



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case Number 123188 / 23

(1)	REPORTABLE YES/NO
(2)	OF INTEREST TO OTHER JUDGES YES/NO
(3)	REVISED.
19/4/24	
DATE	SIGNATURE

In the matter between:

**THE MINISTER OF EMPLOYMENT AND LABOUR**

Applicant

and;

**MTHUNZI MDWABA**

First Respondent

**THUJA HOLDINGS (PTY) LTD**

Second Respondent

**THUJA CAPITAL TRANSFORMATION FUND**

Third Respondent

**ALTA THERESA ROETS**

Fourth Respondent

**LITHA JAMAL MDWABA**

Fifth Respondent

**NAVAMANI NAIDOO**

Sixth Respondent

**NATIONAL TREASURY**

Seventh. Respondent

**UNEMPLOYMENT INSURANCE FUND**

Eighth Respondent

**JUDGEMENT**

J D Maritz AJ:

[1] This is mainly an application for what is now known as legality review, also referred to as "self-review".

[2] The Minister of Employment and Labour applies to have a written contract, between the Unemployment Insurance Fund (the "UIF") and Thuja Holdings (Pty) Ltd, the second respondent, declared invalid and set aside. The reason is alleged non-compliance with legal prescripts by administrators of the UIF in the process of concluding the contract.

[3] In terms of this contract, signed on behalf the UIF by the erstwhile Director-General of the Department of Employment and Labour, the UIF agreed to pay the amount of R5,000,000,000 (five Billion Rand) in three tranches over a period of eighteen months to the second respondent. This amount would be made up of an "*equity investment*" of R1 billion (for which the UIF was to acquire maximum of 19% of the issued share capital of Thuja Holdco – a company still to be formed and not intended to be listed on any formal securities exchange); R 2,5 billion "*grant funding*" (a cash grant to be used by the second respondent in projects forming "*part of the scheme*"); and R1,5 billion "*debt funding*" (a loan to the second respondent), interest free for the first five years.

[4] These funds were to be used by the second respondent for the purpose of executing a scheme, defined in the contract as "... *the job creation initiative scheme conceptualized by Thuja as outlined in annexure 'A'...*". Annexure "A" in turn states that Thuja will: "...*build and further the development of skills and enterprises through the acquisition, amalgamation and coordination of existing companies, projects, organisations and initiatives.*" The document then lists some of Thuja's objectives and aims, all of which have to do with improvement of skills, stimulation of business in target areas, improvement of productivity, increasing of contributions to and reducing claims against the UIF etc. These are all also part of the normal mandate of the Department of Employment and Labour, which includes the UIF and Productivity SA, a juristic person created in terms of Chapter 5 of the Employment Services Act, 2014.

[5] The UIF appears not to be a legal persona, but it clearly is a public entity as intended in the Public Finance Management Act, 1 of 1999 ("*the PFMA*"). In terms of the Unemployment Insurance Act, 63 of 2001, the UIF is administered by a commissioner, an employee of the Department of Employment and Labour. The Director General of this department is the "*accounting authority*" for this fund, including for the purposes the PFMA.<sup>1</sup> The executive authority in respect of this Department, including the UIF, is the Minister.

[6] The first respondent is Mr Mthunzi Mdwaba, a director of the second respondent and apparently also of the third respondent. The fourth, fifth and

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<sup>1</sup> See: Section 11(1) of the PFMA.

sixth respondents are individuals involved with or employed by one or more of the first to third respondents. The seventh respondent is National Treasury, who did not actively participate in these proceedings. The eighth respondent is the UIF, a public entity resorting under the Department of Employment and Labour and therefore under the first respondent.

[7] The UIF initially filed an "*Explanatory Affidavit*", deposed to by its acting Director General, the purpose of which was to place information, about the way the contract had been concluded and relevant considerations thereanent, before the court. The UIF supported the Minister's bid to have the contract set aside, without opposing any other relief and without claiming costs. The UIF added that it was in the process of bringing its own self-review application. The UIF later filed a supplementary affidavit, in which it indicated that it still supports the Minister's application, it is therefore no longer necessary for it to bring its own self-review application, but it reserves its right to do so. The UIF also later filed Heads of Argument because "... *public interest plays a pivotal role in the resolution of this issue...*" and briefed two counsel to appear in court, still without asking for an order as to costs in its favour against anyone.

[8] Turning to the main application, it is at the outset necessary to state that the first, second and third respondents were not present, nor were they represented by counsel or an attorney, when oral argument for the Minister and the UIF was presented and heard. This came about in the following manner:

- a) This application started in the urgent court, where it had been set down for 12 December 2023. The matter was not heard on that day but was postponed to 25 January 2024.
- b) On 24 January 2024 the matter was allocated, by directive of the Deputy Judge President, to be set down for hearing in the Third Court before me on 2 February 2024. It was so postponed on 25 February 2024. In the same directive, the respondents were ordered to file their application for condonation, answering affidavit and heads of argument by 29 January 2024. (As it turned out, the first second and third respondents filed their answering affidavit a day late, and their heads of argument two days late. These were nevertheless accepted on 2 February 2024).
- c) In the meantime, the first to third respondents had apparently filed a Notice in Terms of Rule 35(12) and (14), requiring the Minister to produce certain further documents. This Notice was withdrawn after business hours on 1 February 2024 – the day before this court would commence to hear the matter.
- d) On 2 February 2024, the hearing of the matter could not commence straightaway, as the first, second and third respondents then sought leave to bring an application “in terms of Rule 35(13)”, for an order compelling the Minister to “furnish” them with certain documents –

mostly those previously sought in terms of the (by then) withdrawn Notice in terms of Rule 35(12) and (14).

- e) Despite protestations from the Minister's counsel (Mr Masuku SC), Mr Ngandwe (counsel for the first to third respondents) was given the opportunity to address the court on this new interlocutory application and Mr Masuku SC was given the opportunity to respond. The application eventually was dismissed – still on that day. I gave my reasons *ex tempore*, which I will not repeat.
- f) This left only an hour of that day, during which Mr Masuku SC was allowed to address the court on the main application. By the end of court time, the matter was postponed *sine die*, for new hearing dates to be arranged and the matter to be re-enrolled. This was eventually arranged for 22 February 2024 – to possibly roll over to 23 February 2024.
- g) On 22 February 2024, the hearing could, again, not start at 10:00 as scheduled. The reason was, so Mr Ngandwe informed the court, that the first to third respondents were in the process of preparing a new interlocutory application, this time for leave to supplement their answering affidavit. The estimation was then that the application would be ready by 11:00. That hour came and went, without any report about the progress. I sent my registrar to find Mr Ngandwe or anyone else who could report on the status of the matter. The registrar reported that

neither Mr Ngandwe nor the applicant's attorney could be found at court, nor could Mr Ngandwe be contacted by telephone. This of course left the court in the dark about the status of the matter.

- h) Eventually, about 12:00, I was informed that the hearing could start. Back in court, the proposed supplementary affidavit, with a written notice of an application for leave to supplement the answering affidavit, was handed up. It was one full lever-arch file – possibly 500 or more pages. Of those, 58 pages comprised the Notice of Motion and proposed supplementary affidavit (roughly 10% or 12%), while all of the rest were annexures. The matter was then stood down until 14:00, to have some opportunity to peruse the application and proposed supplementary affidavit – with annexures.
- i) According to the proposed supplementary affidavit of Mr Mdwaba, the annexures thereto were the same documents as the first, second and third respondents had previously sought from the Minister in terms of Rules 35(12) and (14). Those documents had come to hand in the meantime (so Mr Mdwaba stated) when some unknown well-wisher had sent some of those documents to Mr Mdwaba by e-mail, and had "dumped" the rest at Mr Mdwaba's residence. All of that occurred, so Mr Mdwaba claimed, after the interlocutory application had been dismissed on 2 February 2024.

- j) At 14:00 I gave Mr Ngandwe the opportunity to address me on this new application. However, I made it clear that he should focus his address on pointing out – in the proposed supplementary affidavit of Mr Mdwaba – what new evidence it is that the supplementary affidavit could introduce. This was because, upon the first reading of the document, it seemed that there is no reference – in the proposed supplementary affidavit – to any specific page, paragraph, or line in the hundreds of pages of annexures, as being where some new evidence could be found. Also, save for introducing the stack of annexures, the proposed supplementary affidavit appeared to just rehash matters previously covered in the answering affidavit. During argument, it was necessary to remind Mr Ngandwe, more than once, to keep the focus as indicated, but he was ultimately unable to submit anything more than that the annexures themselves are not yet before court and should be accepted “... *for the sake of completeness*”.
- k) I was not persuaded that the proposed supplementary affidavit and/or annexures should be allowed, and that application was dismissed with punitive costs. Again, I gave my ruling and reasons *ex tempore*, which I will not repeat herein. By then it was after 16:00 and the court was adjourned until the next morning.
- l) The next morning, I was informed by Mr Ngandwe that his mandate had been terminated and that he wished to be excused. I excused him.



Then, the attorney for the first to third respondents (Mr Khumisi) sought to – orally - apply for a postponement. I allowed Mr Khumisi to present such an application, though with the cautioning that, if the first, second and third respondents wish to rely on any factual considerations not yet before the court – in support of the application for a postponement – those facts should be presented on oath – either in an affidavit or viva voce. Mr Khumisi elected to present the viva voce evidence of Mr Mdwaba.

m) Mr Mdwaba then took to the witness stand and was sworn in. He explained (I paraphrase) that he had not been satisfied with the manner in which I had interacted with his counsel the previous days, although his counsel assured him that there was no difficulty between him and the bench. Mr Mdwaba further explained that he, his attorney and his counsel had - the previous evening - considered their strategy. They had even considered an application for my recusal but decided against it. Their joint decision was ultimately that the mandate of Mr Ngandwe, as counsel, would be terminated, even though there was no dissatisfaction with his handling of the matter. This, they estimated, should achieve a postponement - hence the turn of events that morning.

n) Having heard further argument from Mr Khumisi, Mr Masuku SC for the applicant and Mr Hulley SC for the eighth respondent, I refused the

postponement. Again, I gave my ruling and reasons *ex tempore*, which I do not repeat herein.

- o) Mr Khumisi then asked that he and the first to third respondents be excused from the proceedings altogether. I excused them and directed Mr Masuku SC to continue with his argument for the applicant.

[9] In preparing this judgement, I still had regard to and considered the answering affidavit and the heads of argument previously filed on behalf of the first to third respondents.

#### RELEVANT HISTORY AFTER CONCLUSION OF THE CONTRACT:

[10] This application was brought as an urgent one, almost one year after the impugned contract between the UIF and the second respondent had been signed. (The second respondent, represented by Mr Mdwaba had signed the contract on 14 December 2022<sup>1</sup> and the UIF, represented by its erstwhile Director-General, signed on 18 December 2022. The urgent application was issued on 23 November 2023, to be heard on 12 December 2023.)

[11] The Minister, on his version, had become aware of the contract in December of 2022 – after being alerted to news media reports. He immediately instructed the Director-General “*to put a stop to this project*”, with a reservation of his (the Minister’s) right “*to withdraw the contract in part or*

*entirely*” based on an investigation to follow. (From the papers, it is obvious that this instruction somehow also came to the attention of the first respondent).

[12] The Minister then required the Director-General to provide a report on the matter, which was delivered about 27 January 2023. The most important points (for purposes of this judgement) contained in this report were:

- a) As his starting point, the former Director General referred to the fact that, about 2019, the Department of Employment and Labour had launched the UIF's Labour Activation Program (LAP) - to pursue a mandate of economic growth and job creation. This was also driven by the Employment Services Act of 2014 and the Unemployment Insurance Amendment Act, 2016.
- b) The Director General referred to section 6 of the Employment Services Act, which empowers the Minister to establish work schemes to promote and sustain employment or create opportunities for self-employment. Likewise, section 7 of that Act empowers the minister to establish schemes to minimize retrenchments, which may include “... *turnaround strategies, lay-offs, retraining or alternative employment opportunities.*”
- c) Next, the Director General pointed out that the LAP has three sub-programs, one of which is a Business Turnaround & Recovery Program, run through Productivity SA. (Productivity SA is a juristic person created in

terms of Chapter 5 of the Labour Services Act 2014, of which Mr Mthunzi Mdwaba - first respondent - had been the chairperson at the time, so appointed by the Minister. The LAP is funded through *surplus*, or income derived from workers' invested contributions to the UIF.

- d) The Director-General also reminded that in 2019, the Department had issued a general "*Call for Proposal*" to employers generally, to submit particulars about job opportunities as they become available. The Director General then states that the "*Thuja Proposal for Employment*" ("*the Thuja Proposal*"), from which the impugned contract later resulted, had been submitted during this "*Call for Proposal*" process. (This, in itself, puts the notion that the Thuja Proposal had been "*unsolicited*" in doubt).
- e) The Director-General further reminds that he had instituted the Labour Activation Programs National Adjudication Committee (LNAC), to adjudicate on proposals and applications for TOU (training of the unemployed) and ED (enterprise development) schemes, of which the Thuja Proposal was one.
- f) The Thuja Proposal, originally submitted in 2019, had been declined by LNAC in April 2022, although it was supported by the Commissioner of the UIF and approved for implementation by the Director General in May 2022. (The Commissioner and the Director General both expressly rejected the LNAC recommendations). The Director General expressed his dismay with LNAC's decision but emphasized that the commissioner of

the UIF had recommended the proposal and that the final decision did not rest with LNAC but with himself – as accounting authority for the UIF.

- g) In conclusion, the Director General then recommended that the Minister should decide to implement the contract. It was specifically recommended that, because formal transactions underlying the equity-component and the loan-components of the scheme were still to be concluded, the first tranche of R2 billion – payable on 31 January 2023 – should specifically go towards the grant-component of the scheme.

[13] The minister did not follow the recommendation of the Director General and instead continued to prohibit payment being made in terms of the contract.

[14] Early in March 2023, a letter of demand, threatening legal action, was received from attorneys representing the first and second respondents.

[15] As early as 18 March 2023, the first and second respondents' attorneys had already mentioned that there is "... *no legal basis for the unlawful self-review or due diligence.*"

[16] At the same time, the first to third respondents had also reported what they called the minister's unlawful interference in the contract between the UIF and the second respondent, to the deputy president of the Republic of South Africa.

[17] The papers are mum about the events during the next two months but, on 9 June 2023, the minister wrote to the first and second respondents, informing them that a service provider had been appointed to investigate “... *the processes followed leading up to the appointment of Thuja Holdings (Pty) Ltd as well as to conduct a due diligence process to determine whether you have the necessary capacity to deliver on the project...*”.

[18] On 11 September 2023 the minister wrote to the Director General, informing him that the findings of the investigators had been submitted to the President of the Republic of South Africa, whose directives are being awaited.

[19] From this point onwards, the tone of Mr Mdwaba's correspondence to the Minister became openly hostile and abusive. This was especially so after the Minister had formally notified Mr Mdwaba that he (the Minister) was considering removing Mr Mdwaba as chairperson of Productivity SA and gave him the opportunity to give reasons why this should not be done. The Minister eventually in fact removed Mr Mdwaba as chairperson of Productivity SA on 22 September 2023 – with immediate effect. Because this question – of the removal of Mr Mdwaba as chairperson of Productivity – is no longer part of this dispute, it is not necessary to dwell on this aspect any further.

[20] The next was that, according to the Minister, Mr Mdwaba had interviews with news reporters, in which he alleged that the Minister had stopped the

implementation of the Thuja contract as part of a corrupt scheme involving himself, two other ministers and the Secretary General on the African National Congress, to extort payment of R500 million in exchange for the applicant's approval of the contract. These interviews were then widely published on television and in printed news media.

[21] The exact dates and specific news channels or publications where these allegations by Mr Mdwaba were reported, are not stated by the Minister but Mr Mdwaba attached a copy of one newspaper report to his answering affidavit (which also served as answering affidavit for the second and third respondents). That report appeared in a Sunday newspaper (the name is not legible) of 5 November 2023 under the heading: *"Ministers demand R500m bribe for UIF jobs deal, claims Mdwaba."*

[22] Mr Mdwaba also did not deny that he had made these allegations of and concerning the applicant to news reporters during interviews, which interviews had been televised on news channels. What he did say about it in his answering affidavit was: *"... The applicant's complaint stems from an interview which I was invited to by Newzroom Africa, a television news broadcasting channel and two other similar interviews held on various dates on or about 7 October 2023"; and "... The applicant assumes that I will continue to attend similar interviews in future, which is rather speculative and without merit."*

[23] I find that the allegations of and concerning the Minister, as paraphrased by the applicant in the founding affidavit and as encapsulated in the newspaper headline attached to the answering affidavit, were made by the first respondent and were defamatory of the Minister.

[24] In the answering affidavit, the first respondent tried to brand his statements of and concerning the Minister as the truth. In this regard he stated: *"... all I have ever done is to speak and tell the absolute truth by exposing corruption and maleficence ..."* ; *"Based on information that was availed to me at the meeting held on or about the 19<sup>th</sup> of May 2023, I reasonably believed the information conveyed to me to be true and correct and I still believe it to be correct."*; and *"I engaged in the interviews with the intention to place the information made available to me in the public domain for the benefit of the public without any intention to defame or injure the Applicant."*

[25] The so-called *"information made available"* to the first respondent was nothing more than a string of printed WhatsApp messages (collectively attached to the answering affidavit as annexure "MM15") and a printout of what is just called *"chat.txt-notepad messages"* (attached as annexure "MM16"). The WhatsApp messages, which run over some 21 pages, are too cryptic to reveal any specific meaning. It certainly contains no readily discernable proof of extortion or corruption on the part of the Minister. The chat.txt-notepad messages run into some 71 pages of single line spaced text, apparently spanning the period from 30 December 2022 to 12 January 2024. No proof of corruption or extortion on the part of the Minister can readily be



gleaned therefrom. Mr Mdwaba also made no effort, in his answering affidavit, to draw attention to any specific page, paragraph or passage in those documents, as being what he relies upon for his conclusions.

[26] It can therefore be concluded that the first respondent presented no form of evidence to prove that his statements of and concerning the Minister were true. The first respondent certainly did not give any undertaking not to repeat such allegations of and concerning the Minister, with or without any conditions attached. He did not do so in his answering affidavit, nor in any other manner or at any other time.

[27] The relief initially claimed by the Minister was the following:

- a) That the matter be heard as an urgent one.
- b) An order declaring the contract to be unlawful and accordingly be set aside.
- c) An order declaring that Mr Mdwaba, as chairperson of Productivity SA, an entity in the UIF, had been conflicted and disqualified from concluding the contract with the UIF;
- d) An order declaring the applicant's decision – to remove the first respondent as chairperson of Productivity SA – to have been lawful;

- e) An order interdicting the first respondent from continuing to make false and defamatory statements about the applicant's conduct in relation to the contract; and
- f) That the first respondent be ordered to pay the costs of the application on a punitive scale, including costs of two counsel, with any other respondent who opposes, jointly and severally.

[28] There was no counterapplication by any of the respondents at all.

[29] During his argument, Mr Masuku SC (for the Minister) indicated that the prayers paraphrased in paragraphs 28 c) and d) above (prayers 3. and 4. of the Notice of Motion in the main application) are not persisted with. Those are the prayers concerning the position of Mr Mdwaba as chairperson of Productivity SA and his removal therefrom by the Minister. The remaining issues are dealt with separately below.

[30] Urgency.

- a) The Minister explained in his founding affidavit that, although he had known about the irregular signing of the contract since the end of December 2022, and had instructed that the transaction be stopped in February 2023, the first respondent's accusations of corruption – on the applicant's part – only started in September 2023.

- b) The Minister does not say exactly when he gained knowledge of the allegations of corruption being made in public news media. However, as said before, the first respondent mentioned that he had been interviewed by news reporters about 7 October 2023, while the one newspaper headline contained in the papers – alleging bribery on the part of *inter alia* the applicant - ostensibly dates from 5 November 2023. In his answering affidavit, Mr Mdwaba stated that the Minister had knowledge of Mr Mdwaba's interviews with news reporters since 7 November 2023, without saying how he knows this.
- c) The application was issued 23 November 2023, to be heard on 12 December 2023. This means that the application was issued at most two months after the Minister became aware of the allegations by the first respondent (not necessarily in news media), and less than a month after he became aware that those allegations were being published on television and in printed news media.
- d) The urgent application – for an interdict against the publishing of defamatory statements - was unnecessarily complicated by the inclusion of the prayers to declare the contract invalid and be set aside, and that the removal of the first respondent as chairman of Productivity SA be confirmed by the court (which had now been

abandoned), all as part of a single-phased urgent application. A simple application to interdict the publishing of defamatory statements, perhaps pending some "*Part B*" application – in the normal course – for the rest of the relief, as is often done, or even pending an action, could have been done much quicker and would have been far more palatable in an urgent court.

- e) Nevertheless, the brazen publishing of such defamatory statements by the first respondent, as I have found to have been done, warranted swifter attention from the court than would have been available to the applicant in the ordinary course. The way the matter had been managed and allocated by the Deputy Judge President also went a long way to relax the initial time constraints imposed for the filing of papers and heads. This, and the fact that the applicant ultimately did not persist with the prayers about the removal of the first respondent as chairman of Productivity SA, persuaded this court to hear the matter on what remained of the merits. I find the matter to be urgent enough to be heard.

[31] Delay in Bringing the Application:

- a) It is firstly necessary to consider whether any delay on the part of the Minister – in bringing this application for legality review – was unreasonable under the circumstances. This is not about urgency in terms of Rule 6, but is enjoined by judgments of the Constitutional

Court and the Supreme Court of Appeal in matters such as Gijima, Asla, and NICS.<sup>2</sup>

- b) While the Minister had been aware of the need for a legality review since March 2023, he had also appraised the first to third respondents of his misgivings about the contract from, at the latest, February 2023. The Minister had also informed the first to third respondents, then, that he had instructed that the contract not be implemented – pending investigations.
- c) These steps were in my view sufficient to avoid letting the first to third respondents developing any illusions about their respective positions, or to have them act to their detriment due to such illusions.
- d) The forensic investigation ordered by the Minister was only completed about June 2023 – according to the evidence.
- e) The delay in bringing this application was not unreasonable under those circumstances. However, if the delay could be said to have been unreasonable then, given the nature and enormity of the transaction, and the conduct of the Director General in concluding it – as discussed below, such delay should in my estimation be overlooked.

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<sup>2</sup> Discussed below, referenced in Footnote 2.

[32] Legality of the Contract:

- a) The Minister's case is of the kind now referred to as "legality review", about which judgments in the Supreme of Appeal and the Constitutional Court abounded in the last number of years.<sup>3</sup> Those are cases where organs of state approach the court to declare invalid and set aside illegal administrative acts performed by its own administrators.
- b) The principle – referred to as the principal of legality – which is to be applied in these cases, was stated by Madlanga J in Gijima,<sup>4</sup> as follows:

*"... it seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. ...*

*What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent*

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<sup>3</sup> To name but a few, see: Khumalo vs Member of the Executive Council for Education, KwaZulu Natal 2014 (5) SA 579 (CC); State Information Technology Agency SOC Ltd vs Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC); Buffalo City Metropolitan Municipality vs ASLA Construction (Pty) Ltd [2019] SACC 15; Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd 2021 (4) SA 436 (SCA).

<sup>4</sup> *Supra*, par [40].

*with the Constitution itself. In short, it is invalid. That is a consequence of what s 2 of the Constitution stipulates. ... the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review."*

- c) This principle, which has also come to be known as the Gijima-principle, applies where the exercise of public power had not conformed with prescripts of the law in general – not only of a express prescript in the Constitution itself. This is because the legality principle is an incident of the rule of law, which is a core value of the Constitution. As stated by Navsa ADP in NICS,<sup>5</sup>

*"There is no merit to the surprising submission on behalf of the GMM that the present case is one that is simply a legality challenge without constitutional overtones. The complete answer is to be found in Asla. I can do no better than to quote the relevant passages: 'There is a clear basis for jurisdiction as the matter concerns s 217 of the Constitution. It deals with procurement by an organ of state, judicial review of a decision by an organ of state and the question of a just and equitable*

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<sup>5</sup> *Supra* at 463 par [58].

*remedy in terms of s 172(1)(b) of the Constitution. Lawful procurement is patently a constitutional issue. In this court, the Municipality relies on a legality review. By its nature, legality review raises a constitutional question. It is founded upon the rule of law, which is a founding value of our Constitution.' "*

- d) In this case, the Minister mainly relied on the fact that the Director General, who had also been the designated 'accounting authority' for the UIF,<sup>6</sup> had not complied with section 54(2) of the Public Finances Management Act, 1999 before concluding the contract. That section provides:

*"(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:*

- (a) establishment or participation in the establishment of a company;*

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<sup>6</sup> See: Section 11(1) of the Unemployment Insurance Act, 63 of 2001.



- (b) *participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;*
- (c) *acquisition or disposal of a significant shareholding in a company;*
- (d) *acquisition or disposal of a significant asset;*
- (e) *commencement or cessation of a significant business activity; and*
- (f) *a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement."*

e) The relevant treasury in this case is the National Treasury (seventh respondent). The "executive authority" mentioned in section 54(2) is of course the Minister himself.<sup>7</sup>

f) The Minister contends that, at least, the "equity investment"-component in the contract would fall within the ambit of one or more of the transactions mentioned under section 54(2) of the

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<sup>7</sup> See: Definition of "executive authority" in section 1 of PFMA, 1999.

PFMA. The UIF fully supported this stance. This is obviously correct, and I find so.

- g) It is undisputed, if not common cause, that the erstwhile Director General had not complied with section 54(2) of the PFMA before signing the contract. (He had not informed National Treasury, nor had he submitted any particulars of the transaction to the applicant, before signing the contract).
- h) But it is much worse. The evidence presented by the Minister proves that the erstwhile Director General had not simply failed to comply with section 54(2) of the PFMA. He actually refused to comply, even after his attention had been drawn to that section and he had been advised not to conclude the contract before complying with that section – by the Chief Director: Legal Services of the Department, one V Singh.
- i) The advice of V Singh had raised a number of other grounds why the contract should perhaps not be concluded, including that -in terms of section 7(1) of the Unemployment Insurance Act, 2001, the UIF may only do investments through the Public Investment Corporation; Treasury Instruction 12 of 2020/2021 – in terms of which surplus funds must be surrendered; and that the Thuja scheme may to an extent not fall within the investment mandate of the UIF.

- j) The Director-General dismissed the advice from V Singh, apparently on the basis of advice from Thuja (Mr Mdwaba) to the effect that the transaction falls within section 5(d) of the UI Act. This was after the Memorandum of V Singh had been made available to Thuja. (See par 105 of the Founding Affidavit, although the document supposed to be annexure MEM30 is missing from the papers).
- k) I fail to see how section 5(d) of the UI Act – even if the contract fell within the ambit thereof – could displace the requirements of section 54(2) of the PFMA. Section 5 - including 5(d) - of the UI Act defines the scope of business that the UIF may do, not the manner in which specific transactions should be approved. Section 54(2) of the PFMA provides the procedure, and identifies the approving authority in the case of certain transactions. The respective two statutes do not cover the same subject matter.
- l) Be that as it may, all of this followed after the basic Thuja Proposal had already been declined by the Labour Activation Program Adjudication Committee (LNAC) in May 2022, but the Director-General nevertheless approved it subject to a due diligence investigation being done, which had in any event not been done by the time he signed the contract. In other words, he even flouted the condition imposed by himself when approving the proposal – against the recommendation of LNAC.

- m) To top it all, the Director General had apparently not only bypassed the applicant in the process of concluding the contract, but he also bypassed the Unemployment Insurance Board, appointed in terms of Chapter 6 of the UI Act. In terms of section 48(1)(a)(iv) it is the duty of that Board to advise the Minister (applicant) on, *inter alia*, “...the creation of schemes to alleviate the effects of unemployment...”, which was also one of the objectives of the Thuja scheme.
- n) Section 217 of the Constitution, 1996 provides that, whenever an organ of the state (which the UIF undoubtedly is) contracts for goods or services, it must be done in accordance with a system which is fair, equitable, transparent, competitive and cost effective. In this case, the contract amounted to the outsourcing of many of the functions of the Department of Employment and Labour (including of the UIF and of Productivity SA) and was therefore to a large extent a contract for services. There had been measures and systems in place to ensure fairness, transparency and cost-effectiveness, such as the PFMA itself – particularly section 54(2) thereof; LNAC; the UI Board and even the Director General's own previous condition of a due diligence investigation to be done, all of which he flouted or at least ignored when he signed the contract.

- o) The notion that the Thuja Proposal was unsolicited, if that was the case, changes nothing because it is not the Thuja Proposal that is the target of the legality review. It is the conclusion of the contract itself that is the target.
- p) For these reasons, I find that the signing of the contract by the Director General under the particular circumstances did not conform to the relevant prescripts of the law, was illegal and therefore invalid. It falls to be set aside.

[33] Defamation and an Interdict:

- a) Given the history and circumstances set out above, I find the Minister had a clear right not to be defamed by allegations of extortion and corruption - in the context of the non-implementation of the contract.
- b) Such allegations as the first respondent had made to news reporters during October and November 2023 were defamatory of and concerning the Minister and the first respondent has shown no legal justification for doing so.
- c) In view of the first respondent's conduct in the past, and his refusal or failure to undertake to refrain from such conduct in future, I find

that the Minister's apprehension of a repetition of such allegations is reasonable.

- d) The Minister clearly has no other remedy to prevent further publication of such defamatory allegations, by the first respondents to new reporters or by any other means.

[34] Costs:

- a) The Minister is successful with in a legality review, and to obtain an interdict against further defamatory statements by the first respondent. He would therefore be entitled to be awarded the costs of the application.
- b) However, the Minister seeks a special punitive costs order against the first respondent. This could have been justified, had this application only been for an interdict against further defamatory statements being made by the first respondent. But that is not the case. This matter is for the greater part about the illegality of the conduct of the Director-General – in concluding the contract under the circumstances he had done. The first to third respondents cannot, as far as the evidence goes, be blamed for the conduct of the Director-General. It was also not unreasonable for them to

defend the contract to the extent they did, in the hope of achieving their bargain.

- c) Under the circumstances, it is not warranted to mulct the first to third respondents with special punitive costs of the application.

[35] In the result, the following order is made:

- a) The written contract concluded between the second respondent and the eighth respondent on 18 December 2022, a facsimile of which is annexed to the Notice of Motion as "A", is declared invalid and is set aside.
- b) The first respondent is interdicted from publicly uttering any statement to the effect that the applicant had been corrupt or extortionate when prohibiting the implementation of the contract mentioned in paragraph a) above.
- c) The first, second and third respondents are ordered to pay the applicant's costs of the application, such to include the costs of two counsel where so employed. To the extent applicable and necessary, I direct that such costs are to be taxed on scale "C" in terms of the recently amended Rule 69.
- d) In respect of the eighth respondent's costs, no order is made.

  
  
J D Moritz

19/4/24

Acting Judge of the High Court: Pretoria

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