

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 34583/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>22/11/23</u>	
DATE	SIGNATURE

In the matter between:

PUBLIC SERVANTS ASSOCIATION

Applicant

and

SOUTH AFRICAN REVENUE SERVICE

First Respondent

**COMMISSIONER OF THE SOUTH AFRICAN
REVENUE SERVICE**

Second Respondent

MINISTER OF FINANCE

Third Respondent

**NATIONAL EDUCATION HEALTH AND ALLIED
WORKERS UNION**

Fourth Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 22 November 2023.*

JUDGMENT

KUBUSHI, J

Introduction

- [1] This case revolves around the lawfulness, or otherwise, of a Substantive Wage Agreement entered into between the First Respondent and some of its employees. The Applicant seeks to enforce the Substantive Wage Agreement and asks this Court to order specific performance. The First and Second Respondents have, also, launched a counter application which seeks an order declaring the said Substantive Wage Agreement, unlawful and invalid.
- [2] At issue is the implementation of the final year of a Multi-Year Wage Agreement ("the Wage Agreement") entered into by the Applicant, the Public Servants Association ("the PSA"), together with the Fourth Respondent, the National Education Health and Allied Workers Union ("NEHAWU") on the one hand, and the First Respondent, the South African Revenue Service ("SARS") on the other hand.
- [3] The Wage Agreement concerned is a collective agreement concluded in the process of collective bargaining as provided for in section 18 of the South African Revenue Act ("the SARS Act").¹ A collective agreement is defined in Section 213 of the Labour Relations Act,² as *"a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand, - (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations"*. The PSA and NEHAWU are both registered trade unions respectively, representing some of the employees of SARS.
- [4] The Wage Agreement, which is also referred to in the papers as the Substantive Wage Agreement, *alternatively*, the three-year wage agreement, was concluded on 31 March 2019 for a period of three years, and provided for salary increases in the years 2019/2020, 2020/2021 and 2021/2022. The salary increases were

¹ Act 34 of 1997.

² Act 66 of 1995.

duly implemented in 2019/2020 and 2020/2021, but for reasons that shall appear later in this judgment, SARS refuses to implement the 2021/2022 salary increases.

- [5] As already indicated, the proceedings consist of two applications. In the first application, which is referred to herein as the main application, the PSA seeks to enforce the Wage Agreement, in particular, the implementation of the final year of the Wage Agreement, which is Clause 4.1 of the Wage Agreement. In the second application, which is the counter application to the main application, SARS, as the Applicant therein, seeks to review and set aside the Wage Agreement, *alternatively*, to review and set aside Clause 4.1 of the Wage Agreement, on the ground that it is unlawful and invalid *ab initio*. SARS, also, anticipates that there may be a reasonable delay in bringing the counter application, and has simultaneously asked for condonation thereof.

Parties

- [6] The PSA, as the Applicant in the main application, seeks relief against SARS and the Second Respondent, the Commissioner for the South African Revenue Service ("the Commissioner"), for the enforcement of the Wage Agreement. Although the relief is sought against both SARS and the Commissioner, for convenience, reference is made in this judgment solely to SARS without distinguishing between the two respondents.
- [7] Initially, the PSA also sought relief against the Third Respondent, the Minister of Finance ("the Minister"), for an order directing the Minister to make the necessary allocation of funds to SARS, to enable implementation of the salary adjustments provided for in Clause 4.1 of the Wage Agreement, for the period 2021/2022. Based on the information provided in the Minister's answering affidavit to the main application, the PSA abandoned the relief sought against the Minister, but did not formally withdraw the case against the Minister, who remains a party to the litigation since, as the executive authority of SARS, it is alleged that he is an interested party. The Minister has taken issue with the PSA due to the PSA's failure to withdraw the case against the Minister even though it (the PSA) has abandoned the only relief it sought against the Minister, and seeks a punitive

cost order against the PSA. This issue is to be dealt with in full later in the judgment.

[8] SARS is opposing the relief sought by the PSA in the main application, and is, simultaneously, as the Applicant in the counter application, seeking, in the main, an order against the PSA and NEHAWU, to review and set aside the Wage Agreement, *alternatively*, to review and set aside Clause 4.1 of the Wage Agreement.

[9] Even though NEHAWU is not cited as a party in the main application, however, as one of the signatories of the Wage Agreement and for the purposes of the counter application, SARS applied and was granted leave to join NEHAWU as a necessary party to the counter application. This necessitated NEHAWU to oppose the counter application seeking the enforcement of the Agreement.

Relief sought

[10] The relief sought by the PSA in the main application is for:

10.1 An order that the Substantive Wage Agreement is valid and binding on SARS;

10.2 An order that the failure by SARS to implement the salary increases provided for in Clause 4.1 of the Substantive Wage Agreement for the 2021/2022 period is in breach of the contracts of employment of the PSA's members employed by SARS; and

10.3 An order that SARS implement the salary increases provided for in Clause 4.1 of the Substantive Wage Agreement for the period 2021/2022.

[11] SARS, in opposing the relief sought by the PSA, raises the following two discrete legal grounds:

11.1 By virtue of the provisions of sections 53(4), 66(3) and 68 of the Public Finance Management Act ("the PFMA"),³ the Substantive Wage Agreement is unlawful and, accordingly, not binding on SARS; and

11.2 The implementation of the salary increases for 2021/2022 is objectively impossible for SARS.

[12] SARS also contends that if neither of the two defences are upheld, an order of specific performance would not be just and equitable.

[13] Insofar as the main application is not dismissed on its own terms, SARS seeks to counter-apply for an order to review and set aside the Wage Agreement. This, according to SARS, is so because the Wage Agreement (or Clause 4.1 thereof) breaches sections 53(4), 66(1) and 66(3) of the PFMA and section 216 of the Constitution. The allegation is that the agreement is, accordingly, invalid and unenforceable to this extent, and falls to be declared invalid in terms of the principle of legality. SARS submits that for the same reasons, the decision by SARS to enter into the agreement is unlawful and invalid, and falls to be reviewed and set aside and declared invalid, in terms of the principle of legality, as well. Since, the counter application is, also, premised on the alleged non-compliance with the abovementioned sections of the PFMA, the determination of the defences raised by SARS in the main application will also determine the counter application.

Factual background

[14] There are no significant factual disputes on the papers. The matter is about a collective wage agreement which was entered into between the respective trade unions and SARS. As already stated, it arose in the process of collective bargaining, which is provided for in section 18 of the SARS Act. The increases provided for in the first two years of the wage agreement were implemented, however, the third year increases were not implemented.

³ Act 1 of 1999.

[15] The Wage Agreement at issue was concluded in the National Bargaining Forum (“the NBF”), established in accordance with section 18(2)(b) of the SARS Act. The founding affidavit in the main application, sets out in detail what transpired during the collective bargaining process leading up to the conclusion of the Wage Agreement. None of that is placed in dispute, and it is not necessary to repeat same in this judgment, save to indicate that the Wage Agreement was entered into at the behest of SARS when after the parties had reached a deadlock in their negotiations and the employees had embarked on a protected strike, SARS presented a revised offer which culminated in the conclusion of the Wage Agreement in the NBF.

[16] The Wage Agreement dealt with a range of issues, the most relevant to these proceedings being the agreement on salary increases, as reflected in Clause 4.1 of the Wage Agreement. The Clause provides for the increases to the guaranteed total packages of the employees in the Bargaining Unit, as follows: for the financial year 2019/2020, an increase of 8%; for the financial year 2020/2021, an increase of projected consumer price index (“CPI”) + 2%; and for the financial year 2021/2022, an increase of projected CPI + 2%.

[17] As already indicated, the agreed upon salary increases were implemented in the first two financial years, but the agreed salary increase for the third financial year was not implemented. Hence, the application before this Court.

Issues for determination

[18] The issues to be determined are threefold, namely:

- 18.1 Whether the Wage Agreement is unlawful and invalid for want of compliance with sections 53(4), 66(3) and 68 of the PFMA;
- 18.2 Whether the First Respondent has made out a case for supervening impossibility of performance;
- 18.3 Whether the relief sought by the Applicant, the enforcement of the increase provided for in the final year of the Substantive Wage Agreement, is fair and justified in the circumstances.

[19] The parties agree that if the agreement is found to be unlawful, it will not be necessary to deal with the issue of impossibility of performance because if the agreement is unlawful, it cannot be enforced. It is also common cause that if the agreement is found to be lawful and possible of performance, the issue to follow will be whether, taking all the facts of this matter into account, specific performance can be ordered.

Legislative Framework

[20] The PFMA is the national legislation contemplated in section 216 of the Constitution. Section 216 of the Constitution envisages national legislation establishing a National Treasury and prescribing measures to ensure that both transparency and expenditure control in each sphere of government are attained.

[21] To give effect to the provisions of section 216 of the Constitution, the PFMA was enacted to regulate financial management in the national sphere of government and provincial government; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.⁴ The relevant sections in the PFMA for purposes of this judgment are sections 53, 66 and 68, particularly, sections 53(4) and 66(3).

[22] Section 53 is located under Chapter 6 of the PFMA. The Chapter is divided into two parts and section 53 falls under Part 2, which deals with the establishment of accounting authorities of Schedule 3 public entities, like SARS. The section itself deals with annual budgets by non-business (Schedule 3) public entities. In terms of section 53(1), the accounting authority of a public entity must submit a budget of estimated revenue and expenditure to the executive authority responsible for that entity for that financial year for approval by the executive authority. Under section 53(3), a public entity may not submit a budget for a deficit without prior approval from Treasury. It means that SARS cannot budget for a deficit unless with prior approval from Treasury. Section 53(4), in turn, provides

⁴ See *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* 2019 (6) BCLR 749 (CC) at para 6.

that the accounting authority for such public entity is responsible for ensuring that the expenditure of that public entity is in accordance with the approved budget.

[23] Section 66, on the other hand, is located under Chapter 8, which seeks to regulate loans, guarantees and other commitments. Section 66 itself is headed “Restrictions on borrowing, guarantees and other commitments”. The relevant part for purposes of this judgment is section 66(3)(c), which sets out the persons through which public entities like SARS may borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment. In respect of national public entities like SARS, only the Minister may borrow money or enter into any other transaction that binds or may bind that public entity to any future financial commitment.

[24] Section 68 provides for the consequences of unauthorised transactions. In terms of this section, if any other transaction which purports to bind an institution to any future financial commitment was entered into without the Minister’s authorisation as contemplated in section 66(3)(c), that transaction does not bind the state and the institution concerned.

Discussion

[25] The issues for determination are dealt with hereunder separately, in turn:

Whether the Wage Agreement is unlawful and invalid for want of compliance with Sections 53(4), 66(3) and 68 of the PFMA

[26] SARS’ case is basically based on the contention that the multi-year agreement is objectively invalid and unlawful for want of compliance with sections 53 and 66 of the PFMA; in particular, sections 53(4) and 66(3)(c), read with section 68 of the PFMA. It is SARS’ case that the Wage Agreement is subject to section 66(3) of the PFMA, and it is unlawful on that basis alone. But if SARS is wrong on that basis, the contention is that, at the very least, the agreement is subject to section 53(4) of the PFMA.

Section 66(3) of the PFMA

- [27] SARS' proposition, in respect of this issue, is that the Wage Agreement constitutes a transaction as contemplated in sections 66(1) and 66(3) of the PFMA and, as such, the agreement seeks to bind SARS and the Revenue Fund to a future financial commitment. According to SARS, section 66 of the PFMA is not only concerned with the borrowing and lending of money, but includes all future financial commitments. An agreement that commits the fiscus to paying salaries at an increased rate in the future, constitutes a future financial commitment, and thus, falls under section 66 of the PFMA, so goes the argument. In terms of section 66(3) of the PFMA, it is only the Minister that has the power to conclude such an agreement, and in this matter, when concluding the Wage Agreement, SARS was not represented by the Minister. The Wage Agreement (or Clause 4.1 thereof) accordingly contravenes section 66(3) of the PFMA. The contention, therefore, is that in view of section 68 of the PFMA, SARS is not bound by the Wage Agreement or Clause 4.1 thereof. SARS argues further that on this basis alone, the Applicant's case is not sustainable and falls to be dismissed.
- [28] It was accepted on behalf of SARS that if section 66(3) is to apply, then SARS shall have shown that the agreement had been signed by the Minister. It was, furthermore, accepted that there is no suggestion or any evidence on the papers that indicates that the Minister signed the agreement – this is common cause.
- [29] The real debate, as rightly defined by the parties, is whether there is a breach of section 66(3) of the PFMA. In other words, is the Wage Agreement an agreement that is subject to section 66(3), and in particular, is it an agreement that in the words of section 66(3), may bind a public entity like SARS, to any future financial commitment. The issue, thus, turns on the interpretation of the term “any future financial commitment”.
- [30] SARS contends that the term “any future financial commitment” in section 66(3) be given a broad meaning to include any type of future financial commitment, including a collective agreement like the Substantive Wage Agreement. This

proposition by SARS is opposed with a counter proposal that a narrow meaning be given to the said term as it was done in *Waymark*.⁵

[31] In *Waymark*, the Supreme Court of Appeal,⁶ and, subsequently the Constitutional Court, found that section 66 of the PFMA has no application to procurement contracts legitimately concluded pursuant to procurement processes. In that judgment, the Road Traffic Management Corporation (“the Corporation”), which is also a Schedule 3 public entity, sought to escape liability for a contract which provided for payment over a number of years. Like SARS, the Corporation argued that section 66(3) of the PFMA covered any agreement with a future financial commitment. Given that their contract with Waymark had not received ministerial approval, the Corporation argued that they were not bound by the agreement. The Constitutional Court, confirming the decision of the Supreme Court of Appeal, concluded that the agreement in question fell outside section 66’s reach as it was, essentially, a procurement contract.

[32] The Constitutional Court in *Waymark*,⁷ went at length to consider the well settled principles of statutory interpretation as enunciated in the well-known judgment in *Endumeni*,⁸ and a number of other decided cases, (it is not necessary to repeat them in this judgment), when interpreting the term “any future financial commitment” in section 66 of the PFMA. Having done so, the Constitutional Court expressed itself in the following manner:

“A contextual reading of sections 66 and 68, given the chapter in which they are located and the relation of that chapter to other chapters of the PFMA, lends itself to the interpretation that the phrase “any other transaction that binds or may bind that public entity to any future financial commitment” as referred to in section 66 must mean a transaction that is somehow similar to a credit or security agreement. This accords with and respects the generality of an accounting official’s duty for financial oversight. An overly broad interpretation of section 66 would detract from the accounting officer’s powers and place more of a burden on the Minister. The narrower reading, moreover, avoids requiring transactions that fall under section 54(2) also to

⁵ *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* 2019 (6) BCLR 749 (CC).

⁶ *Waymark Infotech (Pty) Limited v Road Traffic Management Corporation* [2018] ZASCA 11 (6 March 2018).

⁷ *Waymark* above n 5 at para 45.

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 – 19.

need ministerial approval under section 66, thus, in effect requiring two separate approvals. This double check, which is not spelt out in express or necessarily implicit terms, would be a significant administrative burden on public entities. Rather the context and structure of the PFMA impels the view that “any other transactions” must be similar to loans and security, and distinct from most other transactions (especially those in section 54(2)).”

[33] The Court, in interpreting the phrase “any future financial commitment”, opted for the narrower approach and, thus, came to the conclusion that it must mean a transaction that is somehow similar to a credit (loans) or security agreement. The Court, thus, set the test for determining transactions that fall within the purview of section 66(3) of the PFMA, as transactions that are similar to a credit (loans) or security agreement. If a transaction is not a credit (loan) or security agreement, it does not fall within the purview of section 66(3) of the PFMA.

[34] Conversely, SARS is of the view that *Waymark* finds no application in this matter as the facts in *Waymark* are distinguishable from the facts of this matter, and that the finding of that Court was, accordingly, fact specific. The contention being that the agreement that was considered was a procurement contract, and that the question of whether a non-procurement agreement could be subject to section 66(3) of the PFMA, was simply not addressed.

[35] It is indeed so that *Waymark* and the current matter are distinguishable on the facts. There are, nevertheless, certain relevant passages in that judgment that impact upon what this matter is dealing with. For instance, the interpretation of the term “any future financial commitment” in section 66(3) of the PFMA, is on point. The interpretation that the Court gave to the meaning of the term, is not specific to procurement contracts, but applies to all agreements that the government or in particular, public entities may enter into.

[36] Is the agreement in the current matter, that is, the Wage Agreement, a future financial commitment as provided for in section 66(3) of the PFMA, in the sense that it envisages a transaction that is somehow similar to a credit (loan) or security agreement? From the papers presented in this matter, there is nothing that suggests that the Wage Agreement contemplates an agreement that is

similar to a credit (loan) or security agreement, neither was it suggested by any of the parties in oral argument. It cannot, therefore, be said that the Wage Agreement is an agreement that foresees to bind SARS to a future financial commitment. The agreements referred to in section 66 of the PFMA relate to transactions involving the borrowing and lending of money, and do not apply to agreements like the Wage Agreement.

[37] The Wage Agreement is a collective agreement that arose from a collective bargaining process. In this instance, it arose out of a protected strike action which was in the process of a collective bargaining process. The agreement was entered into solely for the purpose of regulating and dealing with employees' wages and increases. That it has been entered into for a period of over a year, does not qualify it as a transaction that binds or may bind SARS to any future financial commitment as envisioned in section 66(3) of the PFMA.

[38] Accordingly, there is no reason why interpreting section 66(3) of the PFMA to cover only transactions that are similar to credit (loans) or security arrangements, would frustrate the purpose of the PFMA. Interpreting section 66(3) too broadly, as the Constitutional Court, in *Waymark* found, would result in an infinite number of transactions requiring ministerial approval, thereby frustrating the efficiency of the administration of public finances and stifling the operations of SARS.⁹ The conclusion, therefore, is that the Wage Agreement falls outside the reach of section 66(3) and that both sections 66(3) and 68 (which was predicated on the applicability of section 66(3)), find no application in the circumstances of this matter.

[39] SARS argues that if it is to be found that section 66(3) of the PFMA does not apply, that is, that the Minister has no power to consent or otherwise to the Wage Agreement, then that safeguard is put to one side, and the next safeguard is section 53(4) of the PFMA. It was accepted on behalf of SARS that the difficulty that faces it is that *Waymark* seems to read the interpretation of section 66(3) very narrowly. The argument was in turn made that even if this Court were to

⁹ *Waymark* above n 5 at para 57.

interpret section 66(3) in that manner, such interpretation will strengthen the argument for section 53(4), as the last guard rail.

[40] The question, therefore, is whether section 53(4) of the PFMA envisages a safeguard as submitted by SARS.

Section 53(4) of the PFMA

[41] SARS submits that the current Wage Agreement is subject to section 53(4) of the PFMA, and as it stands, it is non-complaint with that section. In its papers, SARS argues that the linking of the salary increases to CPI in future years contravenes section 53(4), since the parties could not have known what the CPI would be on 1 April 2020 and on 1 April 2021. More importantly, they could not have known if the fiscus would be able to afford salary increases, let alone those which are increased by the applicable CPI plus 2%.

[42] In addition, as at the time of concluding the agreement, there was also no approved budget and/or available funds to satisfy the anticipated salary increases for the 2020/2021 and 2021/2022 years. Accordingly, so it is argued, the agreed increases, as contained in the agreement, contravene section 53(4) of the PFMA and violate the principles of expenditure control as contained in section 216 of the Constitution, and the PFMA's objective to manage expenditure, assets and liabilities efficiently and effectively.

[43] During oral argument, it was explained on behalf of SARS that, the unlawfulness contended for in section 53(4) of the PFMA, is not the existence of the Wage Agreement; nor is it the existence of the above CPI inflation, but, it is the existence of a Multi-Year Agreement which does not contain some sort of a provision which states that it is contingent on the necessary budget being given. Put differently, the unlawfulness is not that the agreement is inherently unlawful because it is three years, or that the agreement is inherently unlawful because it is above inflation. The unlawfulness, as it was argued, is that the agreement is for three year increases and contains no safety valve for when the money is not available in SARS' budget by virtue of circumstances that prevail then. It is in that regard that SARS argues that section 53(4) of the PFMA be read to provide that

any agreement for multi-year wage increases is subject to the appropriate caveat or the appropriate safety valve which says it is subject to the budget that is available.

[44] The Constitutional Court in *Waymark*, addressed the relationship between section 66(3) and 53 of the PFMA,¹⁰ and remarked as follows:

“The intractable terrain that the RTMC traverses to reinforce its argument in reaching this conclusion is section 53. Section 53(1) provides that the accounting authority of a public entity like the RTMC must submit a budget of estimated revenue and expenditure to the executive authority responsible for that public entity “for that financial year” for approval by the executive authority. Section 53(4) in turn provides that the accounting authority for such a public entity is responsible for ensuring that the expenditure of that public entity is in accordance with the approved budget. Because the approved budget can only be for a single financial year under section 53(1), the RTMC argues that accounting officials cannot commit the public entity concerned to financial obligations beyond a single, budgeted financial year. So these officials must use section 66 to undertake financial obligations extending beyond one fiscal year. Hence section 66 should be interpreted to apply to any transaction extending beyond a budgeted financial year. Otherwise accounting officials would lack the power to enter into multi-year transactions, or can do so unchecked.

This argument ignores the other legislative provisions that empower accounting authorities of public entities to enter into multi-year transactions under executive oversight. First, section 53(5) of the PFMA provides that the National Treasury may regulate the application of section 53. To that end, the National Treasury has promulgated regulations,¹¹ which provide that public entities must have a strategic plan, covering a period of three years, and including multi-year projections of revenue and expenditure. The strategic plan must be submitted to and approved by the executive authority – the relevant cabinet member – responsible for the public entity concerned.¹² Presumably, if an accounting authority does not ensure that the expenditure is in line with the strategic plan, then that authority commits an act of financial misconduct, every member becomes individually and severally liable, and

¹⁰ *Waymark* above n 5 at paras 52 and 53.

¹¹ Treasury Regulations for departments, trading entities, constitutional institutions and public entities, GN R225 GG 27388, 15 March 2005 (Treasury Regulations).

¹² *Id* at Regulation 30.1.1.

such misconduct is a ground for dismissal, suspension or any other sanction.” (*some footnotes excluded*).

- [45] The safeguards that SARS contemplates should be read in section 53(4) of the PFMA, are not spelt out in express or implicit terms in that section. Thus, its argument that oversight of expenditure in regard to financial obligations beyond a single, budgeted financial year, that is not budgeted for, is required and should be found in section 53(4), is simply not sustainable. SARS’ argument in this regard ignores, as the Constitutional Court found in *Waymark*, the fact that there are legislative provisions in the PFMA that empower accounting authorities of public entities to enter into multi-year transactions under executive oversight.¹³
- [46] Firstly, section 53(1) of the PFMA requires that the accounting authority of a public entity like SARS submit a budget of estimated revenue and expenditure to the executive authority responsible for that public entity for that financial year for approval by the executive authority. Any multi-year Wage Agreement expenditure that is to be incurred will, obviously, be reflected in that budget and will be approved by the Minister. It is not in dispute that, in this instance, the salary increases provided for in each year of the Wage Agreement as required, are reflected in the budget submitted by SARS for that year. As such, the Minister ought to have been aware of the expenditure for the salary increases.
- [47] Secondly, the Ministerial oversight is legislated for through the Regulations promulgated¹⁴ in terms of section 53(5) of the PFMA.¹⁵ The said Regulations advocate for the submission, to the executive authority, of a strategic plan, covering a period of three years, which includes multi-year projections of revenue and expenditure. The strategic plan must be submitted to and approved by the executive authority – the relevant cabinet member – responsible for the public entity concerned. Even at this level, the Minister ought to be aware of any expenditure that would be caused by salary increases. The Minister will, in this way, know and carry out any future financial commitments by public entities like

¹³ *Waymark* above n 5 at para 53.

¹⁴ Treasury Regulations above n 11.

¹⁵ *Waymark* above n 5 at para 53.

SARS, and be able to properly prepare the National budget, and to ensure that public funds are managed effectively and efficiently.

[48] Over and above that, the SARS Act has further checks and balances regulating the financial discipline of SARS. Section 9(3) provides that as accounting authority, the Commissioner is responsible for the expenditure of SARS, for the proper and diligent implementation of Part 5 of the SARS Act, which deals with financial matters. As accounting authority, the Commissioner must also keep full and proper records of all income and expenditure to ensure that the available resources of SARS are properly safeguarded and used economically, and in the most efficient and effective way.¹⁶ In terms of section 26, the Commissioner is to prepare, during each financial year, estimates of SARS' income and expenditure for the next financial year and submit to the Minister for approval. Before approval of the estimates, the Minister must consult the Board.¹⁷ In accordance with section 29, the Commissioner must annually submit to the Minister a report of SARS's activities during a financial year. These sections show that the Commissioner, as the accounting authority for SARS, is responsible for the financial matters of SARS, and the Minister, in the exercise of his oversight functions of SARS, is kept abreast of financial activities on an annual basis. Any multi-year agreement concluded, ought to have been visible to the Minister, either in the annual report or the income and expenditure estimates.

[49] Fundamentally, section 53(4) of the PFMA enjoins the accounting authority of a public entity to ensure that expenditure of that public entity is in accordance with the approved budget. It means that the accounting authority must take measures to ensure that the expenditure of the public entity in question, is in accordance with the approved budget. Once a budget has been allocated to the public entity, the accounting authority has to ensure that the expenditure of the public entity is kept within the limits of that budget. This accords with and respects the generality of an accounting authority's duty for financial oversight.

¹⁶ Section 22 of the SARS Act above n 4.

¹⁷ The SARS Advisory Board established in terms of section 11(1) of the SARS Act. The Board advises the Minister and the Commissioner on any matter concerning, amongst others, the management of SARS, including operational, financial and administrative policies and practices. (section 13(1)(a)).

[50] There can, therefore, not be a reading of the section to mean that a multi-year agreement concluded by the public entity, should contain a provision which states that the agreement is contingent on the necessary budget being given, whilst there are necessary safeguards legislated for in the PFMA, itself, and the SARS Act. Put differently, section 53(4) of the PFMA cannot be read to mean that a multi-year agreement, like the Wage Agreement, must contain a safety valve for when the money is not available in a public entity's budget. Besides, there are no such words with such implication in the section. Consequently, there was no need for the Wage Agreement, in this matter, to state that Clause 4.1 was contingent on the necessary budget being available.

[51] In understanding the gist of what section 53 of the PFMA provides for, it is evident that the Wage Agreement does not and cannot breach the provisions of section 53(4), as SARS seeks to argue. Section 53 deals with the budgeting processes of public entities and gives directions to accounting authorities as to how to deal with budgeting processes. It is not concerned with the process for the approval of expenditure. Section 53(4) enjoins the accounting authority to ensure that the public entity's expenditure does not go over budget. A Wage Agreement can, therefore, not breach the section. Only accounting authorities and, at the very least, public officials may breach the section. Contravention of these prescripts leads to the commission of an act of financial misconduct, every member becomes individually and severally liable, and such misconduct is a ground for dismissal, suspension or any other sanction.¹⁸

[52] Since section 53(4) of the PFMA, does not, itself, expressly state what is to become of expenditure incurred contrary to the approved budget, the focus of the provision will have to be directed at the obligations of the accounting authority and what he or she may or may not do. In that sense, it is reasonable to assume that whatever measures are in place will be directed at the conduct of the accounting authority, and, such measures are to be found in section 51(1)(b)(ii) of the PFMA, that obliges an accounting authority to "take effective and

¹⁸ *Waymark* above n 5 at para 53.

appropriate steps" to "prevent irregular expenditure";¹⁹ and section 51(1)(e) of the PFMA, that requires an accounting authority to "take effective and appropriate" disciplinary steps against any employee who contravenes or fails to comply with a provision of the PFMA or makes or permits an irregular expenditure; and, section 83 of the PFMA, which provides that the accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently fails to comply with a requirement of sections 50, 51, 52, 53, 54 or 55 of the PFMA; or makes or permits an irregular expenditure or a fruitless and wasteful expenditure. Furthermore, despite any other legislation, financial misconduct is a ground for dismissal or suspension of, or other sanction against, that accounting authority or every member of the accounting authority, that is a board or other body consisting of members, or an official of a public entity to whom a power or duty is assigned by the accounting authority.

Regulations 78 and 79 of the Public Service Act Regulations

[53] SARS eschews the afore stated approach to sections 66(3) and 53(4) of the PFMA, and in argument, contends that such an interpretation does not promote oversight of expenditure, which is the central theme of the PFMA, when that expenditure is not budgeted for. Its submission is that the approach to adopt in respect of sections 53(4) and 66(3) of the PFMA should be similar to that which is adopted in the Public Service in terms of the Public Service Regulations,²⁰ in particular, regulations 78 and 79, thereof. The argument is that the provisions of regulations 78 and 79 are, in material respects, similar to section 53(4) of the PFMA which enjoins the Commissioner to ensure that SARS' expenditure is in accordance with the approved budget; and, section 66(1) and (3) of the PFMA, which prohibits SARS from entering into a transaction that binds it or binds the

¹⁹ Expenditure incurred contrary to the approved budget is "irregular expenditure". Irregular expenditure is defined in section 1 of the PFMA as expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including, amongst others, this Act.

²⁰ Public Service Regulations, GN R877, GG 40167, 29 July 2016.

Revenue Fund to any future financial commitment, unless such transaction is concluded through the Minister.

[54] It is worthy to note that regulation 78(2)(c) authorises the Minister to enter into a collective agreement on a matter of mutual interest only if that authority meets the fiscal requirements contained in regulation 79. Regulation 78(3), in turn, authorises the Minister to negotiate a collective agreement on behalf of the State, as the employer, in the Public Service Co-ordinating Bargaining Council. Whilst, regulation 79(c) authorises the Minister to enter into a collective agreement with financial implications only if the Minister concerned can cover the costs of the collective agreement from his or her departmental budget, or on the basis of a written commitment from Treasury to provide additional funds, or if the costs can be covered from funds from other departments or agencies with their written consent, coupled with Treasury approval.

[55] There are three fundamental challenges with SARS' proposition in this regard. Firstly, the Wage Agreement in this matter has been found not to fall within the purview of section 66 of the PFMA, and as a result, no ministerial consent is required as opposed to regulations 78 and 79, which require ministerial consent. Secondly, the provisions of section 53(4) of the PFMA enjoins the Commissioner to safeguard SARS' expenditure, and has been found not to allow for a reading that provides that a multi-year agreement concluded by the public entity, should contain a provision which states that the agreement is contingent on the necessary budget being given. This against the provisions of regulations 78 and 79 that clothe the Minister of Public Service and Administration with the necessary authority to negotiate and conclude a collective agreement with financial implications only if he or she can be able to show how the costs of the collective agreement will be covered. Thirdly, SARS' employees are employed subject to terms and conditions of employment determined by SARS, after collective bargaining between SARS and the recognised trade unions and with the approval of the Minister. The collective bargaining must be conducted in accordance with the procedures agreed on between SARS and the recognised trade unions.²¹ Whereas, in terms of regulations 78 and 79, collective

²¹ Section 18 of the SARS Act above n 1.

agreements are negotiated in in the Public Service Co-ordinating Bargaining Council, by the Minister of Public Service and Administration.

- [56] Evidently, there can be no possible comparison between regulations 78 and 79 of the Public Service Act Regulations and sections 53(4) and 66 of the PFMA. If the legislature had intended these prescripts to achieve the same purpose, it should have been so specifically legislated. There would have been no need for the issuing of the Regulations as the situation would, in any event, have been covered by the PFMA. Clearly, public entities like SARS, have been specifically excluded from the Public Service. SARS has its own dispensation provided for in the SARS Act. The fact that public entities have been excluded from the Regulations shows that there was an intention to differentiate between the two.

Whether the First Respondent has made out a case for supervening impossibility of performance

- [57] SARS' other defence is that of impossibility of performance. Its argument is that it is not able to pay the salary increases in accordance with the Wage Agreement. It submits, in its papers, that it is objectively impossible for it to pay the salary increases as demanded. On that basis, it, as such, submits that the Wage Agreement is void and unenforceable and must be declared as such by the Court. The reasons upon which SARS relies for its defence of impossibility of performance is the low economic downturn in the country's economy that negatively impacted on SARS' budget and resulted in its budget being unable to cover all its expenditure. In essence, the only reason SARS has advanced for the non-payment of the salary increases, is that it was allocated less money than it requested.
- [58] In order to determine whether this defence may avail SARS, it is necessary to, first, consider the facts relevant to this defence, and then consider the nature of the impossibility relied upon. The factors advanced by SARS to explain this defence are fully set out in SARS' answering affidavit, and are, also succinctly summarised in its heads of argument as follows:

- [59] South Africa had by then experienced low economic growth, thus resulting in severe limitations on public funds. The low economic downturn had an adverse impact on revenue collection. The low growth on revenue collection was considerable. In 2019, Government collected R 63.3 billion less revenue than was projected at the time of the 2019 Budget. In 2020, the State was borrowing at an increased rate to fund operations, with the deficit projected at 6.3 per cent of the gross domestic product ("GDP"). Debt-service costs absorbed 15 cents of every rand government collected.
- [60] In 2020, and as a major step towards fiscal sustainability, government reduced the main budget expenditure baseline by R 156.1 billion over the next three years in comparison with the 2019 Budget projections. This was approximately 1 per cent of the GDP per year.
- [61] In order to achieve fiscal sustainability, Treasury considered various ways of restraining expenditure. One of the main areas of concern for Treasury was the increasing wage bill, which had been growing strongly since 2010/2011 and averaged 35.4 per cent of total consolidated expenditure by 2019/2020.
- [62] A number of reforms were thus introduced in order to achieve spending efficiency. These included the curbing of salary increases in the public sector. In this regard, Treasury instructed that *"there will be no increase in the salaries of public office bearers in 2020/21"*.
- [63] The COVID-19 pandemic had further exacerbated the precariousness of the public finances, which had already reached an unsustainable position even before the pandemic. Government had to deploy a range of fiscal and monetary measures to address the adverse effects of the pandemic, limit the economic damage and support recovery.
- [64] In light of these economic challenges and reductions on expenditure, SARS' budget and expenses were adversely impacted to the extent that SARS commenced the 2020/2021 financial year with a R 460 million deficit position in its operational expenditure. This excluded, amongst others, critical Information

Communication Technology ("ICT"), related investment of R347 million, as well as, critical vacancies of R 225 million.

- [65] Despite the aforesaid deficit, SARS was not allowed to budget for a deficit in the 2020/2021 financial year in light of the tight fiscal conditions, severe economic uncertainties and the contingent liability effects on the fiscus. Resulting from this refusal to budget for a deficit, SARS remained with a net in-year deficit of R 460 million, after further lockdown implied savings such as travel and related expenses were realised. The critical ICT and APP related projects further remained unfunded. With the COVID-19 related cost, the total funding shortfall was R 1,2 billion.
- [66] On 5 October 2020, Treasury forwarded a letter to SARS and advised that pursuant to the tabling of the adjustment appropriation bill, SARS' cost of employee budget ("CoE") had been reduced by R 238 144 000 and that the adjustment was necessitated by efforts to protect the integrity of the fiscal framework after alternative cost reduction mechanisms were exhausted. SARS was then required to implement the CoE baseline reduction and submit the revised drawings by 9 October 2020.
- [67] On 9 December 2020, Treasury provided SARS with preliminary 2021 Estimates of National Expenditure ("ENE") allocation letter setting out the allocation for 2021 financial year. The allocation further decreased SARS' medium-term funding by R 2 billion, inclusive of 2020/2021 (in-year) reduction of R 238 million, which increased the in-year deficit to R 698 million. The actual total in-year deficit thus reflected R 313 million.
- [68] In order to address these challenges, SARS put in place stringent measures to close the deficit gap. This was done mainly through non-payment of salary increases to employees in the non-bargaining forum in 2020, retaining the moratorium on vacancies, a drastic plan to reduce SARS' physical footprint and move taxpayer offerings to digital platforms which was fast tracked by COVID-19. The reduction of the footprint could, however, not yield immediate savings to address the deficit position, as it was more of a medium to long term solution.

- [69] Whilst these measures resulted in the actual total in-year deficit being reduced from R 698 million to R 313 million, this still reflected an unsustainable trend of not filling vacancies, not paying salary increases to management, no bonus provision as well as reprioritisation of savings realised from the COVID-19 lockdown. All of which negatively impacted on SARS' ability to give proper effect to its mandate.
- [70] On multiple occasions, SARS engaged with Treasury and requested additional funding in order to address the aforementioned challenges. Such requests were however unsuccessful. Instead, on 24 March 2021, Treasury issued an ENE final allocation. Although the allocation suggested that it had effected a baseline allocation increase, a proper analysis indicates that there was no increase effected. This was so because R 11 295 167 was allocated for 2021, as compared to the allocation of R 10 973 100 in 2020. This equated to 2.9 per cent increase from 2020 to 2021. The allocation of R 11 295 167 included a ring-fenced amount for OTO ("Office Tax Ombud") of R 45 million. The preliminary allocation had a shortfall of R 1 094 121, as fully set out in the ENE submission of 11 December 2020. An additional R 1 billion was then allocated to a part of this shortfall as follows: an amount of R 329,3 million for vacancies; R 430 million for ICT; and, R 240,7 million for APP Projects, which amounted to a total additional allocation of R 1 billion. There was still a shortfall, even after the purported increase in the preliminary funding. SARS was still not able to fully implement APP projects and the graduate programme, nor was it able to pay increases in accordance with the Wage Agreement. Treasury, as the functionary responsible for managing the fiscus, also indicated that the public purse was overly stretched and unable to pay salary increases.
- [71] SARS submits that on the facts of this matter and having regard to the lack of funding from Treasury, the impossibility of performance is absolute, thus excusing performance of the contract. In support of its argument, SARS refers to the judgment in *Kwazulu-Natal Joint Liaison Committee*,²² wherein the Constitutional Court endorsed the possibility of raising the defence of

²² *Kwazulu-Natal Joint Liaison Committee v Member of the Executive Council Department of Education, Kwazulu-Natal and Others* 2013 (6) BCLR 615 (CC) at para 107.

impossibility of performance on account of change of circumstances that results in the absence of public funds. The Court in that judgment held as follows:

"It was open to the Department to put up a more detailed defence on the papers It could have raised the defence that even if the formation of the contract was accepted, its content was nevertheless contrary to public policy because it fettered the state's discretion to expend public money in the public interest. Or it could have pleaded that the contract was terminated by subsequent impossibility or illegality because of statutory budgetary obligations. These defences may have proved successful if the facts and law supported them."

[72] The contention is that the only way in which SARS can have funds to pay the increased salaries, is through an appropriation by an Act of Parliament. Such appropriation was not made; thus, SARS submits that in this matter, the Wage Agreement is void and unenforceable.

[73] In terms of the common law doctrine of supervening impossibility of performance, each party's obligation to perform in terms of an agreement and their respective rights to receive performance under that agreement will be extinguished in the event that the performance by a party of its obligations becomes objectively impossible as a result of unforeseeable and unavoidable events, which are not the fault of any party to that agreement. Such events are known as *vis major* or *casus fortuitous*. Performance of an obligation will not be objectively impossible if the performance has merely become more onerous, difficult, or costly.

[74] The Court in *Peters, Flamman and Co*,²³ held that it was only if "a person is prevented from performing his contract by *vis major* or *casus fortuitous*" that "he is discharged from liability". The author Bradfield GB in *Christie's Law of Contract in South Africa*,²⁴ opines that "the events giving rise to impossibility of performance are generally subsumed within the notions of *vis major* or *casus fortuitous*". The author, further, states that "for purposes of this branch of the law, there is no necessity to distinguish between *vis major* and *casus fortuitous*, which between them include any happening, whether due to natural causes or human

²³ 1919 AD 427 at 435.

²⁴ Bradfield, *Christie's Law of Contract in South Africa* 8ed (Lexis Nexis, 2022) at 574.

agency, that is unforeseeable with reasonable foresight and unavoidable with reasonable care”.

[75] The Supreme Court of Appeal in *MV Snow Crystal*,²⁵ explained the operation of the legal principles relating to impossibility of performance, in a contractual setting, in the following terms:

“As a general rule impossibility of performance brought about by *vis major* or *casus fortuitous* will excuse performance of a contract. But it will not always do so. In each case it is necessary to “look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied”. The rule will not avail a defendant if the impossibility is self-created, nor will it avail the defendant if the impossibility is due to his or her fault.”

[76] In order to prove the defence of impossibility of performance, SARS must prove the following requirements:

76.1 It has become objectively impossible to implement the 2021/2022 salary increases provided for in the Substantive Wage Agreement. This means that the circumstances must be such that no party could tender performance, not just the particular party. It is not sufficient to demonstrate that performance is difficult or involves significant financial hardship.

76.2 The reason why it has become objectively impossible is due to some form of *vis major* or *casus fortuitous*;

76.3 The impossibility is neither self-created nor the fault of SARS; and

76.4 The impossibility must not have been avoidable or reasonably foreseeable by the party attempting to invoke the principle of impossibility of performance.

²⁵*Transnet Ltd t/a National Ports Authority v The Owner of MV Snow Crystal* [2008] 3 All SA 255 (SCA) at para 28.

[77] SARS has been unable to prove any of these requirements. Firstly, the impossibility of performance was not established. The evidence establishes that SARS' funding requirements for 2021/2022 was R 12 066 198.²⁶ This included the increases provided for in the Wage Agreement.²⁷ Originally, the allocation was reduced to R 10 295 167, but an additional R 1 billion was allocated. All in all, SARS received an allocation of R 11 295 167. Included in SARS' expenses were the salary increases which were to be paid out of the final allocation. It is confirmed in the Minister's affidavit that once the final allocation is appropriated by Parliament, National Treasury does not dictate to SARS how it must expend the allocation. SARS, having received the allocation of R 11 295 167, chose to allocate it to expenditure other than the salary increases pertaining to the Wage Agreement. In these circumstances, there can be no question of impossibility of performance. Performance was possible in that SARS had the necessary funds, however, it opted to allocate those funds elsewhere. A choice of how to spend the money allocated does not amount to objective impossibility.

[78] The communication between SARS and the National Treasury, which SARS wants to rely on as creating a basis for finding that the implementation of the Wage Agreement is objectively impossible, does not assist. If anything, the communication serves as confirmation of the allocation of an additional amount of R 1 billion to SARS.

[79] The papers indicate that SARS might be operating under some financial constraints. In those circumstances, paying the increases provided for in the Wage Agreement may require the re-allocation of funds which might have been earmarked for other purposes. There is no evidence on record to indicate how SARS expended the allocation to prove that there was no money available for the increases or whether the expenditure allocated was more critical than the increases. Of importance is that, notwithstanding the fact that there were reductions to SARS' annual baseline in the years 2019/2020 and 2020/2021, SARS still made payment in terms of the increases provided for in the Wage

²⁶ See annexures DM6, which is a letter by SARS to Treasury dated 25 August 2020 re SARS MTEF Requirements.

²⁷ Annexure DM5 shows that the budget allocation of R 10 527 781 for 2021/22 was inclusive of costs related to the salary increases per the Wage Agreement. This is also confirmed in the Minister's affidavit.

Agreement. The Minister confirms in his affidavit that the annual baseline for the operational and contractual expenditure of SARS was reduced in 2019/2020 and 2020/2021 with no additional funding allocated to SARS to cover salary increases for the 2019/2020 financial year. SARS had to cover all funding pressures and additional funding requirements with regard to compensation of employees, goods and services, and capital requirements within the allocated baseline. This is what SARS did, and could have done with the allocation received in the 2021/2022 financial year.

[80] In its own words, SARS contends that whenever it managed to generate some internal savings through diligent cost containment initiatives, it ring-fenced these savings towards employee salary increases and the SARS Employee Value Proposition, and offered these savings to the employees. This indicates that performance is possible. SARS just has to juggle the funds around and cover salary increases for the 2021/2022 financial year, like it did in the other years.

[81] Secondly, the evidence as it stands does not establish that the impossibility of performance that is alleged, arose as a result of *vis major* or *casus fortuitous*. In essence, the only reason that SARS has advanced for the non-payment of the salary increases is a smaller overall financial allocation than requested. This is not *vis major* or *casus fortuitous*.

[82] Incidentally, the issue of the COVID-19 pandemic, which SARS seeks to rely on as having made it impossible for SARS to perform, much as it can be considered as *vis major* or *casus fortuitous*, it does not assist SARS' case. It is indeed so that COVID-19, which caused the economic downturn in the country, adversely impacted SARS' budget, leading to SARS being allocated a smaller budget than requested. This, however, does not take away the fact that SARS was allocated funds by Treasury which it had to use with regard to compensation of employees, goods and services and capital requirements. The pandemic had no effect on the allocated funds once they were in SARS' hands. It was left to SARS to decide how to expend the allocation. In this case, it opted not to pay the salary increase.

[83] Even if the COVID-19 pandemic was to be taken as having caused SARS to be allocated a limited budget, this cannot be regarded as *vis major* or *casus*

fortuitous because SARS' financial woes preceded the pandemic.²⁸ In its own words, SARS states that COVID-19 further exacerbated the precariousness of the public finances, which had already reached an unsustainable position even before the pandemic. The difficulty experienced in regard to the salary increases was not a new phenomenon. The wage bill had been on the increase and growing strongly since 2010/2011 and averaged 35.4 per cent of total consolidated expenditure by 2019/2020. To this extent, SARS' financial difficulties were foreseeable and avoidable.

[84] For its proposition that the dire state of the fiscus and the State's inability to provide salary increases has recently been acknowledged by the Court, SARS refers to and relies on the Constitutional Court judgment in the *Public Sector Matter*,²⁹ where it was held that it is impossible for the State to pay salary increases under the current fiscal climate, particularly having regard to the challenges arising from the COVID-19 pandemic.

[85] The counter proposition that any reliance by SARS on the *Public Sector Matter* judgment is misconceived and ill-founded, has merit. The *Public Sector Matter*, as it was argued, is distinguishable from the current matter on the facts and the legal issues that were decided. The only material factual overlap between the current matter and the *Public Sector Matter* are that both matters involved a three-year Multi-Year Agreement for salary increases and that the third and final increase was not implemented.

[86] There is no overlap of legal issues between the two matters. The *Public Sector Matter* turned on the interpretation of regulations 78 and 79 of the Public Service Act Regulations, whereas the Court in the current matter is seized with the interpretation of sections 53(4), 66(3) and 68 of the PFMA. Although the legal issues in respect of impossibility of performance and specific performance arose in the *Public Sector Matter* like in the current matter, the issue of impossibility of performance was not addressed in the *Public Sector Matter* judgement, and, as

²⁸ See *Post Office Retirement Fund v South African Post Office SOC Ltd and Others* [2022] 2 All SA 71 (SCA) at para 81.

²⁹ *National Education Health and Allied Workers Union v Minister of Public Service and Administration and others and related matters* 2022 (6) BCLR 673 (CC) at para 102.

regards the issue of specific performance, the context in the *Public Sector Matter* was completely different from that in the current matter. Fundamentally, in the *Public Sector Matter*, the agreement was found to be unlawful, which is not the same finding in the current matter as the agreement is declared lawful. The finding in the *Public Sector Matter*, that it was impossible for the State to pay salary increases under the current fiscal climate, particularly having regard to the challenges arising from the COVID-19 pandemic, was made in light of the finding that the agreement was unlawful. Consequently, the *Public Sector Matter* is no authority for the proposition raised by SARS.

Whether the relief sought by the Applicant, the enforcement of the increase provided for in the final year of the multi-year wage agreement, is fair and justified in the circumstances

[87] In the *alternative*, and in the event that this Court does not uphold the submissions relating to the defence of the unlawfulness of the agreement and the objective impossibility as a basis for not enforcing the agreement, SARS submits that the facts of this matter justify that the Court exercise its discretion against granting an order for specific performance. And in so doing, SARS urges the Court to take the following factors into account:

87.1 The poor economic climate which the world at large, and South Africa in particular, finds itself;

87.2 The fact that government has had to repurpose most of the funding towards operations aimed at dealing with the COVID-19 pandemic;

87.3 SARS remains severely underfunded, but allocated such funding received to ensure that the organisation is able to fulfil its mandate.

87.4 As a result of the limitations in funding, SARS has not paid salary increases to employees that are outside the bargaining forum since 2020, and has not paid bonuses to employees since 2020.

87.5 SARS has put in place cost cutting measures, such as placing a moratorium on the filling of vacancies.

87.6 The whole public sector, which is also funded by Treasury, has not been provided with salary increases on account of lack of funding.

- [88] Based on the above factors, SARS contends that an order for specific performance, under these circumstances, will be ineffective and amount to an exercise in futility. It will, also result in an unjustified and unfair differential treatment amongst employees as non-bargaining employees have not received a salary increase.
- [89] In order to reinforce its submissions, SARS refers and relies on the *Public Sector Matter* judgment, particularly to reaffirm the long-standing principle that an order for specific performance will not be issued where it is impossible for the respondent to comply with the order. This, it submits, is particularly so, when dealing with public funds and where the evidence clearly shows that there are no funds to satisfy the terms of the agreement. The *Public Sector Matter* was discussed under the defence of specific performance and was found to be of no assistance to SARS, which is the same in this regard. As already stated, the findings in that judgment were based on the fact that the agreement therein was found to be unlawful.
- [90] Accordingly, so SARS suggests, a refusal for specific performance is a just and equitable order as contemplated in section 172(1)(b) of the Constitution, because the Applicant and its members will not be left without relief and/or recourse as they will still be entitled to deal with this matter as an interest dispute and as part of the bargaining process.
- [91] SARS' proposition that this Court should exercise its discretion in favour of not granting an order for specific performance, when considered in light of the circumstances of this matter, is not persuasive. This matter revolves around the failure by SARS to implement the salary increases provided for in Clause 4.1 of the Wage Agreement for the 2021/2022 period, which is in breach of the contract of employment of the PSA's members employed by SARS. It, furthermore, involves the constitutional rights of the PSA and its members to engage in collective bargaining (This includes the right to negotiate and to conclude collective agreements), as provided for in section 23(5) of the Constitution.

[92] In terms of section 23(5) of the Constitution, every trade union, employers' organisation and employer has the right to engage in collective bargaining. The right to collective bargaining is effectively the right to conclude collective agreements and to insist on compliance with them. If an employer can choose whether or not to implement a collective agreement, the right to collective bargaining will be rendered meaningless. This will, also, amount to a violation of the rights of the PSA and its members to engage in collective bargaining. As such, a denial of the remedy of specific performance would amount to a denial of the Constitutional right to collective bargaining.

[93] The Constitutional Court in *CUSA*,³⁰ when dealing with section 23(5) of the Constitution, expressed itself thus:

"The right of every trade union and every employers' organisation and employer to engage in collective bargaining is entrenched in section 23(5) of the Constitution. The concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process. Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and to enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law."

[94] The history of the negotiations and the subsequent conclusion of the Wage Agreement shows that the Wage Agreement is a product of the collective bargaining process. Consequently, members of the PSA, as a trade union, and any trade union for that matter, have a constitutional right to engage in collective bargaining. As stated in *CUSA*, the purpose of collective bargaining is to produce collective agreements, and, that collective bargaining can only function if the

³⁰ *CUSA v Tao Ying Metal Industries & Others* [2009] 1 BLLR 1 (CC) at paras 55 and 56.

parties can expect that collective agreements will be upheld. In the absence of this expectation, there is no point in engaging in collective bargaining. If an employer can choose not to comply with a collective agreement, without the consequences of an order for specific performance, the right to collective bargaining is rendered void. The only remedy for a breach of a collective agreement, is specific performance. This is particularly so on the facts of this case where it has been found that the Wage Agreement is lawful and that SARS made a choice to disregard the increases provided for in the Wage Agreement, and instead used available funding for other purposes.

[95] Additionally, the industrial action preceding the conclusion of the Wage Agreement set out in the founding affidavit, which is not placed in dispute, clearly indicates that it was at the insistence of SARS that the parties firstly, entered into a multi-year agreement and, secondly, that the wage increases be linked to CPI, as against the unions who wanted a single year agreement with a fixed increase. It is common cause that the terms of Clause 4.1 of the Wage Agreement, which are a bone of contention in this matter, came about due to SARS' own proposal. The trade unions and their members, agreed to the terms of the Wage Agreement as proposed by SARS, in the *bona fide* belief that SARS will honour it.

[96] Furthermore, the trade union members have rendered services for the last year. A finding has been made that the Wage Agreement is valid and binding. This has the inevitable consequence that the trade union members have rendered services on the terms and conditions set out in the Wage Agreement. These members, therefore, have an accrued right to be remunerated in terms of the Wage Agreement.

[97] SARS' argument that the employees can still resort to the collective bargaining process if specific performance is not granted, is cold comfort indeed since SARS has chosen to disregard a collective agreement which came out of a protracted collective bargaining process, which included a strike by trade union members. This means that a just and equitable order, under the circumstances, is that of granting an order for specific performance.

[98] Under such circumstances, the breach of the agreement and rights of employees to collective bargaining, can only be properly remedied by an order of specific performance.

Conclusion

[99] The Wage agreement, having been found to be lawful and valid, the relief sought by the Applicant, in the Notice of Motion save for Prayer 3 thereof, ought to be granted.

Counter application

[100] The counter application was predicated on the defences that were raised by SARS in the main application. As earlier indicated, a determination of the defences raised by SARS in the main application would also determine the counter application. Consequently, the Wage Agreement having been found to be lawful and valid, the counter application falls to be dismissed.

Abandoned relief sought against the Third Respondent

[101] As earlier stated in this judgement, the Minister has taken issue with the PSA due to the PSA's failure to withdraw the case against the Minister even though it (the PSA) has abandoned the only relief it sought against the Minister. The Minister has, on that basis, approached Court seeking a punitive cost order against the PSA.

[102] SARS argues that the PSA, through its unfettered judgment, made an erroneous decision to sue and claim relief against the Minister. The contention is further that, though the PSA realised its error somewhere along the execution of its legal claim, it unreasonably failed and/or refused to withdraw the litigation against the Minister. Consequently, so it is argued, the PSA must be made to bear the costs of this unnecessary litigation that it has hauled the Minister into, wholly unnecessarily. The costs contended for by the Minister are all legal costs, including cost occasioned by procuring two counsel to defend this matter or to keep a watching brief in this matter, on the scale of an attorney and own client.

[103] The explanation tendered by the PSA, in the replying affidavit, why the case has not been withdrawn against the Minister is because the Minister is the executive authority of SARS, and as the executive authority, he is an interested party in these proceedings and should therefore remain a party thereto. The explanation is rejected by the Minister, who contends that he was not cited in the founding affidavit as an executive authority or as an interested party, and that the PSA cannot make out its case in the replying affidavit.

[104] It is trite law that an Applicant must make out its case in the founding affidavit. In *Mistry*,³¹ the SCA stated that-

“When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:

‘... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.’”

[105] The complaint against the Minister is succinctly set out in the founding affidavit as follows:

“The third respondent is the Minister of Finance ("the Minister"). SARS contends that the reason why it has not implemented the salary adjustments contained in the Substantive Wage Agreement for the period 2021 to 2022, attached hereto as annexure LG1, ("the Wage Agreement"), is that the National Treasury has not provided SARS with the required budget allocation. This can only have been done at the instance of the Minister, which is why he is cited in this application.”

[106] It is clear from the above passage that the PSA did not cite the Minister on the ground that he is the executive authority of SARS or that he is an interested party to the proceedings. On the basis of the authority cited above, the PSA must stand

³¹ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H – 636A.

and fall by its founding affidavit. It cannot make out its case in the replying affidavit, as it seeks to do. The attempt by the PSA to plead a new ground in the replying affidavit is highly prejudicial to the Minister. As such, it (the PSA) ought to have withdrawn the case against the Minister the moment it was informed of the factual position or when it decided to no longer seek any relief against the Minister.³²

[107] On the basis of what is stated above, ordinarily, the PSA would be liable to pay the Minister's legal costs occasioned by procuring two counsel to defend this matter and to keep a watching brief. The PSA submits that it does not tender the Minister's costs, because there are constitutional issues at play in this matter. In denying that there are constitutional issues at play in this matter, SARS ignores the fact that what brought the PSA to Court is not the determination of whether the Wage Agreement falls within the purview of section 66 of the PFMA, or not. The PSA approached Court for the enforcement of the contracts of employment of its members, as amended by the Wage Agreement or Clause 4.1, thereof. Whilst it is for the Court to determine the issue pertaining to section 66 of the PFMA, that issue is raised, in the papers, as a defence by SARS, it is not raised by the PSA and certainly, it does not emanate from the PSA's founding papers.

[108] Furthermore, SARS' failure to implement the Wage Agreement has implications for the constitutional rights of the PSA and its members to engage in collective bargaining as provided for in section 23(5) of the Constitution. As it has been stated, the Wage Agreement is a collective agreement that arose from a collective bargaining process. If it is not implemented, it falls in breach of the contracts of employment of members of the PSA, and violates the PSA and its members' right to collectively bargain.

[109] In accordance with *Biowatch*,³³ the general rule is that in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay the State's costs. Consequently, no costs are awarded.

³² See *Jiba and Another v General Council of the Bar of South Africa and Another* 2019 (1) SA 130 (SCA).

³³ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).

Costs

[110] The PSA contends that costs are to follow the result in a matter like this. If the Court rules in favour of the PSA, SARS should pay the costs of the application, including the costs of senior counsel. If the Court is not with the PSA, SARS should get the costs.

[111] SARS' argument is, also, that costs should follow the result, and if the application fails, it should be dismissed with costs of two counsel – one senior and one junior. The question of costs in relation to NEHAWU is left in the Court's hands. NEHAWU was joined pursuant to the counter application. SARS' contention is that since NEHAWU has opposed the counter application, if the counter application is upheld, then NEHAWU should be directed to pay the costs, given their opposition, and if the counter application is not upheld, then on that basis, each party to pay their own costs.

[112] NEHAWU's proposition is for the counter application to be dismissed with costs, including costs of senior counsel.

[113] It is trite that costs are normally left within the discretion of the Court. All the parties have applied for costs to follow the result and for a cost order on the ordinary scale of costs. That must follow.

Order

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

1. Prayers 1, 2, 4 and 5 of the main application are granted.
 - 1.1. The First and Second Respondents are ordered to pay the costs of the Applicant, jointly and severally, the one paying the other to be absolved.
 - 1.2. Such costs to include the costs of senior counsel.
2. The Counter Application is dismissed.

- 2.1. The First and Second Respondents are ordered to pay the costs of the Fourth Respondent, jointly and severally, the one paying the other to be absolved.
- 2.2. Such costs to include the costs of senior counsel.



↙ E M KUBUSHI
**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing: 04 October 2022

Date of judgment: 22 November 2023

APPEARANCES:

For the Applicant:

Adv. C Orr SC instructed by Bowman
Gilfillan Inc.

For the First & Second Respondents:

Adv. S Budlender SC & Adv I
Kutumela instructed by Savage
Jooste & Adams Inc.

For the Third Respondent:

Adv. M Sello SC & Adv S Gaba
instructed by the State Attorney

For the Fourth Respondent:

Adv. G I Hulley SC instructed by TM
Incorporated Attorneys