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DISPUTE RESOLUTION ALERT

PUBLIC LAW EDITION

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Over 12.1 million licenced drivers came into contact with the electronic National Traffic Information System (eNaTIS), used to pay speeding fines, renew car licences, conduct roadworthy tests and generally implement road traffic legislation. In November 2016, the Constitutional Court in Department of Transport and Others v Tasima (Pty) Limited [2016] ZACC 39 upheld the Department's challenge to a decision of its erstwhile Director General to extend a contract to a private company, Tasima, for the operation of the eNaTIS.

PAJA REVIEW: TOO LITTLE, TOO LATE

In the recent case of *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* (894/2016) [2017] ZASCA 23 (24 March 2017), the Supreme Court of Appeal (SCA) upheld the appeal instituted by Asla Construction (Pty) Limited (Appellant) on the basis of its contention that Buffalo City Metropolitan Municipality (Municipality) failed to bring its application for the review and setting aside of a contract it awarded to the Appellant without unreasonable delay and within 180 days of its award.

COMMERCIALLY LUCRATIVE AGREEMENTS WITH THE STATE ARE NOT NECESSARILY SO

The decision of the Western Cape High Court in *Parkscape v MTO Forestry (Pty) Ltd and Sanparks* (15910/2016) [2017] ZAWCHC 22 (1 March 2017) emphasises how a private entity places itself at risk when concluding a commercial contract with a state entity as highlighted by the decision of the Constitutional Court in *Black Sash Trust v Minister of Social Development and Others* concerning the payment of social grants by a private company, Cash Paymaster Services (Pty) Ltd.

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The Constitutional Court found that the decision blatantly flouted ordinary procurement and tender processes and upheld the Department's reactive review challenge.

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The majority judgment of the Constitutional Court provides useful guidance to both private and public entities when confronted with a defective administrative decision.

The dispute has a tortuous history, summarised in a series of interdicts and contempt proceedings resultant from the newly appointed Director General's decision not to enforce the contract extension granted to Tasima by his predecessor. Instead of challenging the legality of the former Director General's decision to extend the contract, the Department ignored the extension and violated multiple court orders issued by the High Court.

Five years after the contract was extended, the Department sought to reactively review and set aside the extension on the basis that the decision was unlawful. The Constitutional Court agreed. It found that the decision blatantly flouted ordinary procurement and tender processes and upheld the Department's reactive review challenge, ordering Tasima to hand over the eNaTIS to the state-owned Road Traffic Management Corporation (RTMC) within 30 days, which Tasima failed to do.

On Monday, 3 April 2017 the High Court once again ordered Tasima to immediately hand over control of the eNaTIS to RTMC and vacate the premises from which it operates the system.

Tasima has already filed court papers indicating its intention to appeal the ruling.

Progressively more administrative decisions are being ignored because of alleged irregularities in the manner in which the administrator took the decision. However, the disregard of an administrative decision does not have any legal effect until set aside by a court.

The majority judgment of the Constitutional Court provides useful guidance to both private and public entities when confronted with a defective administrative decision.

Firstly, like an order of court, an administrative act cannot be ignored and, until set aside by a court in review proceedings, has a binding effect. Simply put, an "organ of state, like any other party, must challenge an administrative decision to escape its effects".

Secondly, review proceedings should be brought without undue delay. However, when an applicant seeks condonation for the delay, "a full explanation that covers the 'entire period' must be provided".

Finally, sound reasons can justify overlooking the delay, such as "the merits of the challenge", "the effect on state resources" and the prejudice which may be suffered.

Thus, if you want to escape the effects of an administrative decision you must do so through the courts.

Yana van Leeve and Tiffany Jegels overseen by Lionel Egypt

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PAJA REVIEW: TOO LITTLE, TOO LATE

In March 2016, the appellant instituted an action for a provisional sentence claiming the payment of amounts premised on three payment certificates issued by the Municipality's engineers.

In the recent case of *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* (894/2016) [2017] ZASCA 23 (24 March 2017), the Supreme Court of Appeal (SCA) upheld the appeal instituted by Asla Construction (Pty) Limited (Appellant) on the basis of its contention that Buffalo City Metropolitan Municipality (Municipality) failed to bring its application for the review and setting aside of a contract it awarded to the Appellant without unreasonable delay and within 180 days of its award. This decision reiterates the import of the delay rule outlined in s7(1) of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA).

The central issue before the SCA, per Swain JA, was the contention that the Municipality failed to bring its application for the review and setting aside of the contact without unreasonable delay and within 180 days of its award.

In March 2016, the appellant instituted an action for a provisional sentence claiming the payment of amounts premised on three payment certificates issued by the Municipality's engineers. These certificates were issued pursuant to a contract concluded between the Appellant and the Municipality on 18 December 2014 (Contract). By way of a counter application, the Municipality sought an order for the review and setting aside of the Contract on the grounds that it was invalid and unlawful since the Municipality failed to comply with s217 of the Constitution and the relevant procurement legislation and policies. The High Court upheld the Municipality's contentions and accordingly declared the Contract invalid, setting it aside with the effect that the payment certificates issued in terms of the Contract were declared to be void ab initio. This decision gave rise to the Appellant's appeal to the SCA.

The central issue before the SCA, per Swain JA, was the contention that the Municipality failed to bring its application for the review and setting aside of the contact without unreasonable delay and within 180 days of its award. The court's examination of the timeline revealed that there was a delay of 15 months between the award of the Contract to the Appellant and the institution of review proceedings by the Municipality. This was contrary to the provisions of s7(1) of PAJA, which provide that any proceedings for judicial review must be instituted without unreasonable delay and within 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons.

The SCA found that the delay by the Municipality in launching its application for the review of the Contract exceeded 180 days and was therefore unreasonable per se (see *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA para 26). The SCA was then asked to consider whether the delay in launching its application could be condoned by granting an extension of the time period in terms of s9 of the PAJA. The SCA ultimately found that it was not in the interests of justice to grant such an extension. In coming to this conclusion, Swain JA had regard to the following considerations: the Municipality's failure to furnish a full and adequate explanation

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This decision by the SCA reinforces the long-standing principles of the undue delay rule which are predicated upon the desire to avoid prejudice to those who may be affected by the impugned decision.

for the entire duration of its unreasonable delay in instituting its application; the prejudice to the Appellant who had established that the Contract had almost been completed with the ostensible permission of the Municipality; and the severe prejudice to the inhabitants of Duncan Village who would be negatively affected by the inevitable delay in providing them with adequate housing which would flow from a declaration of invalidity of the Contract.

The award of the Contract was accordingly 'validated' by the unreasonable delay of the Municipality and the payment certificates relied upon by the Appellant were declared to be valid.

This decision by the SCA reinforces the long-standing principles of the undue delay rule which are predicated upon the desire to avoid prejudice to those who may be affected by the impugned decision and the public interest in the finality of administrative decisions and the exercise of administrative functions.

It is therefore important to ensure that a comprehensive explanation is provided to the court for any delay in instituting a timeous challenge to administrative action, otherwise it will be too little too late.

Lionel Egypt and Samantha Matjila

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.

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Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.

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COMMERCIALLY LUCRATIVE AGREEMENTS WITH THE STATE ARE NOT NECESSARILY SO

The decision of the Western Cape High Court in Parkscape v MTO Forestry (Pty) Ltd and Sanparks (15910/2016) [2017] ZAWCHC 22 (1 March 2017) again emphasises how a private entity places itself at risk when concluding a commercial contract with a state entity.

In our alert of 17 March 2017, we raised the commercial pitfalls facing a private entity contracting with a state organ which were highlighted by the decision of the Constitutional Court in *Black Sash Trust v Minister of Social Development and Others* concerning the payment of social grants by a private company, Cash Paymaster Services (Pty) Ltd. The earlier decision of the Western Cape High Court in *Parkscape v MTO Forestry (Pty) Ltd and Sanparks* (15910/2016) [2017] ZAWCHC 22 (1 March 2017) again emphasises how a private entity places itself at risk when concluding a commercial contract with a state entity.

The court found the straightforward decision by Sanparks to permit, purely on commercial considerations, MTO to accelerate the commercial realisation of its assets in terms of the lease to be the exercise of a public power and therefore subject to public scrutiny, participation and approval.

MTO concluded a lease with Sanparks which, among other things, permitted MTO to harvest for commercial gain its pine plantations located within the Table Mountain National Park and in accordance with time streams approved by Sanparks. In July 2016, as a result of devastating fires in the park during March of that year, MTO sought Sanparks' approval for the accelerated harvesting of certain sections of its plantation located in the Tokai area of the park. Sanparks agreed to this and felling of the plantation commenced the following month.

Parkscape, a voluntary association of interested persons established in June 2016 to "create safe, biodiverse, open and shaded urban parks in the buffer zones of the Table Mountain National Park where the park meets the urban edge" sought an order setting aside Sanparks' decision to allow the accelerated harvesting of the plantation and preventing the further felling of trees in the plantation pending public participation and approval of this. Parkscape's application was founded upon the contention that the Table Mountain National Park and the plantations therein are a public amenity managed under statutory authority by Sanparks, and that, in agreeing to the accelerated harvesting of the plantation in question, Sanparks was exercising a public, as opposed to a private, power.

This position was upheld by the court and, as a result, Sanparks' decision to permit MTO to embark upon the accelerated felling of its plantation was set aside as unlawful and Sanparks was ordered to engage with Parkscape and other interested parties in relation to the future harvesting of the plantation.

In the circumstances, MTO, whose only interest in the lease was of a commercial nature and to realise its asset located within the park, was and is left commercially exposed. The lease could not provide the parties with unfettered rights, although it afforded them the ability to determine by agreement how certain provisions of the lease, on purely commercial considerations, should be implemented. The court found the straightforward decision by Sanparks to permit, purely on commercial considerations, MTO to accelerate the commercial realisation of its assets in terms of the lease to be the exercise of a public power and therefore subject to public scrutiny, participation and approval.

Nick Muller

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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