



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA JOHANNESBURG

Not reportable

Case no: JA112/2013

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

First Appellant

EKURHULENI METROPOLITAN MUNICIPALITY

Second Appellant

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Third Appellant

THE SOUTH AFRICAN LOCAL GOVERNMENT

ASSOCIATION

Fourth Appellant

BUFFALO CITY MUNICIPALITY

Fifth Appellant

and

INDEPENDENT MUNICIPAL AND ALLIED

TRADE UNION

First Respondent

THE SOUTH AFRICAN MUNICIPAL WORKERS'

UNION

Second Respondent

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

(MOGALE CITY LOCAL MUNICIPALITY INTERVENING)

Heard: 08 September 2016

Delivered: 28 June 2017

Summary: Delay- Labour Court's inherent power to protect and regulate its own process and develop the common law, taking into account the interests of justice also implies the power to dismiss proceedings on grounds of delay- power to be exercised in exceptional circumstances, taking into account factors such as the rights of the parties in terms of s 34 the Constitution, the importance of the matter, the prospects of success, the potential prejudice to the parties, including the consequences of not granting or of granting the relief sought and of not finalising the matter on its merits.

Unreasonable delay in prosecuting the dispute - court *a quo* erred in dismissing the application without considering whether it should, nevertheless deal with the application in light of the aforementioned factors.

Dispute between Unions and local government employer's organisation - Whether authority was given to enter into the settlement agreement - employer's organisation disputing giving authority to one of its employee to enter into a settlement agreement - unions failing to prove that employee mandated to and having actual authority to sign the settlement agreement - Turquand rule of no assistance to unions and unions failing to prove employee having ostensible authority - Employer's organisation could bind its members by entering into a settlement agreement on their behalf and in their interests without a specific mandate from the members provided that the organisation acted within the limits of the powers granted to it by its constitution, the Labour Relations Act, 56 of 1996 and the law generally. Appeal upheld.

Coram: Tlaetsi DJP, Ndlovu and Coppin JJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the order of the Labour Court (Van Niekerk J) dismissing, with costs, an application brought by the appellants in that court for an order declaring that a settlement agreement, entered into between the first respondent, the Independent Municipal and Allied Trade Union (“IMATU”), the second respondent, the South African Municipal Workers’ Union (“SAMWU”) and the fourth appellant, the South African Local Government Association (“SALGA”), on or about 21 February 2006, was not binding on any of them; and that an arbitration award, in terms of which the settlement agreement was made an award on 22 February 2006 (by an arbitrator acting under the auspices of the third respondent, The South African Local Government Bargaining Council (“SALGBC”)), was not binding on them. Leave to appeal having been granted on petition to this Court.
- [2] Even though there are several appellants and respondents cited in this appeal, none of them, with the exception of the second appellant the Ekurhuleni Metropolitan Municipality, and the first respondent, IMATU, participated in the appeal. Mogale City Local Municipality, which was not a party to the proceedings in the court *a quo*, applied to the Judge President for leave to intervene in this appeal and such leave was granted.
- [3] The court *a quo* dismissed the application, having found that the appellants had unduly delayed in the bringing and prosecution of the application. The court *a quo* also found that the appellants were in any event bound by the settlement agreement entered into because SALGA, as an employers’ organisation, was entitled to act and make decisions of its own accord in the interests of its members and did not require an express mandate from individual members, which included the appellant municipalities.
- [4] The main issues raised in this appeal was whether the court *a quo* correctly dismissed the application on the grounds of delay and, if so, whether the application should have succeeded on the merits. Both sides agreed that this Court should finalise the matter if it should find that the application should not have been dismissed because of the delay.

Background

- [5] The facts stated in the paragraphs under this heading, save to the extent stated otherwise, are common cause and are not seriously disputed: On or about 18 July 2005, IMATU and SAMWU (*the unions*) referred a dispute between them and SALGA to the SALGBC for conciliation.
- [6] The dispute, in essence, concerned an alleged breach by members of SALGA of collective agreements that had been entered into between them and the unions. The unions alleged that members of SALGA acted in breach of the collective agreements by *inter alia* appointing, or attempting to appoint, place, or transfer, current and prospective employees on terms and conditions of employment, other than those that were agreed to in the collective agreements. They further alleged that these other terms and conditions were determined by SALGA's members unilaterally at local level in breach of and with total disregard for the collective agreements that were binding upon them. They also alleged that these breaches were in contravention of the SALGBC's Constitution and its established agreement and that they were prejudicial to them and their members, and other employees and prospective employees in the local government sector.
- [7] When conciliation failed, the unions in September 2005 referred the dispute to the SALGBC for arbitration. In the arbitration, the unions sought an order in the following terms:

'6.1 Subject to section 57 of the Municipal Systems Act – SALGA's constituent municipalities advertise posts, offer employment, appoint, employ, transfer, promote, demote, remove or replace employees on terms and conditions of the employment as regulated by the various collective agreements pertaining to the subject matter concluded in the SALGBC;

6.2 SALGA's constituent municipalities may not offer new employees and non-union members employment on terms and conditions of employment different to those offered to or enjoyed by existing employees and union members;

6.3 SALGA's constituent municipalities may not offer contracts of employment or fixed term contracts to union members subject to the requirement that they have to resign their union membership;

6.4 SALGA's constituent municipalities only offer or enter into contracts in terms of section 57 of the Municipal Systems Act 32 of 2000 with municipal managers and the managers directly accountable to the municipal managers (managers directly accountable to municipal managers are defined as managers who are employed on the post level directly below that of the municipal manager, regardless of their post title or responsibilities);

6.5 An order declaring all contracts of employment entered into on a fixed term basis that do not comply with these requirements to be null and void and that the affected employees be deemed to be employed on indefinite contracts of employment as regulated by the various collective agreements dealing with conditions of service and employment; and

6.6 The applicants' costs of suit.'

- [8] The order sought also essentially summarises the case that the unions made out in their statement of case which was filed in the arbitration proceedings.
- [9] On 18 November 2005, a pre-arbitration conference was held at SALGA's offices. However, on 21 November 2005, SAMWU gave notice that it was not going to participate in the arbitration any longer and would abide its outcome.
- [10] The arbitrator gave a ruling on various (about thirteen) issues that were raised *in limine* by SALGA, dismissing all of them. The arbitrator further stipulated that as a consequence of such ruling the arbitration was to proceed on 18, 19 and 20 January 2006 as was previously agreed between the parties. The parties were also urged to have another meeting before the resumption of proceedings in order to attempt to possibly curtail the scope of the hearing.
- [11] On 11 January 2006, SALGA's Mr Linda Dlamini, Mr Johan van Zyl, and the attorney appointed to act on behalf of SALGA in the arbitration, Mr Thibe Mothuloe, met with representatives of SALGA's main members including those of the first, second and third appellants and of the City of Cape Town.

At the meeting, the said representatives were informed of the arbitrator's ruling on the preliminary issues and of the possibility of a settlement.

- [12] It is common cause that concerns were raised at that meeting by representatives of members of SALGA that there was inadequate information available to enable them (or their municipalities) to form a meaningful opinion of the merits or demerits of the dispute. It was accordingly agreed at that meeting that the SALGA's Messrs Dlamini and Van Zyl would seek a postponement of the arbitration in order to enable the representatives of the members to obtain more information and that another meeting would be held once the required information had been obtained.
- [13] On 13 January 2005, Messrs Dlamini and Van Zyl of SALGA and Mr Mothuloe, the attorney, attended a further pre-arbitration meeting at SALGA's offices with representatives of IMATU. Mr Dlamini and Mr van Zyl indicated a desire to settle the dispute, subject to the resolution of "*two areas of concern of a practical nature*" that remained, namely, the manner in which to deal with existing fixed term contracts of employment and how to make provision for specific local circumstances and exemptions.
- [14] On 18 January 2006, the postponement of the arbitration, which was requested by SALGA members, was refused. The arbitration proceeded and the unions led evidence in support of their case. The hearing was postponed to 8 February 2006 in order to *inter alia* enable Mr Mothuloe to obtain further instructions regarding a settlement of the dispute. He reserved his right to cross-examine the witnesses of the unions in the event that he did not receive a mandate to conclude the settlement proposed by the unions.
- [15] On or about 19 January 2006, Mr Van Zyl wrote to *inter alia* the first, second and third appellants requesting them to attend the follow-up meeting on 25 January 2006 to discuss the way forward, including the possible settlement of the arbitration.
- [16] On 25 January 2006, a meeting was held between SALGA's Messrs Dlamini and Van Zyl and representatives of certain of SALGA's members where the proposed settlement of the matter was discussed. The appellants aver in their

application that there was no consensus reached on the terms of the proposed settlement and that no mandate was given to SALGA or to Messrs Dlamini or Van Zyl to enter into the settlement agreement.

- [17] On 6 February 2006, a representative of IMATU sent a draft settlement agreement to Messrs Dlamini and Van Zyl, seemingly in response to an e-mail from Mr Dlamini. On 7 February 2006, IMATU's representative also sent an e-mail to Mr Dlamini clarifying an aspect of the draft settlement agreement.
- [18] Messrs Dlamini and Van Zyl met again with IMATU's representatives on 8 February 2006 to further explore the possible settlement of the matter.
- [19] On 10 February 2006, when the arbitration was to resume, Mr Mothuloe informed the arbitrator that the parties were very close to a settlement and that SALGA needed more time. The arbitration proceedings were consequently postponed to 22 February 2006.
- [20] An exchange of e-mails and telephonic conversations concerning settlement followed between IMATU's representatives and Messrs Dlamini and Van Zyl in the period 13 to 21 February 2006.
- [21] On 21 February 2006, Mr Van Zyl, who was employed at SALGA in the capacity of Manager: Municipal: Labour and Human Resources, sent an e-mail to the representatives of a number of the members of SALGA concerning the proposed settlement. The e-mail reads as follows:

'Dear Colleagues

After several discussions SALGA and IMATU came to an understanding on a possible settlement agreement. You will note that although the agreement is slightly different than discussed it is still in line with what we agreed upon. At least we have opened a window whereby municipalities can deal with the issue of fixed term contract appointments at divisional level.

We have since realised that IMATU indeed intended to get an award with a retrospective effect, which could have detrimental effects on the sector. It was therefore imperative for SALGA to ensure a settlement rather than to continue with the arbitration.

It will be appreciated if you can indicate to SALGA whether we have your mandate to sign the attached agreement.

Sincerely

Johan van Zyl ...'

- [22] Attached to this letter was the proposed settlement agreement.
- [23] The next development in the saga was that on 21 February 2006 Mr Dlamini of SALGA and Mr Barend Koen, IMATU's Deputy General Secretary, signed the settlement agreement in Cape Town.
- [24] Mr Mothuloe confirmed to Mr Kocks for IMATU that the settlement had been reached and requested him to make the settlement agreement an arbitration award at the resumed arbitration hearing on 22 February 2006, albeit in Mr Mothuloe's absence.
- [25] On 22 February 2006, the settlement agreement was indeed made an arbitration award by agreement between the parties.
- [26] In the interim, members of SALGA were responding to Mr Van Zyl's e-mail of 20 February 2006 which called on members to indicate to SALGA whether it had their mandate to sign the settlement agreement. For example, the City of Johannesburg (the first appellant), in a letter dated 21 February 2006 addressed to the Chief Executive Officer of SALGA, indicated that the proposed settlement would be prejudicial and that it would therefore not support its signing. It also requested that the signing of the settlement agreement be "*deferred to allow it to consider and make an informed proposal on the settlement*". Other members responded in a similar vein, for example, Tshwane Municipality (the third appellant). The second appellant, in a letter dated 22 February 2006 addressed to Dr Khoza, the CEO of SALGA, stated *inter alia* the following with reference to Mr Van Zyl's letter of 20 February 2006:

'...Upon careful consideration of the issues raised in the proposed settlement and having due regard to the implications such a settlement would have on

Ekurhuleni Metropolitan Municipality and the sector as a whole, it is prudent to indicate the following:

- *The need for broader consultations with municipalities in this regard;*
- *The need to carefully examine the political, financial as well as transformational implications of the provisions of the settlement;*
- *The need to obtain a SALGA NEC mandate on this issue as a matter of urgency.*

Given the above, the Ekurhuleni Metro is not in a position to occasion you with the mandate sought in the aforementioned communiqué from the Acting Executive Director: Municipal Labour and HR. It would hence be appreciated if SALGA would desist from entering into the proposed settlement until all the implications have been dealt with and the interests of the municipalities are protected ...'

[27] These members of SALGA were clearly not aware that the settlement agreement had already been concluded and seemingly remained ignorant of this fact until very much later.

[28] In any event, on 6 March 2006, IMATU applied to the Commission for Conciliation, Mediation and Arbitration ("CCMA") to certify the arbitration award in terms of section 51(8) read with section 143 of the Labour Relations Act¹ ("LRA") and the award, including the settlement agreement, was eventually certified on 8 June 2006.

[29] In the interim, on 22 March 2006 a circular, purporting to have been signed by Dr Khoza, was sent to all municipal managers of SALGA's 284 members advising them of, and supporting and encouraging them to comply with the settlement agreement. Dr Khoza, in an affidavit filed as part of the founding papers in the proceedings in the court *a quo*, avers that she had no recollection of reading or signing the circular, or of approving its contents and that it is probable that Mr Dlamini had placed her electronic signature on the circular without her knowledge.

¹ Labour Relations Act 56 of 1996 (LRA).

- [30] On becoming aware of what the SALGA officials had done, the City of Cape Town eventually, after other efforts, on 23 November 2006 brought an application to rescind the arbitration award incorporating the settlement agreement. SALGA and the unions were cited as respondents. The arbitrator only dealt with that rescission application on 23 July 2007. The application was argued over a period of two days and SALGA also contested the settlement agreement. On 21 January 2008, the arbitrator issued an award rescinding the settlement award.
- [31] On or about 1 August 2006, SALGA and three of its members the first, second and third appellants had, instead, brought the application, which is the subject of this appeal, in the Labour Court for declaratory orders that the settlement agreement and the settlement award were not binding on them.
- [32] In the City of Cape Town's rescission application which was brought in the SALGBC, the arbitrator mentions that he raised the illogicality of SALGA's members proceeding in two forums on the same facts, but rationalised that the Labour Court had to ultimately decide certain of the factual issues finally.
- [33] Condoning the City of Cape Town's late delivery of its rescission application and having dismissed *in limine* points taken by IMATU regarding the City of Cape Town's standing, the arbitrator went on to grant the rescission *inter alia* on the basis that if he had been made aware of SALGA's officials' lack of authority to conclude the settlement agreement, he would not have made it an award on 22 February 2006.
- [34] Notwithstanding the rescission of the award, IMATU continued to contend that the settlement agreement was still binding on SALGA's members, which comprises most of the municipalities in South Africa.
- [35] In June 2008, when it became aware of the litigation in the Labour Court which had been instituted by SALGA, the first, second and the third appellants, Buffalo City Municipality (the fifth appellant) joined as applicant in those proceedings. The City of Cape Town also joined as applicant in those proceedings sometime in November 2008.

- [36] Lengthy collective settlement negotiations followed, but ultimately only the Cities of Cape Town and Johannesburg were able to conclude settlements with IMATU. The other applicants continued with the application proceedings.
- [37] On 29 November 2012, the application was postponed, and was eventually only heard by the court *a quo* on 5 February 2013. The judgment, which is the subject of this appeal, was handed down on 6 May 2013.
- [38] The applicants who persisted with the application, including the second appellant, applied to the Labour Court for leave to appeal against the judgment dismissing the application for a declaratory order and related relief.
- [39] On 21 October 2013, the Labour Court refused leave to appeal and during November 2013 the second appellant petitioned the Judge President for leave to appeal and this was granted.
- [40] During 2014, Mogale City Local Municipality, which was not a party to the application in the court *a quo*, applied to intervene in the appeal and was granted such leave.

Hearing in the court *a quo*

- [41] At the hearing of the application in the court *a quo*, IMATU raised two points *in limine*, the first concerning the standing of the first to third appellants and the second point was that there had been an unreasonable delay in the bringing of the application. The court *a quo* extended this to include the prosecution of the application.
- [42] The court *a quo* chose to deal with the issue of delay first. It held, not only that there had been a delay in bringing the application, but that the applicants “*have been less than diligent in pursuing*” the application. It held that on those grounds alone the application stood to be dismissed. In determining the issue of delay, the court *a quo* applied, what was held by this Court in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*² (*Queenstown Fuel*) concerning a delay in bringing a review in terms of section 145 of the LRA,

² *Queenstown Fuel Distributors CC v Labuschagne NO and Others* [2000] 1 BLLR 45 (LAC) para 24.

namely, that the “*excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand*”.

- [43] The court *a quo* found the explanation for the delay “*insufficient and unacceptable and not at all compelling*”. The court *a quo* was mindful of the fact that the events that formed the basis of the application occurred (by then) more than seven years ago; that the application was (by then) launched six and a half years ago and that the matter was ripe for hearing since about May 2008; that the application had been set down on the unopposed roll on various occasions between 2008 and 2010, but was never proceeded with on those occasions; and that the matter was (seemingly) “*resurrected for reasons that are not apparent*” when it was set down on the opposed motion roll for 29 November 2012 and then postponed for hearing on 5 February 2013.

The hearing in this court

The delay issue

- [44] In this Court, counsel for the second appellant and counsel for the intervening party, in essence, submitted the following with regard to the issue of delay. That the application of the delay rule was unreasonable; that the test in *Queenstown Fuel* was not applicable and that it only applied to the review of arbitration awards where entirely different policy considerations pertain; that the determination of a reasonable time within which the application was to be brought and prosecuted was also not correctly arrived at by the court *a quo*. It was argued in that regard that no time limit was set for the bringing of an application and even if the court had the power to dismiss such an application for undue delay that power was part of a court’s inherent jurisdiction to regulate its own procedures in the interests of justice, which also embraces a court’s power to relax its own rules in instances where substantial injustice would result if the application was to be dismissed purely for delay.

- [45] It was further submitted that the interests of justice favoured a ventilation of the merits of the application and that the delay was not fatal to the

proceedings. Regarding the time periods, it was submitted that the use by the court *a quo* of a six-week period as a benchmark for the reasonable time within which to bring such an application was not reasonable, alternatively, if it was a reasonable benchmark, the balance of convenience favoured the adjudication of the substantive merits of the dispute in the public interest and in the interests of promoting ethical accountable and transparent public administration. Further, if the application was dismissed merely for the delay, the prejudice to members of SALGA and the public interest far outweighed the prejudice that the unions or its members may suffer.

[46] The point was made that the issue, regarding the binding effect of the settlement agreement on the municipalities who refused to agree or assent to it, was far from academic and that it impacted drastically on their rights to employ senior employees on fixed-term contracts of employment. In addition, it was submitted that the settlement agreement had far-reaching implications and that the uncertainty of its validity was also causing uncertainty in the municipal collective bargaining sphere and in dispute resolutions. It was submitted further that IMATU was exploiting the uncertainty to its advantage by obtaining concessions in collective bargaining that it would otherwise not have obtained; and that the settlement agreement serves to unfairly benefit senior managers who elected to accept fixed term employment contracts at far higher salaries, by converting their employment into permanent employment at these higher salaries and at greater costs to local government. It was also submitted that unions were also to be blamed for the delay and that the delay, which was reasonably explained, ought to have been weighed against the prospects of success of the application.

[47] However, the main submission in respect of the issue of delay was that the court *a quo* failed to exercise its discretion properly when it decided to dismiss the application on the ground of delay and that it failed to give sufficient weight to the factors aforementioned and the national importance of the matter.

[48] IMATU supported the court *a quo*'s approach in respect of the issue of delay. Its counsel submitted that the approach and conclusion of the court *a quo* was

correct and that the appellants failed to give a reasonable and acceptable explanation for the unreasonable delay in bringing and prosecuting the application. Counsel described the appellants' argument that IMATU was also to be blamed for the delay as "*belated*" and disingenuous.

- [49] In the High Court the, so-called "delay rule" has more often been applied to the bringing of applications for judicial review.³ Application of the rule was also extended to the prosecution of such reviews.⁴ *Queenstown Fuel* essentially involved a review of a CCMA award⁵ in terms of section 145 of the LRA. *Lion Match Company Ltd v PPWAWU and Others*⁶ also involved, what was essentially characterised by the Supreme Court of Appeal as a review of the establishment of a Conciliation Board under the Labour Relations Act 28 of 1956. The SCA applied the decision in *Wolgroeiens*⁷ and held, essentially, that what was effectively a review, had to be brought within a reasonable time.
- [50] However, that does not mean that a "delay rule" may not be applied to matters which are not reviews. In terms of section 173 of the Constitution of the Republic of South Africa,⁸ ("*the Constitution*") the High Court has the inherent power to protect and regulate its own process and develop the common law, taking into account the interests of justice. Such power also implies a power to dismiss proceedings before it on the grounds of delay.⁹ However, the power is to be exercised only in exceptional circumstances, because a litigant has a right, in terms of section 34 of the Constitution, to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a

³ *Wolgroeiens Afslalers v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) (*Wolgroeiens*); *Gwetha v Transkei Development Corporation and Others* 2006 (2) SA 603 (SCA) paras 22-23; *Opposition to Urban Tolling Alliance ("OUTA") and Others v The South African National Road Agency Co Ltd and Others* (90/2013) [2013] ZASCA 148 (9 October 2013); [2013] 4 ALL SA 639 (SCA) ; *Beweging vir Christelike Volkseie Onderwys and Others v Minister of Education and Others* [2012] 2 All SA 462 (SCA).

⁴ See *Mkwanazi v Minister of Agriculture and Forestry, KwaZulu* 1990 (4) SA 763 (D) at 766F-H.

⁵ An award made in terms of the LRA in the Commission for Conciliation, Mediation and Arbitration (CCMA).

⁶ *Lion Match Company Ltd v PPWAWU and Others* [2001] 11 BLLR 1202 (SCA).

⁷ *Wolgroeiens (supra)*.

⁸ *The Constitution of the Republic of South Africa Act 108 of 1996*.

⁹ See Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4ed page 547; *Hunt v Engers* 1921 CPD 757; *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 272; and *Sanford v Haley* NO 2004 (3) SA 296 (C) at 300 para 8 and the cases cited there.

court. The High Court has exercised the power where there has been an abuse of its process.¹⁰

- [51] Nevertheless, the High Court has a discretion in that regard. It is accepted that there must be a delay which is inexcusable and which has caused prejudice.¹¹ The prospects success on the merits is another relevant consideration, but there is no closed list of factors to be considered. However, the interests of justice are paramount.
- [52] In terms of section 151 of the LRA, the Labour Court is a superior court and has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that of a High Court. Therefore, the Labour Court, like the High Court, has the inherent power to protect and regulate its own process and develop the common law, taking into account the interests of justice. This power, like in the case of the High Court, implies that the Labour Court has the power to dismiss proceedings before it on the grounds of delay, either in the bringing of such proceedings or in their prosecution. Consequently, the court *a quo* did not err by applying the delay rule to the application which is not a review.
- [53] In the LRA and the rules of the Labour Court time periods are set for the filing of the various affidavits in application proceedings and a failure to comply with such time periods would require condonation. Inordinate and unexplained delays are justifiably not to be countenanced. The prosecution of all matters has to be undertaken within the necessary time limits, if any, but definitely expeditiously. Litigation has to reach finality sooner rather than later in order to ensure the stability that is brought about by certainty.
- [54] It is also a longstanding principle that where no time period is stipulated for the bringing of certain kinds of proceedings, they must nevertheless be brought or prosecuted within a reasonable time. There is no time limit stipulated for the bringing of this application. The court *a quo* held that given the nature of the application the closest analogous period in the LRA was the

¹⁰ See *Sanford v Haley (supra)* and the cases cited there.

¹¹ *Ibid* at 300 para 9.

six-week period within which an application for the review of an arbitration award in terms of section 145 of the LRA may be filed. I do not find it necessary to deal with the correctness of that analogy.

- [55] Having found that there has been an inadequately explained unreasonable delay, the court *a quo* nevertheless retained the discretion to determine the application on its merits. In other words, the court *a quo*, in the exercise of its discretion had to decide whether it was going to deal with the merits despite the delay. The delay cannot be evaluated in isolation or in a vacuum, but must be evaluated taking into account at least the following: the potential prejudice to affected parties, the possible consequences of granting the relief sought and the effect of not granting it or not dealing with the matter on its merits.¹²
- [56] The nature of the application and the strength of the merits may also either favour, or not favour overlooking the delay. Unfortunately, the court *a quo* came to a conclusion that the application stood to be dismissed by looking at the issue of delay in isolation. Although it did go on to hold that the application, in any event, stood to be dismissed in respect of the SALGA representation point,¹³ that point did not constitute the entire merits of the application.
- [57] There was an unreasonable delay in bringing and prosecuting the application. There was no argument to the contrary in this Court. However, there were aspects of the delay over which the applicants in the court *a quo*, including the second appellant, had no control and IMATU may to a degree (even slight) also have contributed to some delay. But the nature and importance of the matter, as well as the prospects of success, are factors that required that the merits of the application be dealt with despite the delay.
- [58] The court *a quo* confined itself only to one aspect of the merits, namely, whether SALGA could bind its members without obtaining a specific mandate from them and rightly found that there was no merit in the appellants'

¹² Compare *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) paras 55-57.

¹³ The court *a quo* held essentially that the members of SALGA were bound by SALGA's decision to enter into the settlement agreement and were in fact bound by the settlement and that their "unhappiness" with the settlement agreement was not a basis for setting aside the agreement.

contention that it could not. But that was not all of the merits. It was merely one aspect thereof. Other aspects were, whether SALGA actually authorised the settlement agreement, and if not, whether SALGA could be held to be bound to the settlement agreement on the basis of the alleged ostensible authority of Messrs Dlamini, Van Zyl and Mothuloe. Other issues were whether the ‘Turquand rule’¹⁴ was of assistance to the unions in the circumstances, and as an alternative issue, whether SALGA had nevertheless acted beyond its powers in entering into what, according to the second appellant and the intervening party, was essentially a collective agreement which could only have been concluded in the SALGBC, in accordance with the applicable provisions of the constitutions of that body and SALGA.

[59] I now proceed to briefly discuss those aspects and issues.

SALGA’s powers to bind its members

[60] In my view, the court *a quo* correctly held in respect of this point that SALGA could bind its members by entering into the settlement agreement even though individual members, including the second appellant and the intervening party, did not give it a specific mandate to do so.

[61] It is well established that an employer’s organisation, like a trade union, does not act as an agent of its individual members but represents the body of its members. It acts in the place of its members, representing their interests and it decides how best to do so.¹⁵

[62] Section 200(1) of the LRA specifically provides that:

‘A registered trade union or registered employer’s organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party –

¹⁴ See fn .

¹⁵ See *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A) at 913; *Blyvooruitzicht Gold Mining Co Ltd v Pretorius* [2000] 7 BLLR 751 (LAC) para 12;; *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* [2001] 8 BLLR 857 (LAC) paras 57-58 and paras 63-67; *NUM v Hernic Exploration (Pty) Ltd* [2003] 4 BLLR 319 (LAC) paras 40-41; *NUMSA v CCMA and Others* [2000] 11 BLLR 1330 (LC) paras 29-36 and the cases cited there; see also *Grogan Workplace Law* (9 ed) 327 where reference is made to *SA Society of Bank Officials v Standard Bank of SA Ltd* (1994) 15 IU 332 (IC) at 337-338. Cf *Baloyi v MNP Manufacturing* [2001] 4 BLLR 389 (LAC).

- (a) *in its own interest;*
- (b) *on behalf of any of its members;*
- (c) *in the interests of any of its members.'*

[63] The LRA, in effect, requires, for the sake of certainty and stability in the workplace, that trade unions and employers' organisations, respectively, ought to be able to bind their members.

[64] Dealing specifically with an argument that the union representative who conducted a discussion on behalf of a union had not been mandated by a dismissed employee, this Court (per Conradie JA) held in *Blyvooruitzicht Gold Mining Company Ltd v Pretorius*:¹⁶

'There is no merit in the point that the union representative who conducted the discussion on behalf of UASA had not been mandated by the respondent. When a trade union conducts negotiations of this kind, it represents the interests of employees. It acts as their spokesperson. It does not act as the agent of any one of them (Amalgamated Engineering Union v Minister of Labour 1949 (4) SA 908 (A) at 913). A union's obligations in situations of collective bargaining derive from principles of representative governance rather than principles of agency (cf Sarah Crispie 'Majoritarianism, Collective Bargaining and Discrimination' (1994) 124 ILJ 708).'

[65] The same reasoning could be applied to employers' organisations in relation to their members. SALGA could in terms of section 200(1) have acted in any of the capacities referred to in that section. It was not contended that SALGA acted in its own interest. Mr van Zyl's letter of 20 February implied that the settlement was in the interests of SALGA's members. Like a trade union, an employees' organisation such as SALGA must be able to act in the place and stead of its members. Its members were not cited as parties in the arbitration proceedings and the settlement of those proceedings would essentially have required SALGA to act in the place and stead of its members.¹⁷

¹⁶ *Supra* at para 12.

¹⁷ Compare *NUM v Hernic Exploration (Pty) Ltd (supra)* at para 41.

[66] Thus, in respect of the decisions or action taken by SALGA in those circumstances in the interests of its members, they are binding on the members even though individual members are unhappy about them. This is subject to the proviso that SALGA must not exceed the powers it has in terms of its constitution, the LRA and the law generally.

Did SALGA authorise the settlement agreement?

Ostensible authority and the Turquand rule¹⁸

[67] IMATU relies on the actual authority of Messrs Dlamini, Van Zyl and Mothuloe, alternatively, on their ostensible authority and, further alternatively, on the “Turquand rule”.

[68] As stated earlier with regard to the latter two grounds, they are easily dismissed on the basis of the following. In order to establish that Mr Dlamini and/or Mr Van Zyl and/or Mr Mothuloe had ostensible authority to bind SALGA in concluding the settlement agreement it was incumbent upon IMATU to prove the following: (a) a representation in words of conduct; (b) made by SALGA that either, or any, or all of those persons had the authority in respect of the settlement, to act as they, respectively, or jointly, did; (c) a representation in a form such that SALGA should have reasonably expected that outsiders would act on the strength of it; (d) reliance by IMATU on such representation; (e) the reasonableness of such reliance; and (f) the consequent prejudice to IMATU.¹⁹

[69] In the affidavit deposed to by Mr Koen on behalf of IMATU, the first respondent, he merely avers that Messrs Dlamini and Van Zyl represented to him and Mr Verster (of IMATU) that they were acting on behalf of SALGA. He also relies on the circular dated 22 March 2006 purporting to emanate from

¹⁸ This is a principle that was developed in *Royal British Bank v Turquand* (1856) 6 E & B 327; 1843-60 ALL ER 435, which provides that ‘persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to enquire whether acts of internal management had been regular’- per Lord Simons in *Morris v Kanssen* 1946 AC 459 at 474; (1946) 1 ALL ER 586 (HL) at 592 approving the formulation of the rule in Halsbury’s *Laws of England* 2ed vol 5 432 para 698.

¹⁹ See *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) para 2; *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others* 2012 (5) SA 323 (SCA) para 28.

SALGA and to have been signed by Dr Khoza, its CEO, and in which SALGA's members are requested to comply with the settlement agreement.

- [70] None of those facts amounts to the proof that was required and, consequently, no case of ostensible authority was made out on the papers filed on behalf IMATU.
- [71] IMATU, the first respondent, also relies on the "Turquand rule", but its reliance on that rule is misplaced. Unless it was proved that Messrs Dlamini and Van Zyl had actual authority in terms of the SALGA constitution if the necessary internal formalities were complied with, the "Turquand rule" finds no application.²⁰ The rule does not entitle a third party to assume that SALGA has in fact entered into the settlement agreement. The respondents did not show that Messrs Dlamini and/or Van Zyl had actual authority in terms of SALGA's constitution to enter into the settlement agreement. The averments made by Dr Khoza regarding their lack of authority are borne out by SALGA's constitution and were not really placed in dispute.

The circular

- [72] While the circular of 22 March 2006 could not have induced the unions to enter into the settlement agreement, it could serve as evidence that SALGA had actually authorised the settlement agreement, or ratified its conclusion. Dr Khoza, in the affidavit in support of the application, disputes that she signed the circular, or had knowledge of it, or of the settlement agreement, and of the conduct of Messrs Dlamini and Van Zyl in relation to the settlement in general. According to Dr Khoza, Mr Dlamini was on a frolic of his own and employed attorneys and did what he did in connection with the matter without her knowledge or consent. Dr Khoza denies having delegated authority to Mr Dlamini or to Mr van Zyl.
- [73] More disturbingly, Dr Khoza avers that she has ascertained that despite being aware of the concerns of the members of SALGA in relation to the proposed settlement and the manner in which the dispute was being arbitrated Mr

²⁰ Joubert (ed) *The Law of South Africa* (2 ed) Volume 4 Part 2 para 184 and the cases cited there.

Dlamini failed to bring such facts to her attention. She further avers that it was only as a result of persistent actions of officials of the first appellant and of its then mayor, Councillor Masondo and Councillor Walters that the full extent of Mr Dlamini's conduct had been brought to her attention. She avers that Mr Dlamini *inter alia* caused her signature to be placed on the circular without her knowledge or consent and that as a "lower level of manager", he had no authority to do what he did. According to Dr Khoza, Mr Dlamini was suspended with effect from 25 July 2006 and was to face disciplinary charges for his aforementioned conduct.

[74] IMATU in its answering affidavit put in issue Dr Khoza's averments with bare denials but did not thereby create real disputes of fact in respect thereof. Mr Koen, who deposed to the answering affidavit states, for example, that he had no knowledge about what transpired between Dr Khoza and Mr Dlamini and submits that "whatever has happened is irrelevant as far as the binding nature of the settlement agreement is concerned". But what happened there cannot be irrelevant to the question of the binding nature of the settlement agreement. If Mr Dlamini was not authorised or mandated to do what he did that impacts directly on its binding force. Mr Koen further disputes Dr Khoza's averments on the basis that it is directly contradicted by "Dr Khoza's circular of 22 March 2006 ". That contention clearly ignores Dr Khoza's averments regarding the provenance of the circular. Created as it was, according to Dr Khoza, the circular cannot be construed as confirmation of SALGA authorising or ratifying the conclusion of the settlement agreement.

[75] In light of the conclusion that SALGA has not authorised the conclusion of the settlement agreement, it is not necessary to deal with the other grounds relied upon by the second appellant and the intervening party in this Court, namely, that SALGA acted beyond its powers in entering into the settlement agreement because it was a collective agreement.

Summary

[76] The court *a quo* erred in dismissing the application because of the delay, without considering whether, in light of factors such as the right of the parties

in terms of s 34 the Constitution, the importance of the matter, the prospects of success of the application, the potential prejudice to the parties, including the consequences of not granting or of granting the relief sought and of not finalising the application on its merits, it should, nevertheless, entertain the application, despite the delay, and concluding accordingly.

- [77] Although SALGA could bind its members by acting in their interest and stead, albeit within its powers, it did not authorise the settlement agreement and neither it nor its members, are bound by the settlement agreement or the award incorporating it. As mentioned earlier in this judgment, the award has apparently already been rescinded by the arbitrator acting under the auspices of the SALGBC in an application brought by the City of Cape Town in that forum.

Costs

- [78] There is no reason in law or fairness why the costs should not follow the result. In this Court, both the second appellant and the first respondent (IMATU), each justifiably employed two counsel.

- [79] In the result:

79.1 The appeal succeeds with costs, including the costs of two counsel, where two counsel were employed;

79.2 The order of the court *a quo*, dismissing the application with costs, is set aside and is replaced with the following order:

“1. It is declared that the following are not binding on any of the applicants:

(a) the settlement agreement (purportedly) entered into between the first respondent and the fourth applicant and dated 21 February 2006; and

(b) the award made in the South African Local Government Bargaining Council in matter number HQ 070502 on 22 February 2006.

2. The first respondent is to pay the costs of the application. “

P Coppin

Judge of the Labour Appeal Court

Tlaletsi DJP concurs in the judgment of Coppin JA. Ndlovu JA sadly passed away before the judgment was finalised.

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S X Mapoma

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