[55] Unravelling profits earned from a R2 billion tender implemented over a five-year period will no doubt be financially prejudicial as it is likely to be a costly and time-consuming exercise.

[56] The last factor requires that I traverse the merits of the review application. I do so in the next section of this judgment.

The merits

Pairing of the IDMS and RAMS project

[57] The SIU alleges that DOT paired the IDMS programme with the RAMS programme, thereby amending the focus of the IDMS programme. This resulted in only one tenderer meeting all the needs required, even though several tenderers could have fairly competed on an equal footing solely for the IDMS contract. The RAMS programme and the equipment required for the collection of data, with greater focus added to this aspect, turned out to be the deciding factor in this tender. There was no need for these two programmes to be paired. This resulted in contravention of DOT SCM Policy and consequently, section 45 of the PFMA.

[58] In response to this allegation, Nexor contends, with reference to National Treasury's SIDMS and the SIPDM, that the RAMS was an integral component of the IDMS. In reply, the SIU investigator fails to rebut this averment. He contends that the deponent to Nexor's answering affidavit is not a RAMS and IDMS expert and defer to affidavits by certain DOT officials without specifically dealing with their versions. Then, again SIU resorts to casting aspersions on Nexor by alleging that it lacked RAMS and IDMS expertise and in-sourced it from a company that is not based in KZN. The SIU cites no statutory or regulatory prohibition against this strategy. It is

silent on precisely what component of the tender the in-sourced services addressed and why such in-sourcing is irregular.

[59] Nexor also relies on affidavits by Lulamo Msondezi Futshane, the Chief Director of the National Department of Transport responsible for Road Engineering Standards and Road Asset Management, and Lincoln Letsoaela Matli, the Managing Director of Mosebo Consulting.

[60] In its answering affidavit, DOT also disputes this allegation on the same basis as Nexor. It specifically plead that it is not DOT that paired these programmes.

[61] The SIU has failed to make out a case that pairing these two programmes were solely paired to benefit Nexor. In reply, it disturbingly did not address these allegations.

[62] As contended by Nexor, 9 companies bid for the tender. They would not have done so if they did not meet the tender requirements. The fact that there is a company that did not bid because it lacked the expertise for these two programmes does not render the procurement process uncompetitive. But, more importantly, pairing these programmes is supported by national policy as per National Treasury's SIDMS and SIDMS and as confirmed by National Department of Transport officials referenced in paragraph 59 above.

Failure to address queries by National Treasury

[63] This is another finding by AGSA which the SIU seeks to inappropriately rely on without properly investigating it and placing evidence before the Tribunal. With reference to documents from the record of the tender or documents relied on by the SIU, Nexor and DOT demonstrate that DOT did address queries by National Treasury. In reply to DOT's answering affidavit, SIU merely regurgitated the

allegation without rebutting DOT's answer. In reply to Nexor's answering affidavit, the SIU again questioned Nexor's competency to place a version in response to issues within the personal knowledge of DOT's officials without rebutting Nexor's version.

[64] The SIU failed to impugn Nexor's version, supported by documents DOT disclosed in its record of the tender that it did address National Treasury's concerns. Worse so, DOT confirmed this version in its answering affidavit.

Failure to conduct a gap analysis

[65] In its founding affidavit, the SIU alleges that DOT's Deputy Director General TIRS failed to conduct a comprehensive gap analysis to determine whether DOT had the requisite skills and resources in full time employment to perform the duties contracted to Nexor.

[66] In its supplementary founding affidavit, the SIU reiterates the above allegation. It further alleges that Nexor's tender was not cost effective. Hence, AGSA found that it contravened s38(1)(a)(ii) of the PFMA and TIN 1 of 2013/2014. Numerous, the SIU sought skills information from Mr Thabang Nkosi and Mr S.S. Nkosi. They did not provide it. It was also not included in the record of the impugned decision. They were subjected to a disciplinary enquiry. One of the charges relates to their failure to conduct a gap analysis and compile a business case in respect of the tender.

[67] To substantiate this allegation, the SIU relies on a document entitled "Discrepancies during the planning of the procurement in which AGSA queried lack

of compliance with Treasury Note 1 and s38(1)(a)(ii) of the PFMA and the Department's response thereto, which the SIU failed to attach to its application. It does not take the Tribunal into its confidence regarding whether it was aware of this documents and why it did not disclose them.

[68] This allegation is badly made. Documents relied on by Nexor which ought to only be privy to DOT are not specified. The record of the tender has been disclosed in these proceedings at Nexor's instance. The fact that Nexor has been conducting consulting work with DOT since 2007 does not render the tender irregular.

[69] In reply, without dealing with the evidence Nexor put up to refute the allegation that DOT failed to conduct a gap analysis, the SIU investigator cast aspersions on Nexor and its Chief Executive Officer Managing Director Vikash Bharathlal Narsai ("Mr Narsai"). It accuses Mr Narsai of failing to disclose to the Tribunal that he worked on various DOT contracts since 2007 prior to being awarded the tender and previously worked with Mr S.S. Nkosi. Hence, Nexor had access to documents that should only be privy to DOT.

[70] I determine this issue on the respondent's version. According to Nexor, the SIU inappropriately placed reliance on TIN 1 of 2013/2014. It had been repealed when the tender was issued. Nexor further alleges that Mr S.S. Nkosi conducted a skills audit on 15 August 2016 to identify skills gaps within DOT. The skills audit formed the basis for a motivation Mr S.S. Nkosi made to the DOT Bid Committee for the provision of IDMS and RAMS services. In its answering affidavit, DOT places reliance on the submission its head of department made to the Bid Committee, recommending the appointment of consultants to provide DOT with the skills resources required for the project, which it needed to implement the proposed project. It further contends that the DOT SCM policy did not specifically require that a report on the skills gap analysis be compiled.

[71] At paragraphs 391 to 433 of its answering affidavit, Nexor sets out a detailed analysis of AGSA's queries, the DOT's responses thereto and AGSA's conclusions. Nexor contends that AGSA's report, findings, and conclusions are contradictory, confusing, and unclear. Pertinently, it contends that AGSA misdirected herself by basing her findings on the repealed TIN 1 of 2013/14. She ought to have relied on Treasury Instruction Note 3 of 2017/18 ("TIN 3 2017/18") which came into effect on 15 May 2017 and was thus the applicable regulation when the tender was planned. Nexor analyses the provisions of this Treasury Note and questions whether it applies to the services to be rendered in terms of the tender as it refers to claims that don't apply to the tender.

[72] The SIU's response to this allegation is that the DOT should place a version on these issues. The DOT has not challenged AGSA's report. It therefore stands. It is up to the Tribunal to decide what to make of it.

[73] When Nexor rebutted the SIU allegation that DOT failed to conduct a gap analysis, in reply, the SIU resorted holes AGSA sought to poke into the gap analysis. This represents a deviation from its case as set out in its founding papers. Its case is that no gap analysis was conducted. Its case is not that a deficient gap analysis was conducted. Therefore, its response that AGSA's report stands does not justify a finding that the DOT failed to conduct a gap analysis.

[74] The SIU's reliance on AGSA's findings is misplaced. They are based on a repealed Treasury Instructions. The SIU has not laid a factual basis for a finding that Treasury Note 3 of 2017/18 was applicable and DOT's gap analysis failed to comply with it. In any event, AGSA's findings do not stand as evidence before the Tribunal. The fact that Mr S.S. Nkosi has been subjected to a disciplinary enquiry for his role in the tender does not take this allegation further. These factors do not sustain a finding that the DOT failed to conduct a gap analysis prior to embarking on a tender process therefore failing to adopt cost containment measures as required by s38(1)(a)(ii) of the PFMA. The SIU ought to place the necessary evidence before the

Tribunal to sustain a finding that DOT contravened the statutory and regulatory provisions it relies on. It has failed to do so.

[75] But even more, disturbingly, the SIU made no attempt to dispute the version DOT set out in its answering affidavit. It ought to have properly investigated AGSAs complaints and placed reliable evidence before the Tribunal. Its investigation of this ground of review is inadequate.

Functionality evaluation

[76] Notably, the SIU does not raise this ground of review in its founding affidavit. In its supplementary founding affidavit, it cites the following finding by AGSA:

“There were discrepancies during functionality evaluation in that the scores as allocated by the BEC are inconsistent and not in line with the sub-criterion provided in the bid documents. The BEC allocated scores differently and this is indicative of a subjective evaluation process. There has been non-compliance with Section 5 (1-3) of the Preferential Procurement Regulations, which requires an objective process and for the tender documents to state whether the tender will be evaluated on functionality and to specify the evaluation criteria for functionality, the points for each sub-criterion and the minimum qualifying score for functionality.”

[77] Its supplementary founding affidavit does not reflect that the SIU investigated this finding. It seeks to rely on it without placing any evidence before the Tribunal that would justify such a finding by the Tribunal. Nonetheless, Nexor answered to this unsubstantiated allegation. It had called on the SIU to discover minutes of the Tender Evaluation Committee meeting convened on 13 March 2018 and the score sheets of the members who served on the Functionality Evaluation Panel in terms of Uniform Rule 35(12). These documents reflect the evaluation criteria which were utilised in the functionality assessments were the very criteria prescribed in the amended tender document as set out. Nexor contends that it is therefore misleading and

dishonest for SIU investigator to suggest that Mr S.S. Nkosi prescribed amended evaluation criteria.

[78] The functionality criteria of the amended tender were reflected in the relevant tender document as evident from annexure “VM9:104”. In house resources made up only 6% of the evaluation criteria and survey equipment only 14% thereof. Evaluation Schedules 1 to 6 referred to in the amended tender “VM9:104” and “VM9:129-136” which were part of the amended tender were also relied upon in the functionality assessment thereof. Annexure “VM9:104” and “VM9:105” reflected that the scores of each of the evaluators would be averaged, weighted, and then totalled to obtain the final scores. Annexure “VM15:194-219”, reflects that the said criteria were relied upon in the functionality assessment of the four (4) qualifying bids that were assessed for functionality.

[79] The SIU simply dismissed Nexor’s version by questioning its qualification to rely on this evidence, contending that it is inappropriately speaking for the DOT. Only in its supplementary replying affidavit does it seek to rely on the affidavit of Ntombela who apparently deals adequately with the issue of score sheets without specifically stating what it found in its investigation in respect of the relevant issues. Pertinently, the SIU has failed to deal with Nexor version drawn from the DOT’s documents referenced above.

[80] According to DOT, when the SIU investigator interviewed him, Mr Thabang Nkosi explained what transpired in the TBEC meeting when the tender was evaluated. When it made its findings, the SIU has ignored both the minutes and the explanation. The SIU findings are inconsistent with Mr Thabang Nkosi’s version.

[81] In reply, the SIU reiterates its reliance on AGSA’s report, whose findings, as already stated, are not binding on this Tribunal.

[82] In line with the Plascon's Evan's rule, I accept Nexor's and DOT's version as set out above.

AGSA's findings

[83] In its founding affidavit, the SIU alleges that on or about 29 July 2019, AGSA submitted his Final Management Report to the DOT detailing several queries and responses and made findings regarding the gap analysis and evaluation of the tender as addressed above. AGSA also found that there were discrepancies relating to the variation of the contract in that DOT followed a process for a variation to tender number ZNT 1400-17T and for the in-sourcing of specialists' services for assistance to addressing the issues relating to irregular expenditure, accruals, payables and commitments. The contract was varied at an amount of **R 14 658 348.50** based on an emergency. According to AGSA, this was in contravention of section 38 (1) (a) (iii) of the PFMA as it was not competitive and cost effective and in contravention of Treasury Regulations 16A.6.4 as no emergency existed as envisaged in paragraph 8.2 of Treasury Instruction Note 3 of 2016-2017. Further, AGSA found that there were internal control deficiencies in that DOT's Management did not review and monitor compliance with applicable laws and regulations. There was also a lack of adequate oversight in respect of the SCM process.

[84] The AG made the following recommendations to the DOT Management:

84.1 SCM prescripts must be complied with during the procurement process.

84.2 Nexor's appointment is regarded as irregular and all payments made should be disclosed in the financial statements.

84.3 DOT management to consider investigating the reason why the recommendations by the National Treasury were not adhered to.

[85] The SIU alleges that AGSA's findings confirm that there were irregularities in the procurement process, hence the decision to award the tender Nexor falls to be reviewed.

[86] As contended by DOT, the SIU's reliance on AGSA's findings is misplaced. It did not properly investigate them. It did not consider DOT's response to the findings, which reflects that AGSA's findings are incorrect. The SIU has no mandate to act on the findings in terms of the SIU Act as they do not emanate from its investigation. Further, AGSA has not referred the findings to the SIU for further action in terms of section 5A of the Public Audit Act, 25 of 2004 ("the PAA"). I am constrained to rely on the positions DOT and Nexor take in respect of the AGSA's report.

Double charging and Claim for Services not Rendered

Payment for Bridges and Culverts

[87] The SIU alleges that on 18 December 2018 Nexor claimed, and DOT paid to Nexor an amount of R25,412, 700 in professional fees for the inspection of Bridges and Culverts. On 9 January 2019, Nexor again claimed for the same item an amount of R35,000,00 which DOT also paid. Therefore, Nexor double charged for this item. This item was part of the contract and should have been covered in the payment for R35,000,000. Alternatively, in the event that the inspection of bridges was not part of the contract, a variation of the contract ought to have been made or a new tender issued. Therefore, the amount of R25,412,700 was irregularly claimed. It constitutes fruitless and wasteful expenditure in terms of section 45 of the PFMA.

[89] Nexor disputes that the payments were irregular. DOT also disputes this.

[90] According to Nexor, the tender made provision for the inspection of 1,000 bridges per annum. An allowance for the inspection of a further 5,000 bridges was made given that the tender is for a period of 5 years. After Nexor was appointed,

DOT informed it that it had a back-lock for the inspection of bridges. It required Nexor to fast-track its work to enable it to comply with its RAMP submission for 2018. 3,683 bridges were identified for this purpose and inspected between June and September 2018. An invoice attached as VM:39 for R25,412,700 was claimed in December 2018. DOT duly paid it.

[91] According to DOT, even if these payments were irregular, they do not render the awarding of the tender irregular as the payment was made after the tender had been awarded. The SIU has not furnished evidence that the two invoices relate to the inspection of the same bridges. It has not properly investigated this issue or engaged DOT in that regard.

[92] I have already ruled that paragraphs 68 to 71 in the founding affidavit where these allegations are made falls to be struck out as sought by Nexor. In any event, the allegations made in these paragraph fall to be determined in Nexor and DOT's version as set out above.

Payments made during Lockdown

[93] The SIU alleges that Nexor irregularly claimed payment for services rendered during the Covid-19 Lockdown period between 25 March and 30 April 2020 under circumstances where DOT had issued an instruction suspending all construction sites and demanding that all such sites be decommissioned.

[94] It is common cause that on 19 March 2020, DOT paid Nexor an amount of R42 110 927.00 in respect of an invoice annexed to the founding affidavit as annexure "VM 42". However, on 24 March 2020, Nexor further submitted an invoice annexed to the founding affidavit as annexure VM 43 in the amount of

R14 942 587.00 for part of April 2020. On 20 April 2020, Nexor further invoiced DOT the invoice marked annexure “VM 44” in the amount of R29 286 065.00 for the balance of April 2020.

[95] According to the SIU, having invoiced DOT the full amount in respect of March 2020 through the invoice of 19th March 2020, the further payment of R14 942 587.00 which was invoiced on 24 March 2020 and the payment of R29 286 065.00 which was invoiced on 20 April 2020, amounting to the total of **R44 228 652.00**, were irregularly claimed by Nexor. I also constitute fruitless and wasteful expenditure in terms of section 45 of the PFMA.

[96] Nexor and DOT deny that these payments were irregularly made. According to Nexor and DOT, the invoices rendered in March 2020 relate to services rendered prior to the lockdown. In relation to the April invoice, the SIU has failed to establish that the services were rendered during lockdown or at all. DOT considered services rendered in terms of the contract essential services and granted Nexor a permit to continue to render services during the lockdown period.

[97] In reply, the SIU essentially seeks to impugn the validity of the permit DOT issued to Nexor and that the services purportedly rendered were essential services. This is a new case inappropriately made in reply. The case the SIU made in the founding affidavit is that payments were made under circumstances where no services were rendered. The new case made in reply only shows that the SIU failed to investigate the allegations and engage DOT in respect thereof.

[98] Nexor asserts that it had provided DOT with a cash flow annexure to the Service Level Agreement it concluded with DOT. It makes provision for a flat rate. The relevant services have been rendered as reflected in summaries and compact discs reflecting the particulars of the work done.

[99] I find that there is no merit to the SIU's grounds of review.

COUNTERAPPLICATION

[100] In the counterapplication, the MEC impugns the SIU investigation report into procurement irregularities in respect of the tender and seeks the SIU findings declared constitutionally invalid, unlawful, and set aside. He relies on the following grounds of review:

100.1 The findings and the report of the SIU bear no rational connection to the information that served before the SIU and as a result lack substantive rationality; and

100.2 When conducting the investigation, the SIU failed to afford DOT and/or its officials, especially those against whom adverse findings and recommendations were made, an opportunity to make presentations in relation to the intended findings and recommendations.

[101] The SIU oppose the counter application. It has raised several points in *limine*. It also opposes the counter application on the merits. It only raised one substantive ground of defence, that the findings in its report are procedurally and substantively rational.

[102] The SIU's points in *limine* are as follows:

102.1 The Tribunal lacks jurisdiction to grant the relief sought in the counter application and lacks the competency to grant any relief at the instance of any other party, except at the instance of the SIU.

102.2 The MEC has unreasonably delayed bringing the counter application.

102.3 The MEC has pre-empted his right to review and set aside the findings and recommendations of the SIU.

102.4 The President ought to have been joined as a party to the proceedings; and

102.5 DOT lacks *locus standi*.

Points in *limine*

Delay in bringing the application

[103] The SIU grounds this point in *limine* on the basis that it instituted the review application in March 2021. It released its investigative report to the Premier of KwaZulu Natal on 14 July 2022. DOT ought to have brought the counterapplication when it became aware of the SIU findings. The earliest was in March 2021 when it was served with the review *application* or in July 2022 when the SIU released its report to the Premier.

[104] DOT's defence to this point in *limine* is that in July 2022, the SIU released its report to the Premier and not to it. There is no evidence that the report was ever furnished to the MEC. The Premier and the MEC are two distinct organs of state. Therefore, serving the report on the Premier does not constitute service on the MEC.

[105] Notably, DOT completely fails to deal with the contention that it became aware of the SIU findings when it was served with the review application in March 2021. It does not even deny that it became aware of the SIU findings on that date because the SIU contention is irrefutable. The fact that at that time, DOT had decided not to impugn the SIU report does not mean that it was not aware of the findings. Its decision to abide this application and to implement the SIU findings points to the contrary. I therefore find that the DOT became aware of the SIU findings in March 2021 when it was served with the review application. The clock started ticking then.

[106] DOT does not even give reasons for its initial decision to abide the SIU findings and explain why it changed its stance. The fact that DOT underwent a

change in administration is not a satisfactory explanation for its changed stance. DOT is an organ of state with perpetual succession. Its persona does not change when there is a change in its administration. The fact that the preceding administration decided to abide the Tribunal's decision and implement the SIU findings further weakens its case.

[107] The new DOT administration took office in August 2022. Approximately, a further six months passed before the MEC decided to enter the fray. The MEC's explanation for this delay is that after he came into the office and when briefed with matters concerning DOT, he sought clarity from its officials in relation to what was contained in the SIU's papers. These inputs were received only in March 2023. Upon receipt of a response from DOT officials, he decided to oppose the application. He fails to explain why it took DOT almost seven months to revert to him. The MEC only entered the fray in April 2023. At that stage, it did not even consider it courteous to inform the other parties and the Tribunal that it intended impugning the SIU report. It only expressed an intention to oppose the review application. It brought the counterapplication when it filed its substantive papers in July 2023, taking the other parties and the Tribunal completely by surprise.

[108] DOT has failed to provide a full and satisfactory explanation for its delay in bringing the counter application. There is therefore no basis on which to find that its delay in bringing the application was reasonable.

[109] DOT hitherto decided to abide the Tribunal's judgment and order without qualification and implemented the SIU findings. DOT cited no persuasive reasons for its changed stance. It makes out no case that its initial decision to abide the SIU report was wrongly made. It has launched this counterapplication without disavowing its previous reliance on the SIU findings. It also makes out no case that it wrongly implemented the SIU recommendations. It is important in the present circumstances for DOT to explain the basis on which it seeks to have the findings and

recommendations some of which it had not only initially accepted, but also implemented, reviewed, and set aside. It fails to do so.

[110] The MEC asserts his right to change the decision hitherto taken by his predecessor on various authorities. As argued on behalf of the SIU, DOT's reliance on *Njongi v MEC of Welfare, Eastern Cape*¹⁰ ("*Njongi*") to assert its right to change its stance is misplaced. The statement in *Njongi* which the MEC seeks to place reliance relates to distinguishable facts. I quote it below:

"It is always open to the provincial government to admit without qualification that an administrative decision had been wrong or had been wrongly taken and consequently to expressly disavow that decision altogether. Indeed, government at every level must be encouraged to re-evaluate administrative decisions that are subject to challenge and, if found to be wrong, to admit this without qualification and to disavow reliance on them. There are literally thousands of administrative decisions of this kind made every day and it would be quite untenable for each decision to be set aside by a court before the underlying obligation can be enforced. Prescription would begin to run (if it is indeed applicable in a case of this kind) as soon as the provincial government disavowed reliance on the administrative action concerned."

[111] *Masuku v Special Investigating Unit*¹¹ ("*Masuku*") is also distinguishable. Further, the SIU investigator did interview DOT officials in respect of whom the SIU made findings. Disturbingly, according to DOT, the SIU ignored the explanations offered by some of the relevant officials which rebutted its purported findings and proceeded to premise its review grounds on such findings. Therefore, *Masuku* does not support the case DOT seeks to establish.

¹⁰ *Njongi v MEC of Welfare, Eastern Cape* 2008 (4) SA 237 (CC).

¹¹ *Masuku v Special Investigations Unit and Others* (P55372/2020) [2021] ZAGPPHC 273 (12 April 2021).

[112] *National Treasury and Another v Kubukeli* (“Kubukeli”)¹², is also inappropriately relied on by DOT. There, the Supreme Court of Appeal found that there was no obligation to afford implicated persons an opportunity to make representations. National Treasury had not afforded Kubukeli an opportunity to make representations to its investigators. Here, the implicated officials were offered such an opportunity. The SIU findings are not determinative of the parties’ rights. They only set out a *prima facie* case to be tested in further proceedings such as the present review application and the disciplinary proceedings DOT held against some of its officials.

[113] *Prudential Authority of the SA Reserve Bank v Msiza*¹³ (“Msiza”) is distinguishable for the same reason as Kubukeli as the implicated officials were afforded an opportunity to make representations to the SIU.

[114] The MEC further contended that the SIU failed to meet the requisite standard required when conducting the investigation, to ensure compliance with the requirement of procedural rationality justify the exercise of the Tribunal’s discretion to overlook the delay. The SIU asserts that it properly investigated the tender within its statutory mandate as set out in sections 4 and 5 of the SIU Act. It made findings and recommendations. These are not binding on the Presidency and DOT. Its findings stand to be tested or impugned in subsequent legal proceedings, such as internal disciplinary proceedings and this application.

[115] The fact that DOT has implemented some of the recommendations point to the fact that it had accepted the SIU report. Under these circumstances, the grounds of review it relies upon in this application do not justify declaring the report invalid and setting it aside. In this judgment, I have made several findings in relation to the findings and/ or recommendations the SIU made, and where are appropriate found

¹² *National Treasury and Another v Kubukeli* 2016 (2) SA 507 (SCA).

¹³ *Prudential Authority of the SA Reserve Bank v Msiza* (A294/2021) [2023] AGOOHC 313 (2 May 2023).

that the grounds of review based on specific SIU findings were not sustained. These indicate that the SIU did not investigate the relevant issues with the depth called for and failed to engage the DOT on those issues. DOT has successfully impugned the relevant findings in these proceedings.

[116] Under these circumstances, the interests of justice are better served by promoting certainty in administrative decisions by leaving the SIU report and the findings made there-in undisturbed. The delay in bringing the review application is unreasonable and inordinately long. Therefore, this point in *limine* stands to be upheld.

Jurisdiction

[117] The SIU contends that in terms of the Special Investigating Unit and Special Tribunals Act¹⁴ ("SIU Act"), the MEC may not pursue a legality review against the SIU in the Tribunal. It may do so in another forum. There is no merit to this contention. As contended by the MEC, section 8 of the SIU Act makes it clear that not only the SIU may institute civil proceedings in the Tribunal. Any other interested party may do so. The Regulations issued in terms of the SIU Act defines an interested person as any person who has a direct and substantial interest in a judgment or order of the Tribunal and who may be prejudiced if the judgment or order is carried into effect. The MEC has a direct and substantial interest because the relief the SIU seeks will affect DOT's interests because an order reviewing and setting aside a contract to which DOT is a party is sought.

[118] Furthermore, the counterapplication is a reactive challenge to the review application. A purposive interpretation to section 8 of the SIU Act and the definition of interested person in the Regulations issued in terms of the SIU Act to give effect to the right of every person in terms of section 34 of the Constitution to have any dispute that can be resolved by application of the law determined by a court or independent Tribunal supports such a construction.

¹⁴ Act 74 of 1996.

[119] Therefore, the jurisdiction point in *limine* falls to be dismissed.

Non-joinder

[120] The SIU contends that the MEC ought to have joined the President to the counterapplication because he issued the Proclamation that authorised the investigation into the process that led to the awarding of the tender. There is no merit to this contention. The MEC does not impugn the President's powers to issue the Proclamation or the terms of the Proclamation. He impugns the way the SIU carried out its mandate to investigate the process that led to the awarding of the tender. The SIU has not established that the President has a direct and substantial interest in the relief sought in the counterapplication.

[121] Therefore, the non-joinder point in *limine* stands to fail.

Locus standi

[122] The SIU contends that DOT's head of department lacks *locus standi* to institute the counterapplication. This contention is a non-starter. The head of department is not a party to the counterapplication. Therefore, the question of *locus standi* does not arise in relation to him. The MEC is a party to the counterapplication. The head of department is only a deponent to the affidavits filed on behalf of the MEC.

[123] For the above reason, the *locus standi* point in *limine* also falls to be dismissed.

Other points in limine

[124] The SIU has also raised the following points in *limine*:

124.1 The MEC may not change his stance without first reviewing the decision to abide.

124.2 The MEC has accepted the SIU recommendations. Therefore, the current MEC and the head of department are functus officio.

124.3 No explanation has been offered for the inaction between the MEC's appointment and the launching of the counter application.

[125] I have considered these points in the exercise of my discretion to overlook the delay.

[126] In the premises, the counterapplication falls to be dismissed.

COSTS OF THE REVIEW AND COUNTER APPLICATION

[127] Nexor seeks punitive costs against the SIU in the review application. Since, it did not oppose the counterapplication, it is not entitled to the costs of that application.

[128] The following factors warrant a punitive cost order as sought by Nexor. The SIU failed to consider material evidence from the record of the impugned tender. It failed to consider the relevant evidence even after Nexor grounded its version on them. It rather resorted to casting unsubstantiated aspersions on Nexor and its Chief Executive Officer and Managing Director. The SIU's grounds of review were completely devoid of merit. It delayed bringing the application and failed to fully account for the delay. It would be a travesty of justice if Nexor is rendered out of pocket by this application.

[129] It is just and equitable that the SIU and DOT `bear their respective costs of these applications.

THE WASTED COSTS OCCASIONED IN APRIL 2023

[130] The fact that DOT is a successful party in the review application, its opposition of that application was not unnecessary. It is therefore just and equitable that the SIU also bears its wasted costs occasioned by the April 2023 postponement.

COSTS OF THE APPLICATION TO COMPEL

[131] The material Nexor sought in this application was referred to in email correspondence between DOT and the SIU that formed part of the record of the impugned tender. The material comprises a draft affidavit by Mr Thabane Nkosi which the SIU had sent to this interviewee by email on 29 January 2020, a recording of an interview the SIU investigator held with this official and the affidavit this official allegedly signed and sent to the SIU. Nexor had, by way of a letter dated 20 July 2021, notified the SIU that it requires this material.

[132] The SIU failed to acknowledge Nexor's request. At the judicial case management held on 12 August 2021, the SIU and DOT failed to provide any reason for non-compliance with Nexor's request. I then directed Nexor to bring an application to compel that I may consider its request judicially and make an enforceable order.

[133] The MEC did not oppose this application. The SIU also did not file opposing papers. It filed an explanatory affidavit in which it explains that it is not the custodian of the record of the impugned tender and that Nexor is not entitled to the material it seeks because it does not form part of the impugned record. For these reasons, it is opposing an order holding it liable for the cost of the application to compel.

[134] In a surprising twist, to its explanatory affidavit, the SIU attached Mr Thabang Nkosi's draft affidavit, and a transcribed record of the interview the SIU investigator held with Mr Nkosi. It explained that contrary to the impression created in the email Mr Thabang Nkosi sent to the SIU, he never furnished the SIU with his signed affidavit. Consequently, the latter document is not in its possession.

[135] It is indeed correct that ordinarily, DOT is the custodian of the impugned record. The material sought were strictly speaking not part of the impugned record. However, these factors do not absolve the SIU from liability for the wasted costs of the application. Its liability is justified by the fact that the SIU occasioned the wasted costs arising from the application to compel when it ignored Nexor's request for this material. Further, when Nexor complained about the SIU's lack of response to its request at the judicial case management meeting, the SIU did not raise the issues it subsequently raised in its explanatory affidavit. Hence, I directed that Nexor bring an application to compel so that I may deal with its request judicially. Had the SIU responded to Nexor's request and made the submissions contained in its explanatory affidavit at the judicial case management meeting, it is unlikely that I would have directed Nexor to bring an application to compel. It is that application that not only elicited a substantial response from the SIU, but it has resulted in compliance with Nexor's request by the SIU. Therefore, principally, Nexor is successful in this application. The SIU is analogous to an unsuccessful party.

[136] Since I found that Nexor is entitled to the costs of the review application on the attorney and client scale, it would not be just and equitable for Nexor to be out pocketed by this application.

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

ORDER

1. The review application is dismissed.
2. The applicant shall pay the second respondent's costs of the review application and the application to compel on a punitive scale, which costs shall include the costs of two counsel where so employed.
3. The counterapplication is dismissed.
4. The applicant and the first respondent shall bear their respective costs of the review application and the counterapplication.
5. The applicant shall also bear its wasted costs occasioned by the April 2023 postponement.

MODIBA J
PRESIDENT, SPECIAL TRIBUNAL OF SOUTH AFRICA

APPEARANCES

Attorney the applicant Ms S Zondi, Office of the state attorney

Counsel for the applicant Adv. RBG Choudree SC, assisted by K Bheemchund

Attorney for the first respondent Mr T Makhubela, MT Makhubela Incorporated

Counsel for the first respondent Adv. M Mojapelo assisted by D Mtsweni

Attorney for the second respondent Mr V Chetty, V Chetty Incorporation

Counsel for the second respond Adv. A.K Kisson-singh SC assisted by V.I Gajoo SC

Date of hearing 11 September 2023

Date of Judgment 27 February 2024

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 AFRICANLII. The date and time for delivery is deemed to be 10 a.m.