



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2102/23

In the matter between:

LESEDI LOCAL MUNICIPALITY

Applicant

and

ROELIEN OELOFSE N.O

First Respondent

BOIKOKOBETSO VICTOR MOFOKENG

Second Respondent

Heard: 27 June 2025

Delivered: 11 September 2025

Summary: Review application in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 - Delay rule in legality reviews discussed and followed - Delay overlooked - Primary requirements for legality listed - Rationality requirement discussed - Finding rational and connected to the evidence - Review application dismissed - No order as to costs.

JUDGMENT

MOTSHEKGA, AJIntroduction

[1] This is a review application brought in terms of section 158(1)(h) of the Labour Relations Act¹ (the LRA). The applicant, Lesedi Local Municipality (the Municipality), seeks an order in the following terms:

1.1 That the verdict and/or ruling (the ruling) granted by the first respondent (the Chairperson) at the conclusion of the disciplinary hearing on 06 June 2023, be declared unlawful and invalid, and thus reviewed, and set aside.

1.2 Alternatively, that the matter be remitted to the Municipality for hearing under a different chairperson.

1.3 That any party which opposes the relief sought be ordered to pay the costs of this application on an attorney and client scale.

1.4 Granting the applicant further and/or alternative relief.

[2] The review application is opposed by the employee, Boikokobetso Victor Mofokeng (Mofokeng), who has filed an answering affidavit wherein he *inter alia* raises a jurisdictional point of law regarding the applicant's failure to timeously file its review application.

[3] However, Mofokeng's answering affidavit has been filed outside the required 10-day period², with the Municipality having declined to grant an extension when it was sought on his behalf. Subsequently, a condonation application for the late filing of the answering affidavit has been filed.

[4] It follows that, prior to a determination of the jurisdictional point as raised by Mofokeng, the Court is required to decide on the condonation for the late filing of the answering affidavit.

¹ Act 66 of 1995, as amended.

² Rule 7(4)(b) of the now-repealed Rules of the Labour Court.

Background facts

[5] Mofokeng is an electrical engineer professional, having initially been employed as a graduating engineer by the Municipality on 1 November 2016.

[6] At the time of the disciplinary hearing, he occupied the position of electrical engineering technician. However, during that same period, he had also been requested to carry out some of his manager's responsibilities whose mother had taken ill.

[7] During the course of March 2022, the Municipality fell victim to fraud. An email exchange between Mofokeng, acting on behalf of the Municipality, and a service provider regarding the payment of outstanding invoices, resulted in payment of R2 060 235.04 into a fraudulent Absa bank account. Mofokeng had received emails, purportedly from the service provider, informing him that its bank details had changed and enclosing a fraudulent bank confirmation letter.

[8] Upon discovery of the fraudulent transaction, the Municipality appointed a forensic investigation company to conduct an investigation. Following the investigation, a report was prepared which concluded that the Municipality's loss of R2 060 635.04 was, *inter alia*, attributable to Mofokeng's negligence and recommended that disciplinary action be considered against him.

[9] Pursuant to the findings of the forensic investigation report, three charges were initially proffered against Mofokeng, but subsequently, the first charge was withdrawn, and the following charges remained:

'Charge 1.2: You have allegedly committed an act of misconduct under the Disciplinary Code of LLM [Lesedi Local Municipality] which amounts to gross negligence in that you, at or near LLM offices in that on or about 21 February 2022, you have deliberately omitted to submit the aforesaid invoices when you submitted purported ABSA Confirmation Bank letter to Finance for the purpose of payment and/or capturing, while aware that you did not verify the CPI changes of banking details, neither did you follow the requisite procedure for changing banking details and/or dates for invoices in

order for the payment to be carried out and thereby subvert the internal applicable procedures.

Charge 1.3: You have allegedly committed an act of misconduct under the Disciplinary Code of LLM which amounts to gross negligence in that you, at or near LLM offices in that on or about 21 February 2023, you have failed to exercise proper care and without proper cause, failed to perform your duties as the Electrical Engineer in that upon receipt of updated invoices and ABSA Bank Confirmation letter you have failed to contact ABSA Bank or CPI to confirm that they have changed their banking details from FNB to ABSA Bank thereby contravening the applicable procedures.'

[10] Mofokeng pleaded not guilty to the charges against him. At the conclusion of the disciplinary hearing, the Chairperson found him not guilty on both charges and held as follows:

' ...

5.19 The invoices submitted were the correct invoices and if payment was effected on those invoices as approved the money would have reached the correct account. BK [Mofokeng] changed the course by submitting the ABSA bank letter after the fact.

5.20 BK did not call CPI to verify the banking details, he received an e-mail with the bank letter. He explained that it was Finance's responsibility to verify the details the have access to CSD [Central Supplier Database] to do just that. The creditor's department indicated on the bank letter that they verified the information but evidently, they did not. Finance is the gatekeeper of payments, they failed in their duty to ensure that payment was made to the correct person.

5.21 There was no evidence to support the contention that the employee failed to follow procedure when there was no clear procedure set out. Ms Mcube testified that all supporting documents have to go through the signature process and this includes the bank letter. Ms Mbewe and BK testified that there is no hard and fast rule, they are merely required to submit the letter to Finance, which was done.

5.22 The emails received appear to be legitimate and there was no reason to believe that it was sent from someone other than Gabby Lupke.

There is no requirement that the employees must contact the contractor directly when there is a change in bank details this is the responsibility of the Finance department.'

[11] The Municipality, aggrieved by the Chairperson's verdict, has instituted these review proceedings.

Grounds for review

[12] The Municipality contends that the Chairperson's verdict and/or findings amount to a gross irregularity and/or misconduct as she failed to properly exercise her discretion and thereby exceeded the powers bestowed on her when she made a finding that Mofokeng was not guilty of the charges brought against him. It is submitted that she failed to do so by (a) acting *ultra vires* and in bias; (b) considering irrelevant evidence; (c) failing to consider relevant evidence and legal principles; and (d) failing to properly analyse the facts and apply the relevant legal principles.

[13] Mofokeng refutes the Municipality's submissions and maintains that the Chairperson's verdict was well reasoned and that the evidence was correctly assessed.

Condonation for the late filing of the answering affidavit

[14] On 27 October 2023, the Municipality served its review application on Mofokeng. The application was subsequently filed with the Court on 9 January 2024. Mofokeng's notice of intention to oppose and his answering affidavit were due on 10 November 2023.

[15] On 7 November 2023, Mofokeng filed a notice of intention to oppose, but failed to file an answering affidavit. On 30 November 2023, through his attorneys of record, Mofokeng sought an extension to file his answering affidavit outside the time period, which extension was pithily declined by the Municipality, through its attorneys of record.

[16] On 31 January 2024, Mofokeng filed his answering affidavit, approximately 55 days out of time. This was followed by the Municipality's replying affidavit on 12 February 2024, wherein the late filing of the answering is raised as a *point in limine*.

[17] The provisions of the Practice Manual³ are clear regarding the filing of opposing affidavits. In this respect, Clause 11.4.2 provides that:

'Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'

[18] To this end, it follows that the Municipality was required to object to the late filing of the answering affidavit by delivering a notice of objection, failing which, its right to object lapsed and thus the necessity to file a condonation application was vitiated.

[19] For avoidance of doubt, the raising of a *point in limine* regarding the lateness of the answering affidavit in a replying affidavit where the Practice Manual requires a notice of objection is irregular. This is not in compliance with the provisions of the Rules and the Practice Manual as adverted above.

[20] However, the fact that the *point in limine* was raised in the reply and not in a notice of objection is not fatal to the Municipality's objection. The objection was raised timeously. The situation would be different if the objection had not been raised at all in the papers and the Municipality sought to object to its admission on the day of the hearing.

[21] In *Bon Accord Environment Forum v Department of Mineral Resources: Chief Inspector of Mines (Gauteng Region) and Another*⁴, where a similar objection

³ Practice Manual of the Labour Court of South Africa, 1996 (repealed, effective 17 July 2024).

was raised in a replying affidavit, this Court held that condonation was not necessary as the objection was lodged outside the 10-day period. The facts in that case are distinguishable from the current in that the Municipality's objection was raised timeously.

[22] Ultimately, the underlying purpose for clause 11.4.2 has been met, namely, to avert inundating the Court with condonation applications where there is no objection to filing opposing affidavits outside the required timeframes. The obverse being that, where a party timeously objects, only then is the Court called upon to consider a condonation application for the late filing. And in the present matter, the Court has indeed been called upon to consider Mofokeng's condonation, which it now turns to.

[23] Mofokeng's condonation application is unsatisfactory. The founding affidavit fails to account for the lengthy period of delay in sufficient particularity, and only certain days are accounted for. The reasons for the delay are equally unconvincing. Mofokeng cites the closure of his attorneys' offices during the festive season, unavailability of counsel and financial constraints owing to the demands of the festive season, including children's school fees. He fails to attach any formal communication with the unavailable counsel or explain why the services of any other counsel could not be secured. Furthermore, he does not state whether the children for whom he had to pay school fees are his, and if not, the basis upon which an obligation rests on him. And even if they are his, how many and the extent of the financial obligation is unexplained.

[24] It would appear that Mofokeng's strategy was to present the Court with as many reasons as possible, without any particularity, in the hope that one might be accepted, or that the sheer number of reasons cited increases their plausibility. The opposite was in fact achieved. The Court finds that the reasons are terse and, accordingly, no meaningful weight can be attached to them.

⁴ [2021] JOL 49770 (LC) at para 9.

[25] To add to the difficulty in evaluating Mofokeng's condonation application, the prospects of success are not properly outlined in the founding affidavit. Instead, Mofokeng directs the Court to his answering affidavit. This approach of pleading is wholly unacceptable. It is mischievous for a party to rely on the contents of an affidavit, not yet admitted by the Court, to fortify its submissions regarding the prospects of success. Consequently, this Court is not apprised of Mofokeng's prospects of success. Prinsloo J⁵ states the following in that regard:

'The applicant's prospects of success in the main application must be canvassed in the founding affidavit in the application for condonation. It is not enough simply to refer, for example, to a statement of claim and assert that the prospects of success are apparent from that document. The applicant stands or falls by the founding affidavit.'

[26] Mofokeng has been less than diligent in seeking indulgence from the Court for the late filing of his answering affidavit. This much is evinced by the delayed filing of the condonation application, which was filed two weeks following the filing of the answering affidavit.

[27] The Court is unpersuaded that exceptional circumstances exist to overlook the delay, let alone to consider the prospects of success not properly before it. The condonation application thus fails.

Has the review application been filed timeously?

[28] Notwithstanding that Mofokeng's answering affidavit has not been admitted, nothing precludes the Court from *mero motu* raising a dispositive jurisdictional issue.⁶

[29] The current review application is brought in terms of section 158(1)(h) of the LRA, commonly referred to as a legality review. Significantly, the LRA has not prescribed any timeframes for its institution.

⁵ CN Prinsloo, A Van Niekerk, 'Labour Court Manual', Juta at p 85.

⁶ See: *Booi v Amathole District Municipality and Others* 2022 (3) BCLR 265 (CC) at para 35.

[30] The absence of a statutory time limit is not *carte blanche* for an applicant to bring a section 158(1)(h) whenever it pleases. To this end, the Labour Appeal Court in *MEC for Economic Development, Environment and Tourism: Limpopo Province v Mogahlane*⁷ has held that:

‘Although there is no prescribed time limit for launching a review under section 158(1) (h) of the LRA, this type of review application should be initiated within a reasonable time. A period of six weeks has been regarded by our courts to be “within a reasonable time.” In a legality review, the review application must be initiated without undue delay. Courts have the power, as part of their inherent jurisdiction, to regulate their proceedings, to refuse a review application where there has been an unwarranted or undue delay in initiating proceedings, or to overlook the delay in appropriate circumstances. There is, however, no requirement for a party who has unduly delayed the initiation of its review application under s 158(1) (h) of the LRA, to bring a formal condonation application... However, this does not mean that the defaulting party is not required to provide the Court with an explanation for the undue delay in initiating the review application under section 158(1)(h) of the LRA, and persuade it to exercise its discretion in favour of overlooking the delay and entertaining the review application.’ (Own emphasis)

[31] Therefore, six weeks is an instructive guideline insofar as what is considered a reasonable period within which to bring a section 158(1)(h) review. This underscores the principle that *interest reipublicae ut sit finis litium* (it is in the interest of the state that there be an end to litigation), which was aptly reinforced in *Gqwetha v Transkei Development Corporation Ltd and Others*⁸ that:

‘It is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule ... is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more

⁷ (2019) 40 ILJ 315 (LAC) at para 16.

⁸ 2006 (2) SA 603 (SCA) at para 22, citing *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321.

importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.’

[32] The Municipality applied for and received a case number on 20 October 2023. However, despite serving Mofokeng with the review application on 27 October 2023, it appears from the court file that the Municipality only filed its application on 9 January 2024. This much is evident from the court stamp *ex facie* the notice of motion and a request form by the Municipality’s attorneys indicating that the court file had been uplifted for ‘filing’ purposes on the same date.

[33] The Constitutional Court in *Khumalo & Another v Member of the Executive Council for Education: KwaZulu-Natal*⁹ (*Khumalo*), endorsed the following two-stage enquiry enunciated in *Gwetha*¹⁰ (the *Khumalo* test):

‘...an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in light of “all the relevant circumstances”); and if so (2) whether the court’s discretion should be exercised to overlook the delay and nevertheless entertain the application.’

[34] In a faithful observance of the two-stage enquiry, the Court must first ask: is the delay unreasonable? The delay enquiry is factual and depends on *inter alia* any explanation, or lack thereof, provided for the delay. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*¹¹ (*Buffalo City*), it was held that:

‘...the first step in the *Khumalo* test, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. But, as was held in *Gijima*, where there is no explanation for the delay, the delay will necessarily be unreasonable.’

⁹ (2014) 35 ILJ 613 (CC) at para 49.

¹⁰ *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 at para 33.

¹¹ 2019 (4) SA 331 (CC) at para 52.

[35] It was argued on behalf of the Municipality that, due to the absence of a statutory time period, there has not been a delay in initiating the current review proceedings. Furthermore, should the Court hold a view that there has been a delay, the explanation proffered in the founding affidavit is sufficient to hold that the delay is not unreasonable.

[36] The Municipality's explanation for the paucity in time only accounts for certain days during the period 6 June 2023 to 3 October 2024. In respect of the period accounted for, it is submitted that the delay was occasioned by the seeking of a legal opinion and subsequently briefing counsel to draft and settle the review application.

[37] The explanation for the period accounted for is unsatisfactory. On receiving the ruling on 6 June 2023, it took the Municipality some seven weeks to obtain a legal opinion, already outside the six-week time frame. A further two weeks lapsed prior to a decision being taken to challenge the ruling on 10 August 2023. Thereafter, a further two weeks lapse before a consultation with the attorneys on 21 August 2023. Subsequent to the consultation wherein a decision was made to brief counsel, two weeks lapse prior to counsel being briefed on 4 September 2023. Thereafter, another two weeks go by before a consultation with counsel is held, which translates to one month from the date on which a decision to brief counsel was made. The review application was eventually drafted and finalised on 3 October 2023. However, the founding affidavit was only commissioned on 17 October 2023, another two weeks later; no explanation is provided for this delay.

[38] In addition to this unsatisfactory explanation, there is an unexplained delay of a week following the allocation of a case number on 20 October 2023, to when the respondent is served with the review application on 27 October 2023. And significantly, there is no explanation for the three-month gap from a case number being sought and received on 20 October 2023 to the review application being filed on 9 January 2024.

[39] The fact that a section 158(1)(h) review has not been initiated within the six-weeks period does not automatically make the delay unreasonable. In the current

matter, cumulatively, when regard is had to the unsatisfactory explanation by the Municipality and the lack of an explanation for almost half the period of the delay, the delay is unreasonable. This, however, is not the end of the enquiry.

[40] The second stage of the two-stage enquiry, as restated, involves a court exercising its discretion to determine whether the delay can be overlooked. The court is impelled to expatiate on the four factors to be considered, as was deftly outlined by the Constitutional Court in *Buffalo City*¹².

[41] The first factor is the potential consequences or prejudice to be caused by ‘turning the clock back’ in the event that the review is successful.¹³ However, *Buffalo City*¹⁴ reaffirmed that any potential prejudice ‘...may in certain circumstances be ameliorated by this Court’s power to grant a just and equitable remedy...’

[42] The prejudice to be occasioned is that Mofokeng’s employment status would be hanging in the balance due to a possible protracted disciplinary process. Notwithstanding, this alone is not the only factor to be taken into account in deciding whether the Court may exercise its discretion to overlook the delay.

[43] The second of these factors is a consideration of the legal challenge to the impugned decision. In *South African National Roads Agency v Cape Town City*¹⁵ the Court rejected that the delay must be dealt with prior to a determination of the merits. The Supreme Court of Appeal emphasised the following in that regard:

‘It is true that in *OUTA SCA* this Court considered it important to settle the court’s jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a

¹² *Buffalo City* above n 11 at paras 54 – 63.

¹³ See: *MEC For the Department of Health, Western Cape v Weder, In Re: MEC for the Department of Health, Western Cape v Democratic Nursing Organization Of South Africa obo Mangena* (2014) 35 ILJ 2131 (LAC) (*Weder*) at para 20 – 21.

¹⁴ *Buffalo City* above n 11 at para 54.

¹⁵ 2017 (1) SA 468 (SCA) at para 81; this principle was cited with approval by the Constitutional Court in *Buffalo City* – see above n 11 at para 56.

case in order to determine whether the interests of justice dictates that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.’

[44] The Supreme Court of Appeal in *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality and another*¹⁶ held that:

‘Whether a delay should be overlooked does not and should not entail a determination of the merits of the review or collateral challenge. The merits of the challenge are to be weighed on the following basis: if the delay is to be overlooked, is there a challenge that warrants the attention of the court? In other words, whether there is a serious question to be decided. To decide the merits assumes the very jurisdiction that is yet to be determined.’

[45] The nature of the impugned decision in the current matter is the alleged unlawfulness of the Chairperson’s verdict *qua* the Municipality as the employer. It is contended that the Chairperson *inter alia* acted *ultra vires* in finding that Mofokeng was not guilty of the charges of misconduct levelled against him. The *ultra vires* challenge, in and of itself, is sufficient to render the ruling unlawful if properly established, thus making the Chairperson’s ruling susceptible to a legality review. Therefore, on the face of it, the Municipality’s *ultra vires* challenge warrants the Court’s attention. It being trite that such power has to be exercised *intra vires*, that is, within the bounds of lawful authority, lest it constitute an affront to the rule of law – the foundational principle underpinning our system of public administration.

[46] The third factor to be considered is the conduct of the parties. The Constitutional Court in *Khumalo*¹⁷ placed a higher compliance standard on the state as a litigant seeking to review its own decisions and stated that:

‘The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons. Had the matter been brought by a

¹⁶ [2023] 4 All SA 589 SCA at para 51.

¹⁷ *Khumalo* above n 9 at para 51.

private litigant, this aspect of the test might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations, and that she should have within her control the relevant resources to establish the unlawfulness of the decision she impugns, the unreasonableness of the unexplained delay is serious’. (Own emphasis)

[47] The words of Cameron J in *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute*¹⁸ are incisive in this regard:

‘[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’

[48] The Municipality, as an organ of state, is enjoined to ensure that possible unlawful actions are not left unchallenged; in the same token, that obligation must be discharged diligently without undue delay. The Municipality has failed in this respect. At each stage following its decision to challenge the ruling, leading up to a consultation with Counsel, it has proceeded with undue delay.

[49] However, notwithstanding the high standard by which the State is held with respect to the law, in *Buffalo City*¹⁹, the Constitutional Court held that:

‘Even where the functionary has not acted as a model litigant or “constitutional citizen”, there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance.’

¹⁸ 2014 (5) BCLR 547 (CC) at para 82, cited with approval in *Buffalo City* above n 11 at para 60.

¹⁹ *Buffalo City* above n 11 at para 62.

[50] In *casu*, it cannot be gainsaid that the instituting of disciplinary proceedings against Mofokeng was aimed at ensuring accountability, by implication, clean governance in the advent of technological advancement where municipalities, much like private business and individual citizens, have become the target for cybercrimes.

[51] The fourth factor to be considered by the Court is the principle laid down in *State Information Technology Agency (SOC) Ltd v Gijima Holdings (Pty) Ltd*²⁰ (“the *Gijima* principle”) wherein the Constitutional Court emphasised the following, which emanates from its earlier decision regarding a court’s discretion to overlook delays:

‘[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court’s discretion to overlook a delay.’

[52] In essence, the *Gijima* principle dictates that:

‘Even where there is no basis for a court to overlook an unreasonable delay, the Court may nevertheless be constitutionally compelled to declare the state’s conduct unlawful’.²¹

[53] The Constitutional Court in *Buffalo City*²² cautioned that ‘*The Gijima principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined*’.

[54] Furthermore, in *Buffalo City*²³, the second judgment, as per Cameron J and Froneman J, refused to overlook the Municipality’s unreasonable delay, held as follows regarding the delay rule in legality reviews:

‘[131] Refusing to overlook the Municipality’s unreasonable and unexplained delay, and refusing to countenance its illogical somersault in now seeking court sanction for the impugned conduct, does not denote

²⁰ 2018 (2) SA 23 (CC) (*Gijima*) at para 48, citing *Khumalo* n 9 at para 45.

²¹ *Buffalo City* above n 11 at para 63.

²² *Ibid* at para 71.

²³ *Ibid* at paras 131 - 132.

slavish adherence to procedure. Rather, it recognises that the procedural rules regarding delay should be applied in pursuance of the overarching objective of legality review. The delay rule should not be viewed solely through the ancestor lens of common law review, but through our constitutional lens in which legality review serves to promote open, responsive and accountable government.

[132] This purpose-driven approach to procedure is very different to the formalistic notion that the delay rule must necessarily be assessed as a *point in limine* (preliminary point) that precludes any consideration of the merits of the review. Rather, a careful weighing up of two different aspects of the rule of law is required when considering whether it is in the interests of justice to condone or overlook a delay: the importance of declaring (and correcting) unlawful decisions, and the importance of expeditious and diligent compliance with constitutional duties so as to ensure certainty and finality for the parties relying on such decisions. (Own emphasis)

[55] On careful consideration of the above factors as expounded in *Buffalo City*²⁴ and the circumstances in the current matter, the Court is satisfied that the Municipality's delay ought to be overlooked.

An evaluation of the grounds of review

[56] The Municipality's grounds of review are premised on the submissions that the Chairperson: (a) disregarded material evidence when she held that there was no procedure to be followed thus acted *ultra vires*; (b) acted in bias by finding that the Municipality failed to prove its case on a balance of probabilities; (c) failed to apply the applicable legal principles in resolving two conflicting versions regarding the existence of a procedure pertaining to the submission of invoices and bank confirmation letters to finance, thereby making her ruling unreasonable; (d) considered irrelevant evidence when she found that it was the responsibility of Finance to verify bank details making, thus making her finding irrational and unjustifiable; and (e) committed a gross irregularity by failing to make a

²⁴ Ibid at paras 54 – 63.

determination on whether Mofokeng had failed to submit the invoices and by failing to attach weight to the fact that Mofokeng lied under oath and simply accepted that he was confused.

[57] A section 158(1)(h) review is open to the State as an employer to approach the Court to review and set aside the outcome of its disciplinary hearings on ‘*any ground permissible in law*’. The basis thereof being that the Supreme Court of Appeal in *Ntshangase v MEC for Finance: KwaZulu-Natal and Another*²⁵ (*Ntshangase*) has determined that disciplinary hearings conducted by the State as an employer constitute an administrative action.

[58] Hoexter²⁶ has correctly observed that the constitutionalisation of review and the enactment of PAJA²⁷ have brought about an array of alternative pathways to administrative-law review - ‘*the PAJA, s 33, special statutory review, the constitutional principle of legality and the common law*’.

[59] Furthermore, it has now been settled that section 158(1)(h) reviews fall under the legality pathway. In this regard, the Labour Appeal Court in *Weder*²⁸ held that:

‘...Irrespective of the classification of the decisions of appellant as administrative action, appellant’s actions are open to review in terms of s 158 (1) (a) of the LRA on the ground of legality, a principle that has been developed significantly by the courts over the past decade. So much so, that a parallel system of review for action which falls outside of the strict definition of administrative action in terms of the poorly drafted PAJA, has developed.’

[60] Turning to the legality. The essence of the principle is simply that ‘*administrators and other public actors must act lawfully*’²⁹. Moreover, the principle

²⁵ (2009) 30 ILJ 2653 (SCA) at para 12.

²⁶ C Hoexter, G Penfold et al, ‘*Administrative Law in South Africa*’, 3rd ed (2021) at pp 148.

²⁷ Promotion of Administrative Justice Act 23 of 2000, as amended.

²⁸ *Weder* above n 13 at para 33.

²⁹ Hoexter above n 26 at pp 157.

has been vouchsafed by the Constitution³⁰, which states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[61] Given that there is no fixed list of the requirements of the principle of legality, Myburgh³¹ identifies the following as amongst the principle's primary requirements as formulated by our Courts – (i) public functionaries are required to must act *intra vires*; (ii) the exercise of power must be rational; (iii) the power exercised must be for the specific purpose for which it was granted; (iv) rationality entails procedural fairness; and (v) reasons must be furnished for the decision to be rational.

[62] It is perhaps worth observing that these legality requirements mirror the grounds of review as listed in section 6 of PAJA, and as Hoexter³² has opined, the rapid expansion of the principle over the years poses a significant threat to the PAJA.

[63] The Municipality has invoked the requirements of *intra vires*, rationality, and reasonableness amongst its grounds for review.

[64] On the *ultra vires* submission, the Municipality argued that this stems from the Chairperson's failure to decide on issues which she had identified for determination. The Court was directed to the following paragraph from the ruling in support of this submission:

'5.2 In essence it needs to be determined whether the employee deliberately omitted to submit the invoices with the bank confirmation and failed to follow procedure for changing banking details and/or dates for invoices. As well as determine whether he had a duty to contact ABSA or CPI to confirm changes to their banking details.'

[65] The Municipality's *ultra vires* contention seems misplaced. The doctrine presupposes the obverse principle that administrators are required to act within the boundaries and powers granted to them. Thus, that which the Municipality complains

³⁰ Section 33 of the Constitution of South Africa 1996, as amended.

³¹ A Myburgh, C Bosch, 'Reviews in the Labour Courts' at pp 135 -136.

³² Hoexter above n 26 at pp 152.

of is a failure by the Chairperson to exercise powers bestowed upon her and not an exercise in excess of the bestowed powers. The conduct complained of rather fits into one of the listed grounds contained in PAJA³³, that is, *'the action concerned consists of a failure to take action'*.

[66] However, notwithstanding the Municipality's framing of *ultra vires* in this manner, it needs to be considered that the failure to submit invoices was not a distinct charge, but rather part of a broader allegation of gross negligence, which included a failure to verify banking details and follow a required procedure for changing banking details. Accordingly, once the Chairperson found that no clear procedure existed regarding the submission of all supporting documents together with the bank confirmation letter, and that the responsibility to verify changes in bank details rests with Finance, any determination regarding the failure to submit invoices became otiose. Put another way, the submission of the invoices depended on the existence of a clear procedure, which was found to be lacking; thus, the charges could not succeed.

[67] Turning to the ground regarding failure to apply the relevant legal principles when faced with conflicting versions.³⁴ Indeed, the Chairperson's ruling does not state why Mofokeng and his Manager's version that there was *'no hard and fast rule and that they were merely required to submit the letter to Finance'* was preferred over that of the Municipality's CFO. It might be preferred that the Chairperson ought to have fully outlined her reasoning for preferring one version over the other, but this failure is not enough to render her ruling as irrational. An inference can be drawn that by preferring one version over the other, the Chairperson applied the principles laid down by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery*.³⁵

[68] The Municipality's remaining grounds for review are, in essence, no more than a disagreement with the Chairperson's factual findings, but labelled - 'irrational'; 'failure to apply her mind' or 'unreasonable' as though simply labelling the conduct as

³³ Section 6(2)(g).

³⁴ See: *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) (*Stellenbosch Farmers' Winery*) at para 5.

³⁵ *Ibid.*

such is enough to make it so. For instance, the Municipality contends that it was grossly irregular for the Chairperson to accept Mofokeng's explanation that he was not completely truthful in the police statement when he stated that he had printed all documents and sent them to Finance for processing. On this issue, the Chairperson does not explicitly state that she accepts Mofokeng's explanation, but assuming for a moment that she does, this acceptance constitutes a credibility finding in itself. Her acceptance of Mofokeng's explanation might be unpalatable to the Municipality, but it is neither irrational nor a reviewable ground. It is true that lying under oath is a criminal offence, but the Chairperson, in exercising her discretion, was not sitting as a presiding officer in a criminal trial but in a disciplinary hearing wherein she had to determine a misconduct of gross negligence.

[69] Finally, the rationality requirement. In *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Another*³⁶ the Constitutional Court made it clear that '*Rationality is concerned with one question: do the means justify the end?*'

[70] As was aptly articulated by Moshwana J in *Department of Defence v Kagiso Philimon Thamaga and Another*³⁷, the question posed by the Constitutional Court above '*simply means that the desired result is so good or important that any method, even a morally bad one, may be used to achieve it*'.

[71] The Chairperson's finding of not guilty is rationally connected to the evidence before her. Ultimately, her finding was that she was not persuaded by the Municipality regarding the existence of a clear procedure; consequently, she could not find that Mofokeng flouted an unclear procedure. In reaching her findings, the Chairperson preferred Mofokeng's version over that of the Municipality. This Court is unable to find that any ground permissible in law has been established to impugn the Chairperson's decision.

[72] Accordingly, the following order is made:

³⁶ 2020 (1) SA 450 (CC) at para 64.

³⁷ (2022) 43 ILJ 1674 (LC) at para 46.

Order

- 1.The condonation application for the late filing of the answering affidavit is dismissed.
- 2.The review application is dismissed.
- 3.There is no order as to costs.

M J Motshekga

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. P Mthombeni

Instructed by:

MB Mabunda Incorporated Inc.

For the First Respondent:

Mr. W Ngobeni of Ngobeni Wiseman Inc.