



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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES ~~NO~~
(2) OF INTEREST TO OTHER JUDGE: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

DATE

SIGNATURE

CASE NUMBER: 2022-26839

In the matter between:

BLUE CHIP FLIGHT SCHOOL (PTY) LTD

First Applicant

CAMELTHORN ADVENTURES CC

Second Applicant

t/a BUSHPILOT ADVENTURES

TR EAGLE AIR (PTY) LTD t/a EAGLE AIR

Third Applicant

DELMART (PTY) LTD

Fourth Applicant

t/a POWERED FLIGHT TRAINING CENTRE

LS AVIATION CC t/a LEGEND SKY

Fifth Applicant

PARAMOUNT AEROSPACE SYSTEMS (PTY) LTD Sixth Applicant
t/a PARAMOUNT AEROSPACE FLYING SCHOOL

LOUTZAVIA (PTY) LTD Seventh Applicant

ROBERT WILLIAMSON THOMPSON Eighth Applicant
t/a THOMPSON AVIATION

FLITECARE AIR CHARTERS (PTY) LTD Ninth Applicant
t/a FLITECARE AIR CHARTERS AND TRAINING

ANGOL MANAGEMENT SERVICES (PTY) LTD Tenth Applicant
t/a SKYDIVE PRETORIA

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

Heard: 31 OCTOBER 2024

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 20 JANUARY 2025.

Summary: ‘Unreasonable delay’ in instituting review under the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)* *alternatively* upon the principle of legality – factors to be considered.

JUDGMENT

LE GRANGE, AJ:

INTRODUCTION

- [1] Before me is an application by a proverbial squadron of aerophiles (the **applicants**) in terms of Uniform Rule 30A to compel the respondent (the **City**) to comply with rule 53(1)(b), as follows:

‘[P]roduce and dispatch to the Registrar of this Honourable Court and the Applicants within 15 (fifteen) days of the receipt of this Court's order, the full and complete reasons for and record of the decisions and or proceedings sought to be set aside, in the main application, which is/or have at any time been in the [City's] possession or control as envisaged in terms of Rule 53(1)(b) of the Uniform Rules and to notify the applicant that it has done so.

The full and complete reasons and the record is to include, *if available, the source documents for the following specific stated expenses on the profit and loss accounts in the financial statements in the record*: [a list then follows]’ [Emphasis added.]

- [2] It is evident from the applicants’ notice and subsequent application that the relief is not sought on the basis that the City did not provide a record as contemplated in the rule (which it did – consisting of 7 lever arch files) but rather on the bases that the financial statements provided were in fact only summaries of the financial statements; that no source documents were provided; and that the documents listed is necessary ‘in order to cross reference

between the stated figures and the notes and/remarks relating to the specific figures and the source documents thereof.’¹

[3] At the heart of this request and the application to compel stands the main application: a review application of the City’s decision to adopt the Medium-Term Revenue and Expenditure Framework 2021/2022 budget (**MTREF**) which effectively, prejudicial to the applicants, removed certain discounts in respect of training fees relating to training of aircrew at Wonderboom National Airport, more specifically the approach-, grounding frequency- and landing fees.

[4] On 15 May 2023, following a notice in terms of rule 30A, the City responded²:

‘2. We have perused the documents requested and we are instructed to place the following on record:

2.1 The City of Tshwane Metropolitan Municipality's ("the City") comprehensive financial statements are available to the public and can be accessed on the City's Website. However, it should be noted that Wonderboom Airport is a business unit of the City, and *there are no separate full financial statements* of the airport, as requested.

2.2 *The remaining information requested in paragraph 4 of the Rule 30A notice is irrelevant* for the current review application as your clients seek to review a decision to adopt the MTREF 2021/2022 budget which removed the training fee discounts for the aircrew training at Wonderboom National Airport.

2.3. Your client's main contention in the review application is specifically related to the decision to adopt the MTREF 2021/2022 budget. Your client seeks to set-aside a portion of the 2021/2022 MTREF in so far as it relates to the removal of the

¹ CaseLines 16-8 par 4.

² CaseLines 12-40

discounts in respect of the training fees relating to training of crew at the Wonderboom National Airport.

2.4 We are mindful that your client intends to supplement its papers, however, are of the view that such supplementary and/or requisition of the documents should be limited the decision which it seeks to be reviewed.

2.5 Our client is of the view that your client is not entitled to the documents listed in paragraph 4 of the Rule 30A notice. Furthermore, *providing the requested information is beyond the scope of the issues before this court* and may be prejudicial to our client.

2.6 *Our client has provided all the relevant documents to litigation in the record.*
[Emphasis added.]

[5] On 18 May 2023, the applicants, aggrieved by the City's response, replied as follows³:

‘2 Having regard to the content of your letter, we respectfully submit the following:

‘2.1 In response to written representations made on the draft MTREF for 2021/2022, your client stated the following:

".... The majority of the traffic at the Airport is flight training, the current discounted pricing structure is insufficiently too low to cover the direct costs of operating the Airport...."

2.2 Your client, in the urgent application (under case number: 33481/2021), in its preliminary answering affidavit, stated as follows:

2.2.1 Ad paragraph 1.5.2 thereof

³ CaseLines 12-42.

"...of importance, it would result in the city not being able to meet the operational cost relevant to the Wonderboom National Airport..."

2.2.2 Ad paragraph 3.18 thereof:

"... this is due to the fact that at the present moment, the airport does not generate sufficient income to pay for its own operational costs. As a result of this, the majority of the city's residents are subsidizing the operational costs of the airport in circumstances where they do not derive any benefit from it...."

2.3 Although we do not agree with any argument that the Wonderboom National Airport is supposed to carry its own operational costs, which we intend to properly canvas at the hearing of the review application, your client seems to be determined to rely on this argument.

2.4 Accordingly, and in preparing our client's supplementary affidavit, a better understanding of the financial statements of your client, as provided in the record, is of paramount importance.

2.5 A considerable amount is yearly allocated on the provided profit and loss accounts in the financial statements towards depreciation. The reason for this depreciation has never been explained and remains unknown.

2.6 A better explanation as to the stated expenses in paragraph 4 of our clients' Notice in terms of Rule 30A is important for our clients to finalise their supplementary affidavit.'

[6] On 9 June 2023, the application now before me saw the light wherein two issues arose for adjudication: - (i) Whether this court has the necessary jurisdiction to adjudicate the matter; and (ii) if so, whether the facts read with the rules warrants that an order be granted to compel the City to provide the requested list of source documents.

JURISDICTION

Non-compliance with the limitation provision in PAJA

[7] The applicants allege at par 3.9 of their founding affidavit that⁴:

‘This Honourable Court has jurisdiction to adjudicate upon this application by virtue thereof that the main application is pending before this Honourable Court.’

[8] The City disputes this on the following bases⁵: -

2.1 This Court does not have jurisdiction to entertain the main review application and consequently, it also does not have jurisdiction to entertain this interlocutory application.

...

2.2.5 *In paragraph 20 of their founding affidavit in the main application, the applicants say that the main application is brought in term of the provisions of the Promotion of Administrative Justice Act 3 of 2002 (“PAJA”).*

2.2.6 Section 7 of PAJA says that judicial review proceedings in terms of section 6 thereof must be instituted *without unreasonable delay* and *not later than 180 days* after the date on which internal remedies proceedings were finalized or on which the person concerned was informed of the decision or became aware of it or might reasonably have been expected to have become aware of it and the reasons for it.

2.2.7 The applicants became aware of the decision and the reasons for it in May 2021 or at the latest in June 2021. Despite having been granted an interim interdict on the terms referred to above, there were in fact no internal

⁴ CaseLines 12-21.

⁵ CaseLines 12-51 par 2.

remedies available to the applicants in the form of an appeal such as an appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000.

2.2.8 *The applicants failed to bring the main review application without unreasonable delay and not later than 180 days after the dates contemplated in section 7 of PAJA.*

2.2.9 *The applicants instituted the main review application on 28 September 2022, which is more than twelve months after they became aware of the decision sought to be reviewed and set aside, which is way outside the time period prescribed in section 7 of PAJA. As a result of this, this Court does not have jurisdiction to entertain the main review application.*

2.2.10 Without this Court having jurisdiction to entertain the main review application, it follows that it cannot have jurisdiction to entertain the present interlocutory application, which is an application in relation to the main review application and in respect of which this Court does not have jurisdiction.’ [Emphasis added.]

[9] In short, the respondent disputes this court’s jurisdiction, on the basis that the applicants have failed to adhere to the limitation, and condonation provision of sections 7(1) and 9(1) of the *Promotion of Administrative Justice Act* 3 of 2000 (**PAJA**) which provides as follows in relevant part: -

‘7. Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted *without unreasonable delay and not later than 180 days* after the date-

(a) *subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*

- (b) *where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'*

...

9. Variation of time

(1) The period of -

- (a) ...

- (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

- (2) The court or tribunal may grant an application in terms of subsection (1) *where the interests of justice so require*. [Emphasis added.]

[10] In argument the City stayed on this course and requested, on authority of the Constitutional Court in the matter of *The Competition Commission of South Africa v Standard Bank* 2020 JDR 0685 CC, that this court must first consider and pronounce upon the issue of jurisdiction.

[11] The applicants are of a different view, to the effect that this court is not tasked at the hearing of this interlocutory application with the adjudication of jurisdiction or condonation of the pending main review application.

[12] The latter view is not supported by the majority of judges in *Competition Commission*, who held that:

‘[119] Boqwana JA was correct to find that the rule 53 record may be relevant to jurisdiction, since the test for assessing the jurisdiction of the Competition Appeal Court in a review application is connected to the grounds of review. This does not, however, imply that jurisdiction should not be established up front on the basis of what is pleaded in the founding papers. *The court chosen by an applicant in a review application must be able to assert its jurisdiction on the basis of the founding papers. Where no facts are alleged in the founding papers upon which jurisdiction could be founded, the applicant is not entitled to the production of the record in the hope that it will help clothe the court with the necessary jurisdiction. Standard Bank was required to first establish jurisdiction in its founding papers before the Competition Appeal Court could direct the production of a rule 53 record.* As mentioned, the question of jurisdiction has not yet been adjudicated by the Competition Appeal Court. *Boqwana JA should not have directed that the rule 53 record be produced without first deciding whether the Competition Appeal Court was competent to hear the review application as a court of first instance.*

[120] This finding is entirely consistent with what the Supreme Court of Appeal and this Court have said about the importance of the rule 53 record and its availability to litigants. *This is because a distinction must be made between the jurisdiction of the forum to hear the review application and the merits of the review application.* If a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless as the Supreme Court of Appeal put it, “the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be”. This is because, as recognised by the majority decision in Helen Suzman, rule 53 envisages the grounds of review changing after the record has been furnished. The record is essential to a party’s ability to make out a case for review. It is for this reason that a *prima facie* case on the merits need not be made out prior to the filing of record.

...

[201] As mentioned, we agree with the first judgment that the appeal should succeed. *Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders.* This is because a court must be competent to make whatever orders it issues. *If a court lacks authority to make an order it grants, that order constitutes a nullity.* Scarce judicial resources should not be wasted by

engaging in fruitless exercises like making orders which cannot be enforced.’ [Emphasis added.]

[13] This court accordingly directed that the issue of jurisdiction be dealt with first.

Agreement or Condonation

[14] The respondent is correct in its argument that the failure by a disgruntled applicant to secure an agreement, or failing such, to apply for condonation (under s 9 of PAJA) in the event that it is hit by the limitation provisions of 180 days (in terms of s 7(1)), when instituting a review application – is dispositive of the review as the court would have no authority/jurisdiction to entertain the review. See *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* (1044/2020) [2022] ZASCA 56; 85 SATC 216 (22 April 2022), (as approved on appeal by the Constitutional Court in *Sasol Chevron Holdings Limited v Commissioner for the South African Revenue Service* [2023] ZACC 30), in which the Supreme Court of Appeal held as follows:

‘[18] However, it is necessary to emphasise that in this case, as already indicated above, Sasol Chevron did not bring any application for the extension of the 180 day period as contemplated in s 9(2) of PAJA. Accordingly, the fate of this appeal hinges entirely on the question whether or not Sasol Chevron's review application was instituted within the 180 day period prescribed in s 7(1) of PAJA. If not, that will be the end of the matter, and the appeal would fall to be dismissed without further ado.

[19] In OUTA, this court held that:

‘. . . after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether

or not the decision is unlawful no longer matters. The decision has been "validated" by the delay.' [Emphasis added.]

- [15] The point taken was justified but short lived. Considering the City's answering affidavit, it needs be said that the City went sparingly with the truth when it raised the jurisdiction and limitation provision of PAJA as the allegations that the applicant's review is grounded upon PAJA, is simply not correct and/or the *whole* truth. Par 20 of the founding affidavit, in support of the review application, reads as follows:

'The application for review and the setting aside of the resolution passed by the council of the respondent on 27 May 2021 is made in terms of the provisions of the Promotion of Administrative Justice Act, Nr 3 of 2000 (hereinafter referred to as "PAJA"), which will more fully be dealt with hereunder. *In the alternative, this constitutes a legality review.* Subject to the content of the record to be provided, the applicants intend to revisit the basis for this review to be dealt with in the supplementary affidavit.' [Emphasis added.]

Review based upon legality

- [16] It is thus clear that the applicants instituted the review application also upon grounds of legality, an aspect which the City failed to deal with or challenge in the papers before me.
- [17] Further, the City did tender a bare denial of jurisdiction, but this denial was amplified and expressly articulated by the allegation that the application was brought in terms of the provisions of PAJA, and that applicants have failed to adhere to the provisions of that act.
- [18] For the above reason, I accept the correctness of the applicants' unchallenged allegation(s) that the review application may indeed succeed on the basis of legality. This informs the conclusion (at least for now and in the context of the present application) that this court is clothed with the necessary jurisdiction

to adjudicate the present application; and, by implication, that this court does have the requisite jurisdiction to adjudicate the review application.

Unreasonable delay

[19] The City has not just challenged the jurisdiction of this court (based upon the fact that the 180-day period was exceeded) but also claimed that the review was not instituted ‘without unreasonable delay’⁶. Although the challenge stems from the non-compliance of PAJA it remains relevant in the instance due to the court’s inherent jurisdiction.

[20] The following passage in *Sasol Chevron* finds application:

‘[20] The rationale for what has come to be known as the delay rule under s 7(1) of PAJA, whose roots are embedded in common law, was reiterated by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* as follows:

‘Since PAJA only came into operation on 30 November 2000 the limitation of 180 days in s 7(1) does not apply to these proceedings. *The validity of the defence of unreasonable delay must therefore be considered with reference to common law principles. It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings.* The effect is that, in a sense, delay would “validate” the invalid administrative action (see e.g. *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 (SCA) 10b-d, para 27). The *raison d’être* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see e.g. *Wolgroeiers Afslalers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 41)

‘...The scope and content of the rule has been the subject of investigation in two decisions of this court. They are the *Wolgroeiers* case and *Setsokeane Busdiens* (Edms)

⁶ CaseLines 12-53 par 2.2.8.

Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?

(See Wolgroeiers 39C-D.)

The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see e.g. Setsokosane 86G). The investigation into the reasonableness of the delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (See Setsokosane 86E-F).'

[21] In *Gqwetha v Transkei Development Corporation Ltd and Others*, Nugent JA elaborated on this theme and said the following regarding the delay rule:

'Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight . . .'

[21] It is clear from the latter part that the question, of whether there was an undue delay, entails a *factual enquiry* upon which a value judgment is called for in the light of all the relevant circumstances. [See also *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk*

2011 (3) SA 434 (WCC) at 453I-454B; *Madikizela-Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA) at 91D–93C.]

- [22] Considering the authorities referred to above, it is evident that there is no hard and fast rule laid down to determine whether a review was brought within a reasonable time, or whether a court’s discretion should be invoked or not, but that each case must be considered on its own facts.

- [23] In making this value judgment, the starting point will always be that where a party is aggrieved by a decision taken, it is in the interests of the administration of justice that a review must be undertaken and adjudicated as soon as possible.

- [24] In further doing so, and if there is a reason(s) to set a decision aside, the courts have carved a question: Whether it would it be in the interests of the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed?

- [25] To come to a conclusion, the courts have considered various factors. See for instance the matter of *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) where the Constitutional Court held at par 73:

‘The rule against delay in instituting review exists for good reason: *to curb the potential prejudice* that would ensue if the lawfulness of the decision remains uncertain. *Protracted delays could give rise to calamitous effects*. Not just for those who rely on the decision but also for the efficient functioning of the decision-making body itself.’ [Emphasis added.]

See also the matter of *Khumalo v Member of Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) where the Constitutional Court stated:

‘[47] This requirement is based on sound judicial policy that includes an understanding of the *strong public interest in both certainty and finality*. People may base their actions on the

assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

[48] In addition, it is important to understand that the passage of a considerable length of time may *weaken the ability of a court to assess an instance of unlawfulness on the facts*. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. *Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.*' [Emphasis added]

[26] A list of factors which have been considered by the courts over time, which is certainly not exhaustive, is provided hereinunder. Some of these factors were not present or seems not to have been present or considered in certain matters, nor were the factors which were present applied in equal measure in all matters: -

- (i) The extent of the delay;
- (ii) The reason(s) for the delay;
- (iii) The nature and complexity of the impugned decision;
- (iv) The strength of the merits, which included a consideration of the nature and extent of the irregularity(ies);
- (v) The involvement (if any) of the parties in the process that led to the impugned decision; and
- (vi) Any prejudice caused or potential prejudice. In this regard, the following has been considered: (a) The consequent actions which followed the decision; (b) The potential effect of undoing the decision,

for example whether it threatens a myriad of consequent actions or would have calamitous effects. (c) Whether the delay has constrained or will constrain the ability of the court to accurately determine the lawfulness of the decision.

- [27] Considering these factors the solution requires a fact-based investigation – at least in part, because relevant legal considerations may find application such as the exercise of a value judgment and the interests of justice consideration, to name but two.

- [28] At this juncture a court dealing with an interlocutory application, such as in this instance, may normally not be faced with, and be in a position to perform such a fact-based investigation and to pronounce on its findings simply due to the fact that various of these factors may only be introduced, elaborated or settled in the further papers in the review. It would therefore be better adjudicated by the court that adjudicates the review itself. However, considering *Competition Commission* and the court’s inherent jurisdiction – sound advice to any party instituting a review (or a subsequent interlocutory application), and who has a sniff of doubt to whether it is timeously done, would be to set out facts and provide a full explanation of the cause of any possible delay, by having regard to (at least) the aforesaid factors, sufficiently enough for the court to make a value judgment and exercise its discretion to condone any unreasonable delay. The converse is also applicable, if a party intend on opposing an application for review and claim that the application was not brought timeously, to also deal with it in full.

- [29] As the issue of undue delay was raised in this application I will deal with it accordingly.

Extent of the delay

[30] The delay herein is for a period of some twelve months, which seems (at least *prima facie*) unreasonably long in itself.

Reasons for the delay

[31] In this respect the City failed (again for a second time) to be candid which prompted a necessary reply by the applicants wherein this court's attention was drawn to an order granted by Neukircher J on 20 July 2021 and certain relevant (common cause) facts, the chronology of which is as follows:

27 May 2021: The impugned decision was taken.

15 June 2021: Applicants lodged an appeal in terms of section 62 of the Systems Act.

20 July 2021: An order is granted by Neukircher J as an interim interdict on an urgent basis, in terms whereof the City's impugned decision is effectively stayed, as follows: -

‘[P]ending the outcome of the [applicant's] *internal appeal* lodged with the second respondent in terms of Section 62 of the Local Government: Municipal Systems Act, No. 32 of 2000, and pending the final adjudication of

any possible subsequent review application/s to this Court: . . .’

24 May 2022: The City informed the applicants (with letter dated 10 May 2022) that it has no intention to adjudicate the purported appeal on the basis thereof that the decision to adopt a budget is not appealable in terms of section 62 of the Systems Act.

28 September 2022: The review is instituted.

- [32] It was confirmed in argument by both counsel that all the parties, following the decision of the City, labored under the impression that an internal appeal was available to the applicants in terms of s 62 of the Systems Act. To this end, the City in their answer to the urgent application before Neukircher J alleged that: - ‘The appeal which is provided for in terms of the Systems Act is an alternative and adequate remedy to the interdict which the applicant seeks in this application.’
- [33] The realization by the City that s 62 does not find application in the instance came one year later on or about 10 May 2022 and the applicants were informed, that the City does not intend to prosecute the appeal some 14 days thereafter.
- [34] The applicants being of the view that the City’s decision, not to prosecute the appeal, constituted a rejection of the appeal and subsequently lodged the review application within 3 months which they regarded as safely within the 180-day limit set by PAJA.

- [35] This view is wrong firstly, because there was in fact no internal remedy available which caused the applicants to be hit by the limitation provision, and secondly, because the said provision does not grant an aggrieved party *per se* 180 days to attack the decision. The application *must* still be instituted without unreasonable delay.
- [36] Be that as it may, the lion's share of the delay has been explained, and is attributable to both parties in equal measure.

The nature and complexity of the decision taken and the review

- [37] Considering (after the fact) the voluminous record provided by the City in adherence to rule 53, it is clear that a substantial amount of information was considered by the City and/or had a possible bearing on the decision taken.
- [38] It also seems, from the founding affidavit in the review application, that various factual disputes may likely follow, and complex legal principles would need to be considered in the review. The reason for the decision (as more fully discussed hereinunder) may factually not be complex, but the principle behind the decision can be regarded as such.
- [39] In my view (also considering the factor of involvement dealt with hereinunder) the applicants should in this instance have been granted ample opportunity and time to consider the decision, take proper instruction from all the role-players, to research the matter, and to compile and institute the application.

The strength of the merits, which included a consideration of the nature and extent of the irregularity(ies)

- [40] The respondent has not, in this interlocutory application, challenged the merits of the review at all, nor has the respondent (understandably due to the stage of

the process) filed an answering affidavit in the review which could be considered.

- [41] In the premises, the court is left with only the averments of the applicants for which this court is bound to find that a *prima facie* case has been set out.

The involvement (if any) of the parties in the process that led to the impugned decision

- [42] It is clear from the applicants' averments that there was some conversation with the City regarding the issue but that they did not form part of the decision-making process itself. This leaves the aggrieved applicants with uncertainty as to the intrinsic facts and considerations which formed part of the decision. By necessity the applicants had to investigate and consider a broad spectrum of facts and considerations that may or may not have had an impact on the decision and its legality and rationality.

Prejudice

- [43] The City has not alleged any prejudice.
- [44] Further, considering the order of Neukircher J both parties find themselves in a state of abeyance for which reason I do not foresee any consequent actions arising, or that any party (or the public) will act upon the decision to their prejudice.
- [45] The delay would in my view also not in this instance constrain the ability of the court to accurately determine the lawfulness of the decision as most of the information is public knowledge and does not for example involve questions of criminality like fraud which is dependent upon a conglomerate of evidence from various witnesses, but rather (mostly) a principle.

- [46] In conclusion, after considering all of the above, this court finds that the delay in instituting the review, and by implication this application, is not unreasonable and must be overlooked in this instance.

GROUNDS TO COMPEL

- [47] To consider whether the City has complied with rule 53, it must first be considered what constitutes ‘the record of proceedings’. It was held in *Johannesburg City Council v The Administrator Transvaal*⁷ at 91G to 92B that:

‘The words ‘record of proceedings’ cannot be otherwise construed, in my way, than as a loose description of *the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question..... It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it.*’ [Emphasis added.]

- [48] More recently this issue was dealt with in *Helen Suzman Foundation v Judicial Service Commission (Police and Prisons Civil Rights Union and others as amici curiae)*⁸ where the Supreme Court of Appeal held that:

‘[13] The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, *access to the record of the proceedings in which the decision was made*, to place the relevant evidential material before court. It is established in our law that the rule, which is intended to operate to the benefit of the applicant, is an important tool in determining objectively *what considerations were probably operative in the mind of the decision-maker* when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case

⁷ 1970 (2) SA 89 (T).

⁸ 2017 (1) SA 367 (SCA).

and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision.’ [Emphasis added.]

- [49] In response to a question from the bench as to why the notice to compel and the subsequent notice of motion, request(ed) the listed (source) documents ‘if available’, counsel for the applicants argued that the applicants themselves were not part of the decision-making process and they are therefore left at the mercy of the respondent’s honesty to lay bare the documents, evidence, arguments and other information (**the record of proceedings**) which were operative in the mind of the decision-maker at the time of the making of the impugned decision.
- [50] The respondent on the other hand avers that ‘[t]he applicants have not made out a case to demonstrate that the documents sought by them form part of the record of the decision which is sought to be produced. It is incumbent upon an applicant such as the applicants in this case to demonstrate that it is entitled to the relief which it seeks.’
- [51] A relevant question here is – how could the applicants know if indeed these documents exist; and if it were operative in the mind of the decision-maker at the time? The cold reality is that only the decision-maker has full knowledge of what information and/or documentation existed and what was actually considered, especially in this instance where the applicants were not part of the decision-making process itself.
- [52] It becomes even more problematic for an applicant if the decision-maker state under oath what the record of proceedings consisted of and what was considered during the decision-making process, as in this instance where the respondent stated as follows:

‘The applicants’ notice of motion called upon the City to deliver the record and the reasons of that portion of the decision which is sought to be reviewed and set aside. *The City complied*

*with this on 25 October 2022.*⁹ ... The financial statements sought by the applicants *do not form part of the record* of the decision sought to be reviewed and set aside.¹⁰ [Emphasis added.]

- [53] All is however not lost for a disgruntled party as the decision-maker's confirmation of the record of proceedings, comes as a two-edged sword. The record of proceedings so 'discovered' under rule 53 define and set the decision-maker's position pertaining to what was considered in reaching the decision *and by exclusion what not*.
- [54] The downside for the decision-maker is that the exclusion of relevant and critical information, being confirmed under oath, may in itself point to an unjust and/or irrational decision.
- [55] Whether the requested source documents should have been considered by the City, for the impugned decision to be rational, may be a relevant question but this is not to be adjudicated at this stage, nor does it entitle a party to the information or documentation under rule 53, even if available. The position may be different once the pleadings have closed, and the contours of the dispute has been drawn in the review application and where relevance to the disputed issue may entitle a party in terms of rule 35 to this and other information.
- [56] What should also be considered, to determine what may have been part of the record of proceedings, especially if the court is of the view that the decision-maker is not candid with the truth as in this instance, is the reason for the decision. From the minutes of the Special Council Meeting dated 27 May

⁹ CaseLines12-54 par 3.2.

¹⁰ CaseLines12-59 par 5.2.

2021, where the decision was taken to adopt the MTREF, the respondent recorded its reason as follows:¹¹

‘Management of the Airport holds the firm view that *the aeronautical movement fees cannot be sustained by the rest of the City’s residents*. The discounted flight training tariff was used to promote the Airport and to attract operations at the airport.

The Majority of the traffic at the Airport is flight training, *the current discount pricing structure is insufficiently too low to cover the direct cost of operating the Airport*. The demand on the infrastructure maintenance and management and administration of the aeronautical movements has outstripped the discount’s feasibility within the current operational climate. *The property rental amounts, payable or any entity other than the aviators and users of the airport infrastructure and facilities themselves – that is, the “user pay” principle, should be applied and upheld.*

Currently air traffic movement at discount tariffs for flight training are to a minimum, costing the city approximately an amount of R4 million a year in lost revenue.’ [Emphasis added.]

- [57] During argument, counsel for the respondent confirmed that the reason for the decision was based upon the ‘user pay’ principle. The City is of the view – hence the impugned decision – that the aeronautical movement fees should not be sustained and/or subsidised by the rest of the City’s residents. For this reason, so it was argued by the City (in line with the City’s averments in the answering affidavit and other correspondence) that the requested source documents to the financial statements go beyond the scope of the issue.
- [58] In the premises, the financial statements, and more specifically the source documents were not instrumental (albeit maybe indirectly to limit expenses in the normal course) to the respondent’s decision to approve the MTREF.

¹¹ CaseLines 13-109, Annexure “X17 to Founding Affidavit.

[59] For these reasons, I find that the applicants are not entitled to the relief sought in terms of rule 30A read with rule 53.

Order

[60] In the result the following order is made:-

1. The application is dismissed.
2. Each party is to pay its own costs.

A J LE GRANGE
ACTING JUDGE

APPEARANCES:

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