THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case nos: 1106/2023, 1139/2023 and 1053/2023

In the matter between:

VIRGINIA PETERSEN	**FIRST APPELLANT**
BATHABILE OLIVE DLAMINI	**SECOND APPELLANT**
LUMKA OLIPHANT	**THIRD APPELLANT**

and

SOUTH AFRICAN SOCIAL SECURITY AGENCY	**RESPONDENT**

Neutral citation: *Petersen and Others v SASSA* (1106/2023, 1139/2023 and 1053/2023) [2024] ZASCA 173 (12 December 2024)

Coram: MAKGOKA, MBATHA, WEINER, KGOELE and UNTERHALTER JJA

Heard: 8 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 December 2024.

Summary: Self-review – Legality review – undue delay – prescription – Prescription Act 68 of 1969 – debt – public law remedy – judgment debt – intergovernmental disputes – Intergovernmental Framework Relations Act 13 of 2005 — South African Social Security Agency Act 9 of 2004 – Social Assistance Act 13 of 2004 – illegality – power to procure services by the South African Social Security Agency to protect officials of a government department – remedies.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makhoba J sitting as court of first instance):

1 The appeals of the first appellant and the third appellant are upheld in part and are dismissed in part.

2 No order is made as to the costs of the appeals in 1 above.

3 The appeal of the second appellant is dismissed, with costs, including the costs of two counsel, where so employed.

4 The order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

> ‘(i) To the extent condonation is necessary for the late initiation of the review application, condonation is granted;
>
> (ii) the decision of the applicant to procure close protection security services from the fourth respondent for the benefit of the second and third respondents is declared unlawful, reviewed and set aside;
>
> (iii) the agreement concluded between the applicant and the fourth respondent on 26 February 2014, and its addendum pursuant to the decision referred to in (ii) above, are declared unlawful, reviewed and set aside;
>
> (iv) the second respondent (Bathabile Olive Dlamini) is ordered to pay to the applicant the sum of R2 008 086, together with interest at the prescribed rate of interest from the date the applicant made its last payment to the fourth respondent until the date of payment.
>
> (v) the second respondent (Bathabile Olive Dlamini) is to pay the costs of the application brought against her, including the costs of two counsel, where so employed.’

JUDGMENT

Unterhalter JA (Makgoka, Mbatha, Weiner and Kgoele JJA concurring):

[1] The respondent, the South African Social Security Agency (SASSA), administers and makes payment of social assistance in terms of the South African Social Security Agency Act[1] (the SASSA Act). In 2013, the first appellant, Dr Virginia Petersen (Dr Petersen), was the Chief Executive Officer (CEO) of SASSA. She was appointed as the CEO of SASSA in April 2011 for a five-year term, which ended in May 2016. The second appellant, Ms Bathabile Olive Dlamini (Ms Dlamini) was the Minister of Social Development. She no longer serves as a Minister. The third appellant, Ms Lumka Oliphant (Ms Oliphant), served as the Chief Director of Communications at the Department of Social Development (DSD) and she remains in this post.

[2] In 2012, in order to curtail fraudulent claims for social grants, SASSA commenced a process to re-register persons eligible to receive social grants. The process exposed large scale fraud on the part of criminal syndicates and employees of SASSA. This led to some 900 000 grants being cancelled. Dr Petersen, Ms Dlamini, as the Minister, and Ms Oliphant were publicly identified as the officials promoting these efforts to eradicate fraud from the system for the payment of social grants. As a result, threats were made to their lives.

[3] On 25 August 2013, Ms Oliphant was subjected to intimidation by three men while at a restaurant. A meeting was convened by the Gauteng Commissioner of Police with Ms Dlamini, Dr Petersen, the representatives of the South African Police

[1] South African Social Security Agency Act 9 of 2004.

Service (SAPS) and the State Security Agency. Following this meeting, Ms Dlamini, as the Minister, instructed Dr Petersen, as the CEO of SASSA, to procure security services for Ms Oliphant. Such security is styled 'close protection services' in the papers.

[4] On 28 August 2013, Dr Petersen sent a submission to Ms Dlamini, as the Minister. The submission referenced the intimidation of Ms Oliphant; recorded the Minister's request that SASSA should provide close protection services for Ms Oliphant and sought the Minister's approval to appoint a company to do so, at SASSA's expense. Further acts of intimidation were directed to the children of Ms Oliphant and Ms Dlamini. This was confirmed in a threat assessment undertaken by the SAPS.

[5] Ms Dlamini, as the Minister, signed the submission. Dr Petersen then submitted a memorandum to the Bid Adjudication Committee (BAC), purportedly under the Emergency Procurement Rules of SASSA, for SASSA to procure close protection services for Ms Oliphant, her children and the children of Ms Dlamini. The BAC signed the memorandum. As a result, SASSA procured these services from Vuco Security Solutions CC (Vuco), the fourth respondent in the court below, for a period of some six months. The services were extended for a further six months, at the instance of Dr Petersen, who signed a request submitted to the BAC dated 4 December 2013. The services were paid for by SASSA. In total, an amount of R3 499 606 (Three Million Four Hundred and Ninety-Nine Thousand and Six Hundred and Six Rand) was paid to Vuco. Of that amount, R2 008 086 (Two Million, Eight Thousand and Eighty-Six Rand) was in respect of protection services for Ms Dlamini's children, and R1 491 520 (One Million, Four Hundred and Ninety-One Thousand, Five Hundred and Twenty Rand) for Ms Oliphant and her children.

[6] On 17 November 2020, SASSA launched an application in the Gauteng Division of the High Court, Pretoria (the high court), to review and set aside SASSA's decision to procure the close protection services and to declare the contract with Vuco unlawful. SASSA also sought just and equitable relief against Dr Petersen, Ms Dlamini and Ms Oliphant, in effect, to repay to SASSA the amounts, with interest, that SASSA paid to Vuco. Given the passage of time between the decision of SASSA to procure Vuco's services and the initiation of the review, SASSA also sought condonation. In its founding affidavit, SASSA accepted that there had been an unreasonable delay on its part in bringing the review, but it contended that there was no prejudice to Dr Petersen, Ms Dlamini or Ms Oliphant; it averred that the issues were narrow; and 'the determination of the review application will enhance transparency, accountability and will strengthen the public's confidence in the maintenance of the rule of law'.

[7] The review was opposed by Dr Petersen, Ms Dlamini and Ms Oliphant. They raised five defences relevant to this appeal. They contended that:

(a) the review was brought out of time, with unreasonable delay, without any explanation therefor, and that condonation should not be granted;

(b) the debts, in respect of which payment was sought, had prescribed;

(c) SASSA had failed to comply with its duty to attempt to settle what is an intergovernmental dispute in terms of s 45 of the Intergovernmental Relations Framework Act[2] (the IRF Act), and this failure barred SASSA from instituting its review;

(d) the procurement of the close protection services by SASSA was not unlawful; and

(e) the relief sought for repayment should not be granted.

[2] Intergovernmental Relations Framework Act 13 of 2005.

[8] The high court did not uphold these defences. It found that even though the delay in bringing the review was unreasonable, the interests of justice must prevail. There was no prejudice; there were prospects of success; and the public purse required protection. Condonation was thus granted. As to prescription, the high court did not consider that Ms Dlamini or Ms Oliphant was indebted to SASSA. It held the IRF Act not to be of application; that Dr Petersen had no power to approve the use of SASSA's funds to procure close protection services, and that such procurement was unlawful. Since there was no legal basis upon which SASSA paid for the close protection services, the high court decided that these monies must be repaid. It thus set aside SASSA's decision to procure the services; and granted the declarator sought. It ordered Dr Petersen and Ms Dlamini to repay an amount of R2 008 086, jointly and severally, the one paying the other to be absolved; and further, that Dr Petersen and Ms Oliphant repay the amount of R1 491 520, jointly and severally, the one paying the other to be absolved. And finally, Dr Petersen, Ms Dlamini and Ms Oliphant were ordered to pay costs. They now appeal to this Court, each with the leave of the high court. Each of the appellants noted their appeal separately in this Court, as a result of which each was allocated a different case number, hence the three appeal case numbers.

Delay

[9] I commence with the question of delay, and the condonation granted by the high court. Ever since the holding of the Constitutional Court in *Gijima*,[3] an organ of state that seeks to review its own administrative action may not, ordinarily, have recourse to the Promotion of Administrative Justice Act[4] (PAJA), but must bring its review under the legality principle.[5] SASSA did so, and thus the criticism that it

[3] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).
[4] Promotion of Administrative Justice Act 3 of 2000.
[5] *Gijima* op cit fn 3 paras 38-41.

should have brought its review under PAJA, and been subject to the PAJA regime of unreasonable delay, has no merit.

[10] The law that governs delay in cases of self-review under the legality principle lacks satisfactory coherence as a result of the shifting sands that have blown through the Constitutional Court on this matter. It is no modest endeavour to determine what settled propositions emerge from the *dicta* of the Constitutional Court in *Khumalo*,[6] *Gijima*,[7] *Tasima*,[8] *Asla Construction*,[9] *Notyawa*[10] as to the discretion of a court to overlook delay in this species of review. Happily, there is no need for this Court to undertake this task.[11] In *Asla Construction*,[12] the Constitutional Court explained that, unlike the treatment of delay under PAJA, the 180-day period does not apply and no formal application for condonation is required. That proposition is of assistance in the unusual circumstances of this case.

[11] In its founding affidavit, SASSA sought condonation for its delay in bringing the review and acknowledged that there had been an unreasonable delay in doing so. SASSA did not explain the reasons for the delay, and in fact, stated that it was unable to do so. This was surprising, given the years that had passed between the decision to procure close protection services by Dr Petersen and the initiation of review proceedings in 2020. The answering affidavit of Dr Petersen, however, gives an

[6] *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) paras 44 and 45.
[7] *Gijima* op cit fn 3 paras 47-49.
[8] *Department of Transport and Others v Tasima (Pty) Limited* ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 160.
[9] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 53.
[10] *Notyawa v Makana Municipality and Others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC).
[11] See this Court's endeavor to do so: *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA) at paras 34-47.
[12] Supra fn 6 para 51.

account of what occurred after SASSA procured and paid for the close protection services in 2014.

[12] This is her explanation. In 2015, the Auditor General's office made certain findings concerning the need for the close protection services procured by SASSA and directed an enquiry to SASSA. An official of SASSA, Mr Ian Bull, compiled a detailed response, signed by Dr Petersen, justifying the procurement, and defending its legality. In addition, in 2015, questions were raised in Parliament concerning the close protection services procured by SASSA for Ms Dlamini's children, and answers were formulated by SASSA in defence of its actions. A complaint was also lodged with the Public Protector, and a written response was given by the DSD.

[13] Dr Petersen's fixed term employment at SASSA came to an end in May 2016 and she left the agency. In February 2018, a letter was sent to Dr Petersen from SASSA's acting CEO, Ms Pearl Bengu. Her letter stated that Dr Petersen was aware that SASSA did not have 'a legitimate mandate' to provide close protection services; that the amounts paid for these services (some R3 499 606) were declared to constitute fruitless and wasteful expenditure by the Auditor General; that SASSA had attempted to recover payment from the DSD, without success; the matter was referred to SASSA's Financial Misconduct Board; and Dr Petersen was invited to make written representations as to her liability for this expenditure. Dr Petersen took up this invitation.

[14] In September 2018, SASSA decided to hold Dr Petersen personally liable for the moneys paid by SASSA for the close protection services rendered to Ms Oliphant, her children, and the children of Ms Dlamini. On 7 February 2019, SASSA issued summons against Dr Petersen, Ms Dlamini and Ms Oliphant for the repayment of monies expended by SASSA for the close protection services.

SASSA's claim was based upon the alleged misappropriation of funds, alternatively a failure to comply with the SASSA Act, and further, alternatively, unjust enrichment. SASSA's action was defended by the appellants. They raised a number of defences which they also advanced in the review. What SASSA did not do was seek to review and set aside the administrative action taken by it to procure the close protection services. This was done by way of the self-review, the appeal, in respect of which, is now before us.

[15] I have set out in some detail what, according to Dr Petersen, was done by SASSA post 2014. These matters are not placed in issue by SASSA. What emerges is the following. While Dr Petersen headed SASSA, she adopted the position that its actions were lawful. After she stepped down, a process was followed to secure the repayment of what the Auditor General had concluded was fruitless and wasteful expenditure. That was not done with any speed. Nor is it plain why the action was brought, rather than the review that was ultimately initiated and pursued. But it cannot be said that SASSA, from the time of Dr Petersen's departure, and after the interventions of the Auditor General and the Public Protector, was supine. SASSA adopted the position that the procurement of the close protection services was unlawful. It sought repayment from the DSD, and when that yielded no result, it did so from Dr Petersen, Ms Dlamini and Ms Oliphant, who were then put on notice of the claim.

[16] The high court, as set out above, accepted SASSA's acknowledgement of unreasonable delay, but then found reasons, nevertheless, to condone that delay. I consider that the high court's decision to entertain the review should be sustained, but for different reasons. Since, following *Asla Construction*, SASSA was not obliged to bring a formal condonation application, it is permissible to decide the question of delay on the basis of the undisputed facts before us, even though they

derive in large measure from the affidavit of Dr Petersen. SASSA did take steps to secure a remedy for what it considered to be the unlawful procurement that had taken place under the direction of Dr Petersen, and upon the instruction of Ms Dlamini as the Minister. Those steps were taken somewhat ponderously, and perhaps without proper regard for the need to bring a review, until SASSA did so in 2020. But SASSA did seek to give effect to its duty to rectify what the Auditor General had determined to be fruitless and wasteful expenditure. It sought reimbursement from the DSD; it brought an action against Dr Petersen, Ms Dlamini and Ms Oliphant; and then brought proceedings by way of self-review. Those sought to be held liable were put on notice of their alleged liability, without evident prejudice.

[17] The review brought by SASSA and the remedy it sought were certainly deserving of the high court's consideration. The review, though belated, was predicated upon the need to hold officials to account for the expenditure of public money, in no small amount, that appeared to be unlawful, fruitless and may have entailed an abuse of office.

[18] For these reasons, while the review was much delayed, there were reasons for the delay. Until Dr Petersen's departure from SASSA, her stance as the CEO was that SASSA had acted lawfully. One cannot easily imagine how SASSA would have acted contrary to her position. After her departure, the process of seeking redress took time, first with the DSD, then a process to determine whether to proceed against Dr Petersen, next by way of the summons, and finally the review. There were evidently issues as to how to navigate the cause of action by which to hold office bearers to account. I conclude in light of all these facts, that the delay was not undue. But even if it was, enough was done to seek to secure reimbursement. The review raises arguable issues of legality, prescription and an important question as to how just and equitable relief should be applied to hold office bearers to account. To the

extent that any condonation was required, the high court was thus correct to grant it and entertain the review. The appeal on the basis of undue delay cannot prevail.

Prescription

[19] The appellants raise prescription against SASSA. They contend that the debt for which they have been found to be liable became due, at the latest, when Vuco issued its last invoice for payment for the close protection services it had rendered. That was, according to Ms Oliphant, 1 April 2014. The appellants contend that the claims of SASSA against the appellants are debts, and these debts were extinguished by prescription in 2017, in terms of the Prescription Act.[13]

[20] The defence proceeds from an incorrect premise. The debt that SASSA owed to Vuco may have fallen due in April 2014. But that is not the debt that SASSA seeks to enforce against the appellants. The cause of action of SASSA against the appellants is a review. It rests upon a claim arising in public law for the exercise by the court of powers to review administrative action under the legality principle, deriving from the Constitution. Such a review is not a debt for the purposes of the Prescription Act. Nor do the appellants contend that the review brought by SASSA had prescribed. Their complaint is that it was brought with undue delay. But that is not to say that the review and the relief claimed under it is a debt that had prescribed in terms of the Prescription Act. The complaint of undue delay is juridically distinct, and I have dealt with it above.

[21] The confusion in the appellants' treatment of this issue arises because SASSA brought its review and described its relief as the repayment to SASSA of what was paid by it to Vuco. That is not the correct characterisation of the relief sought by SASSA in the review. SASSA sought to review and set aside the decision of

[13] Prescription Act 68 of 1969.

Dr Petersen on behalf of SASSA to have SASSA procure services from Vuco. This review, as I have analysed it, is not a debt in terms of the Prescription Act, but an application to seek the exercise by the courts of their public law powers. Apart from reviewing and setting aside the decision of Dr Petersen, SASSA has sought just and equitable relief that would require repayment by the appellants. The power of the courts to give such relief is to be found in s 172(1)*(b)* of the Constitution. The exercise of that power by a court is also not a debt under the Prescription Act. Once the power is exercised, as occurred at the instance of the high court, the order of the high court to pay an amount of money is a judgment debt that may fall within s 11*(a)*(ii) of the Prescription Act. But that is not a matter I need to decide because the period of prescription for a judgment debt is thirty years. If the orders of the high court sounding in money are judgment debts in terms of the Prescription Act, they have assuredly not been extinguished by prescription. For these reasons, the defence of prescription relied upon by the appellants must fail.

Intergovernmental Framework Relations Act 13 of 2005 (the IFR Act)

[22] The appellants contend that SASSA should have had recourse to the IFR Act before it brought its review and sought payment from the appellants. The affidavits explain that a dispute arose between SASSA and the DSD as to whether the payment by SASSA for the close protection services rendered by Vuco were to be repaid to SASSA by the DSD. SASSA contended that the DSD had undertaken to do so, and the DSD refused to make payment. SASSA did not take this up within the framework for resolving intergovernmental disputes provided for in the IFR Act. The appellants contended that this was a necessary preliminary step before SASSA could bring its review.

[23] Counsel for SASSA and the appellants did not agree as to whether the IFR Act is of application to SASSA. Section 2 of the IFR Act specifies to which institutions

this enactment applies. The IFR Act provides in s 2(2)*(g)* that it does not apply to any public institution that does not fall within the national, provincial or local sphere of government. The parties are at odds as to whether SASSA is such a public institution. SASSA is established to administer social assistance in terms of Chapter 3 of the Social Assistance Act[14] (SAA). The SAA is legislation that has as its object measures to fulfil the constitutional right to have access to social security. The SAA requires the Minister of Social Development to make available various kinds of grants out of moneys allocated by Parliament (s 2 of the SAA). That is clearly a function deputed by the SAA to the Minister of Social Development, and it is located in the national government. SASSA in terms of s 4 of the SASSA Act must administer social assistance in terms of chapter 3 of the SAA. And for this reason, it might be thought that SASSA is a public institution that falls within the sphere of national government. That position is bolstered by s 6(1)*(a)* of the SASSA Act that makes the CEO of SASSA responsible for the management of the agency, but subject to the direction of the Minister of Social Development.

[24] However, there is no need for me to decide whether the IFR Act is of application to SASSA. An intergovernmental dispute is a dispute between different governments or between organs of state from different governments concerning 'a matter arising from a statutory power or function assigned to any of the parties'[15] or 'an agreement between the parties regarding the implementation of a statutory power or function'[16] and 'which is justiciable in a court of law'.[17] Even if the IFR Act is of application to SASSA, the review that SASSA has brought to court is not an intergovernmental dispute as defined in s 1 of the IFR Act.

[14] Social Assistance Act 13 of 2004.
[15] Section 1*(a)*(i) of the IFR Act.
[16] Section 1*(a)*(ii) of the IFR Act.
[17] Section 1*(b)* of the IFR Act.

[25] This is so for two reasons. First, SASSA has brought a review to test the legality of the administrative action that it took to procure the services of Vuco. SASSA does not have a dispute with the DSD as to whether it enjoyed the power so to act. Second, there was a dispute between SASSA and the DSD as to whether the DSD had agreed to repay SASSA for the monies paid by SASSA to Vuco. But that too is not a dispute that falls within the definition of an intergovernmental dispute, because it is not a dispute about the implementation of a statutory power or function. It is a dispute as to whether the DSD had made an agreement to make payment to SASSA. It follows that SASSA was not required to comply with the duties cast upon organs of state by the IFR Act to avoid intergovernmental disputes before initiating its review. The appeal cannot succeed on this ground.

The merits of the review

[26] The central issue upon which the review turns is this: does the SASSA Act, from which Dr Petersen derived her powers, permit her to have taken the decision that SASSA would procure and pay for the close protection services that were rendered by Vuco to Ms Oliphant, her children, and the children of Ms Dlamini? The high court held that the SASSA Act did not empower Dr Petersen, as the CEO of SASSA to do so: the purpose of SASSA, the high court found, 'is the administration and payment of social grants and nothing else'.[18] SASSA supports this finding on the basis that neither the objects of SASSA, nor its functions, as set out in the Act, include a competence to procure close protection services.

[27] The approach taken by the high court engages a somewhat stark literalism. Powers conferred by a statute upon an agency such as SASSA will always be framed with some measure of generality because Parliament seeks to demarcate the essential contours of authority that it wishes to confer. Parliament cannot particularise every

[18] Paragraph 47 of the judgment.

action that an agency is competent to take. It is unhelpful therefore to read the SASSA Act to see whether it specifically refers to the procurement of close protection services. Section 4(2)*(b)* provides for the residual competence of SASSA to 'do anything necessary for the realisation of the Agency's objects' and s 9(2) requires SASSA to 'utilise its funds to defray expenses incurred by it in the performance of its functions'.

[28] SASSA discharges a crucial function: the administration of social assistance. This is a function that derives from the Constitution[19] in order to make good the right, in s 27(1)*(c)* of the Constitution, to social security, implemented in terms of the SAA. SASSA's review has its genesis in the unlawful threats and intimidation that were directed towards officials identified with an intervention to purge the system of fraudulent claimants. For SASSA to procure security services to protect its own officials who carry out the functions of administering social assistance, and who may be subject to serious criminal threats that interfere with the discharge of their functions, could well be a matter that falls within the remit of s 4(2)*(b)* of the SASSA Act. This proposition is premised on certain factual postulates: that the SAPS cannot or will not provide the required protection; that the threat is imminent and serious; and that the private provision of security is the only feasible alternative. But upon these postulates, what could be more necessary to the realisation of SASSA's objects than to protect its officials who are subject to criminal threats and intimidation, so as to permit these officials to carry out their statutory functions?

[29] Had Dr Petersen, as the CEO of SASSA, taken reasonable and proportionate measures to provide security for the protection of SASSA officials who were subjected to criminal threats and intimidation, I should have been inclined to conclude that such measures fall within the remit of s 4(2)*(b)* of the SASSA Act. But

[19] Constitution of the Republic of South Africa, 1996.

that is not what occurred. Dr Petersen procured protection services for people who were not SASSA officials – Ms Oliphant, her children, and Ms Dlamini's children. Ms Dlamini used her position as the Minister of Social Development, with direct authority over Dr Petersen, deriving from s 6(1)*(a)* of the SASSA Act, to require Dr Petersen, as the CEO of SASSA, to procure, through SASSA, the close protection services that the former Minister considered necessary for the protection of an official of the DSD, Ms Oliphant, her children, and the children of Ms Dlamini.

[30] There is no question that there was a serious threat posed to Ms Oliphant, her children, and later on, the children of Ms Dlamini. That threat came about because of the campaign undertaken to rid the system for the payment of social grants of fraudulent claimants. That system is administered by SASSA. Ms Dlamini, as the Minister of Social Development, would have been entitled, and perhaps obliged, to provide security protection for officials of the DSD, and their family members, absent the SAPS doing so. However, the SASSA Act does not empower the Minister to use SASSA, and its funds, to procure protection services for the protection of officials of her own department, the DSD.

[31] It is not part of the functions of SASSA to procure and pay for the protection of officials of the DSD (and their families) and the children of the Minister herself. Officials of the DSD are entitled to protection in the discharge of their functions. It is the duty of the DSD, and ultimately its Minister, to ensure that this is done. In the first place that should have been done by the SAPS. The former Minister did enjoy such protection from the SAPS VIP Protection service. It seems their service did not extend to her children. It is a distressing reflection upon the ineffectiveness of the SAPS that the police could not discharge their most basic function: to ensure the safety of those who do essential work within departments of the state, and their family members. Faced with this fact, it may have been competent for the former

Minister to decide that the DSD would procure and pay for the protection of Ms Oliphant, Ms Oliphant's children, and her own children.

[32] The former Minister, however, acted outside her powers to require Dr Petersen to procure, through SASSA, the protection services required for the protection of officials of the DSD, and their children. So too, the SASSA Act does not empower SASSA to procure such services to protect the officials, and their children, who are employed by another department of state. Although the work of SASSA and the DSD is closely related, as this case illustrates, it was for the former Minister to exercise her executive authority over the DSD, the department for which she was responsible, to protect officials of that department, and their families. Hence, such protection cannot form part of what is necessary for the realisation of SASSA's objects.

[33] It follows that the administrative action taken by Dr Petersen to have SASSA procure and pay for the protection services provided to Ms Oliphant, her children, and the children of Ms Dlamini was *ultra vires*, and hence unlawful. The high court did not err in so finding, though my reasons for reaching this conclusion differ from those of the high court.

Relief

[34] The high court ordered Dr Petersen, Ms Dlamini and Ms Oliphant to reimburse SASSA for the payments made by SASSA to Vuco. The high court offered sparse reasons for the orders it made. It did so without embarking on an enquiry in terms of s 172(1)(*b*) of the Constitution as to whether such an order was just and equitable. It simply opined that there was no legal basis for SASSA to have paid for the close protection afforded to Ms Dlamini and Ms Oliphant, and hence

'they must pay back'.[20] As to Dr Petersen, the high court was content to observe that as the CEO of SASSA, she 'should have known that she was not authorised to use funds meant for the applicant outside the powers of the Act'.[21]

[35] The question as to whether this Court can interfere with the high court's exercise of its jurisdiction to grant just and equitable relief is easily answered. The high court failed to embark upon an enquiry in terms of s172(1)(b) of the Constitution as to whether to grant just and equitable relief. It provided no reasoning to justify the orders it made for this relief. Once that is so, this Court is clearly competent to consider whether the orders granted by the high court, on this score, were warranted, and if not, to correct them.

[36] Once the high court had correctly found that the administrative action was unlawful, it was bound to uphold the review and declare the administrative action unlawful. Whether the administrative action should, therefore, also have been set aside is not an ineluctable consequence of the declaratory order, but it is not an issue that need detain me because none of the parties contended otherwise, I can see no reason why the high court should not have done so.

[37] The orders for payment imposed upon Dr Petersen and Ms Oliphant require closer scrutiny. In the course of oral argument before us, counsel for SASSA conceded that these orders could not stand. The concession was correctly made. Dr Petersen was placed in a position where the Minister, whose directions she was statutorily subject, required her to take steps to have SASSA procure and pay for the close protection services. How this came about is set out above. Dr Petersen followed the former Minister's directions. Dr Petersen's affidavit shows that she *bona fide*

[20] Paragraph 53 of the judgment.
[21] Paragraph 51 of the judgment.

thought that she enjoyed the competence to do what the Minister had directed. And to do so in circumstances in which there was a very real threat which had come about by reason of the work that SASSA and the DSD were doing together. In these circumstances, an official who seeks to carry out her functions, under ministerial direction, in the mistaken but *bona fide* belief that she is doing what is required, should not be saddled with liability for the expenditures that she authorised. In addition, she received no benefit from these actions. In these circumstances, it is not just and equitable relief to saddle Dr Petersen with a liability to pay for the expenditure she authorised. The high court erred on this score. Whether Dr Petersen may be liable for fruitless and wasteful expenditure on some other basis, statutory or otherwise, is not before us.

[38] Ms Oliphant should also not have been rendered liable to reimburse SASSA for the protection services afforded to her by way of an order of just and equitable relief. She and her children were facing criminal threats and intimidation. The SAPS did not act. Ms Dlamini, as the former Minister, and the DSD, had a duty, as her employer, to afford her protection. This was done. That it was done by unlawful means as a result of the engagements between Ms Dlamini and Dr Petersen is not a matter for which Ms Oliphant should be held responsible and ordered to reimburse SASSA. The high court erred in its order against Ms Oliphant on this score. Whether or not Ms Oliphant may be liable on grounds other than those raised by SASSA's review is also not before us.

[39] Ms Dlamini's position is different. She was the Minister responsible for the DSD. She used her position of authority over Dr Petersen to require her to take steps to cause SASSA to procure and pay for protection services for an official of the DSD, Ms Oliphant, Ms Oliphant's children, and her own children. Ms Dlamini gives no satisfactory explanation as to why she acted in this way. She states that the

Director General of the DSD advised her to use SASSA because DSD was not in a position to do so, and SASSA would be reimbursed. At a minimum, Ms Dlamini was required to question the basis of this advice. Common sense would indicate that the DSD could not slough off its responsibilities to SASSA in this way. Ms Dlamini used her authority to require SASSA to do what the DSD had a duty to do. She did so without the exercise of reasonable care. That breach of duty is compounded by the fact that she required SASSA to provide security not just for Ms Oliphant and her children, but also for her own children. Ms Dlamini therefore unlawfully used her authority to secure a benefit for herself. That amounted to a clear abuse of power. In these circumstances, it is just and equitable that Ms Dlamini should be held liable to reimburse SASSA for the benefit she received. The order made by the high court to require this was warranted. As to the running of interest, it is equitable that Ms Dlamini should make good what SASSA has paid to provide security services for her benefit. That includes the time value of money, and hence interest should run from the date that SASSA made the last payment to Vuco in respect of the services rendered by Vuco for Ms Dlamini's benefit. The orders made by the high court to require that SASSA should be fully reimbursed was thus warranted.

Conclusion

[40] The appeal succeeds in part. The decision of SASSA to procure and pay for close protection services was unlawful. The high court was correct to declare this decision unlawful, review it and set it aside. Dr Petersen and Ms Oliphant sought to appeal this order, and in this respect their appeals fail. The orders made by the high court against Dr Petersen and Ms Oliphant to repay SASSA were, however, not warranted. It is relief that is neither just nor equitable, and it must be set aside. In this respect, their appeals are upheld.

[41] The appeal of Ms Dlamini fails, and it is dismissed. Ms Dlamini has not prevailed in sustaining either the legality of Dr Petersen's decision or the order of the high court requiring her to repay SASSA for the close protection services afforded to her children. There was an issue raised in oral argument as to whether the high court had attributed the correct liability for payment by Ms Dlamini. The accounts are attached to the founding affidavit, and they bear out that the amount charged by Vuco in respect of the services rendered to protect Ms Dlamini's children was correctly reflected in the order made by the high court.

[42] The high court did not explain why it also ordered that the agreement concluded between SASSA and Vuco should be declared unlawful, reviewed and set aside. The contract was entered into pursuant to the decision taken by Dr Petersen that SASSA would procure and pay for close protection services. Since that decision was unlawful, and the high court correctly declared it to be so, reviewed and set it aside, it may seem ineluctable that the same remedial treatment should follow in respect of the agreement between SASSA and Vuco. That is not, as a matter of remedial discretion, inevitably so. However, the founding affidavit impugned the agreement for failing to comply with the requirements stipulated for lawful procurement, including s 217 of the Constitution and the Public Finance Management Act.[22] There was some effort by the appellants to resist this conclusion on the basis of the emergency procurement rule 4.3.5 of SASSA's Procurement Policy and the National Treasury Regulations. But if the decision of SASSA to conclude the agreement was unlawful, these procurement rules cannot salvage the illegality of the agreement. The agreement was correctly declared to be illegal by the high court. The only question is whether there is some reason not to review and set aside the agreement. There could be reason to do so on the basis of issues arising in other unresolved disputes, not before us. But nothing was submitted to us on this

[22] Public Finance Management Act No 1 of 1999.

score. Vuco did not oppose the relief sought before the high court. I can see no reason therefore to interfere with the order made by the high court in respect of the agreement.

[43] As to costs, SASSA was content, as against Dr Petersen and Ms Oliphant, to have each party pay their own costs in respect of the appeal. That seems entirely appropriate given that Dr Petersen and Ms Oliphant have, in part, succeeded in the appeal. As the costs before the high court, Dr Petersen and Ms Oliphant chose to defend the case on a wide basis, including the preliminary points that were correctly dismissed by the high court. However, the focus of the application was to hold Dr Petersen and Ms Oliphant liable to repay SASSA. They have been successful on this aspect of the appeal. That being so, I do not consider that they should be liable to pay SASSA's costs in the high court. As for Ms Dlamini, her appeal has failed, and the costs of this appeal must follow that outcome.

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

1 The appeals of the first appellant and the third appellant are upheld in part and are dismissed in part.

2 No order is made as to the costs of the appeals in 1 above.

3 The appeal of the second appellant is dismissed, with costs, including the costs of two counsel, where so employed.

4 The order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

> '(i) To the extent condonation is necessary for the late initiation of the review application, condonation is granted;
>
> (ii) the decision of the applicant to procure close protection security services from the fourth respondent for the benefit of the second and third respondents is declared unlawful, reviewed and set aside;

(iii) the agreement concluded between the applicant and the fourth respondent on 26 February 2014, and its addendum pursuant to the decision referred to in (ii) above, are declared unlawful, reviewed and set aside;

(iv) the second respondent (Bathabile Olive Dlamini) is ordered to pay to the applicant the sum of R2 008 086, together with interest at the prescribed rate of interest from the date the applicant made its last payment to the fourth respondent until the date of payment.

(v) the second respondent (Bathabile Olive Dlamini) is to pay the costs of the application brought against her, including the costs of two counsel, where so employed.'

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

Case No: 1106/2023

For first appellant:	G Bofilatos SC
Instructed by:	Ramsurjoo & Du Plessis Inc., Johannesburg
	Symington & De Kok, Bloemfontein

Case no:1139/2023

For second appellant:	T Tshabalala and L Mfazi
Instructed by:	Tim Sukazi Inc., Johannesburg
	Mlozana Attorneys Inc., Bloemfontein

Case no: 1053/2023

For third appellant:	Z Ngwenya and J Mabuza
Instructed by:	Mametja and Associates Inc., Randburg
	LM Attorneys and Partners, Bloemfontein

For respondent:	M E Manala and S Jozana
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein.