



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: J1527/17

In the matter between:

PUBLIC SERVANTS ASSOCIATION

First Applicant

**DEPUTY DIRECTORS OF PUBLIC
PROSECUTION EMPLOYED AS SUCH BY THE NPA
AND LISTED IN ANNEXURE "A"
TO THE NOTICE OF MOTION**

Second to Further Applicants

and

THE NATIONAL PROSECUTING AUTHORITY (NPA)

First Respondent

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Third Respondent

**THE MINISTER OF PUBLIC SERVICES AND
ADMINISTRATION**

Fourth Respondent

THE MINISTER OF FINANCE

Fifth Respondent

DIRECTOR GENERAL: DEPARTMENT

OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Sixth Respondent

Heard: 26 February 2021 – virtually.

Delivered: 05 March 2021 – electronically transmitted to the parties.

Edited: 20 November 2025.

Summary: An application to review and set aside a decision not to implement the costs of living adjustments in respect of the Deputy Directors of Public Prosecutions (*DDPPs*) and Chief Public Prosecutors (*CPCs*). Section 18(1)(b) of the National Prosecuting Authority (NPA) Act, 32 of 1998 as amended by section 9 of the Judicial Matters Amendment (JMA) Act, No 11 of 2012 interpreted and considered. Jurisdiction of the Labour Court – Court has jurisdictional powers under section 158(1)(h) and section 158(1)(a)(iii) of the Labour Relations Act, No. 66 of 1995 as amended. The common law rule of delay applies and no need to apply for condonation. Held: (1) The application is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] Before Court is an application to review and set aside a decision of the State in its capacity as an employer and to seek a declaratory relief. The application is launched by the Public Services Association (PSA) on behalf of the Deputy Directors of Public Prosecutions (*DDPPs*) and Chief Public Prosecutors (*CPCs*). In terms of annexure A to the notice of motion there are about 112 prosecutors involved in this matter. Prior to the hearing of this matter few interlocutory applications were launched. In one of them my brother Tlhotlhemaje J granted the Director-General: Department of Justice and Constitutional Development leave to be a party to the present application. It

was also ordered that an answering affidavit be filed by no later than 24 January 2020. Instead the answering affidavit was filed almost a year later. Withal, the present application is duly opposed.

Background Facts

- [2] This being a legality review I deem it prudent to state upfront that in terms of section 179 (1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), in South Africa there is a single national prosecuting authority which is structured in terms of an Act of Parliament. The National Prosecuting Authority (NPA) consists of (a) National Director of Public Prosecutions (NDPP); (b) Directors of Public Prosecutions (DPPs) and (c) Prosecutors as determined by an Act of Parliament. On 16 October 1998, an Act of Parliament known as the National Prosecuting Authority Act¹ (NPAA) commenced application in South Africa. The NPAA was subjected to various amendments over the years. The latest of which is one of 22 October 2020. For the purposes of this judgment, the Act as it stood on 22 October 2020 shall be considered.
- [3] In terms of section 15 (1) (b) and (c) of the NPAA, the Minister responsible for the administration of justice is empowered to appoint Deputy Directors of Public Prosecutions (DDPPs) after consultation with the NDPP. Section 16 deals with the appointment of Prosecutors. This matter involves the DPPs and CPCs appointed in terms of the above legislative set up. The present dispute centres around the proper interpretation of section 18 of the NPAA after having been amended by section 9 of the Judicial Matters Act² (JMA).
- [4] At the pivot of the present dispute lies the provisions of section 18 (1) (a) and (b) of the NPAA. In due course the text of the implicated section will be flashed out. The Minister responsible for justice is empowered by these provisions to determine the salary scales for the DDPPs and CPCs. However,

¹ Act 32 of 1998, as amended.

² No. 11 of 2012.

the costs-of-living adjustments so determined are to be effected in accordance with the cost-of-living adjustments determined for legally qualified personnel in the Public Service. The applicants are of the view that the powers to determine the cost-of-living adjustments by the Minister responsible for Justice ended on 12 October 2012 as a result of the introduction of the amendments. The last determination was made on 17 October 2012.

- [5] On 28 February 2013, the Department of Public Service Administration (DPSA) issued Circular 2 of 2013. This circular provided for a cost-of-living adjustment of 6.6% with effect from 1 April 2013. Further circulars were issued adjusting the cost-of-living. The last of which was issued on 31 March 2016 providing for a 7.6% adjustment effective 1 April 2016. The applicant takes a view that all of the abovementioned adjustments were effected within the authority of section 18 as amended. As such they ought to be implemented to the salaries of the DDPPs and the CPCs. The view being that they are also legally qualified personnel in the Public Service.
- [6] On 6 March 2017, Honourable Minister Ngoako Ramatlhodi in his capacity as the then Minister of Public Services and Administration penned a missive to Honourable Minister Masutha in his capacity as the then Minister of Justice and Correctional Services. In the missive, Minister Ramatlhodi expressed a view to the effect that owing to the amendment of section 18 of the NPAA, the determination he made for employees on salary levels 1 to 12 is also applicable to non-Senior Management Services (SMS) DDPPs and prosecutors with effect from 1 April 2017. The applicants take a view that barring to the exclusion of the SMS, the Honourable Minister's interpretation of section 18 as amended is correct.
- [7] The above adjustment was effected in respect of prosecutors and not DDPPs. The cost-of-living adjustment in respect of the DDPPs was implemented in accordance with the cost-of-living adjustment of Senior Management Services

(SMS) employed in terms of the Public Services Act³ (PSA) and Correctional Services Act⁴ (CSA).

- [8] Since September 2016, members of the PSA have been lodging grievances regarding the cost-of-living adjustments. On 12 December 2016, the NPA referred the grievance to the Public Service Commission (PSC) for consideration as required by rule 6(h) of the Rules for Dealing with Grievances of the Senior Management Services, including Heads of Department, of 2010. The PSC upheld the view of the NPA and rejected the grievances. It is apparent that opinions of senior counsel were sought with regard to the interpretation of section 18. That notwithstanding, the NPA disagreed with the argument and interpretations by the applicants. On 31 March 2017, an internal memoranda was addressed to the office of the Deputy National Director of Public Prosecutions (DNDPP) perpetuating the argument. Similarly, the argument was rejected. On 25 April 2017, the argument was escalated to the office of the NDPP, Mr Abrahams. On or about 31 July 2017, the present application was launched. As at that time the views of Mr Abrahams were not expressed.

The late delivery of the sixth respondent's answering affidavit.

- [9] On 26 November 2019, my colleague Tlhotlhemaje J made an order in the following terms:

IT IS ORDERED THAT:

1. The applicant [Director General] is granted leave to intervene as the sixth respondent to the application instituted under case number J1527/17.
2. The applicant must file his answering affidavit to the application instituted under case number J 1527/17 by no later than 24 January 2020.

³ No. 103 of 1994.

⁴ No. 111 of 2008.

3. There is no order as to costs.

- [10] Despite the above order the Director General only delivered an answering affidavit on 28 January 2021. In her wisdom, the Director General sought condonation for the late filing of the answering affidavit and the applicants are in opposition thereof. However, in my view, seeking condonation is an incorrect procedure. Rule 12 of the Labour Court Rules empowers this Court to extend and abridge any period prescribed by the rules on application, and on *good cause* shown. Section 158(1)(f) of the LRA empowers this Court subject to the provisions of the LRA to condone the late filing of any document with the Court. In this respect rule 12 and or section 158(1)(f) does not find application. What is involved herein is a Court order. In terms of section 163 of the LRA any order of the Labour Court may be executed as if it were an order of the High Court. Delivery of an answering affidavit by a specific date is not mandated by the rules of this Court or the LRA but by a Court. A Court order requiring a party to do something – *ad factum praestandum* - is enforced through contempt proceedings. In other words the Director General is in contempt of a Court order of 26 November 2019. The Director General was ordered by this Court to deliver an answering affidavit by a specified date. In order to address the contempt, the applicants may institute contempt proceedings if so advised.
- [11] This Court is not empowered to condone a non-compliance with a Court order. Where a party ignores the terms of a Court order, such a party is said to be guilty of contempt. The requisites of a contempt order are (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of the contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be willful and *mala fide*. It was held in *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*⁵ that while the courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of Court does not consist of *mere disobedience* of a court order, but of the contumacious disrespect of judicial authority. All that is required is

⁵ 2015 (5) SA 600 (CC).

evidence that the contemnor is obstinately disobedient or rebellious. It ought to be shown on the balance of probabilities that the non-compliance was born out of willfulness and *mala fide*. No contempt proceedings serve before me. Clause 13 of the Practice Manual of this Court prescribes a procedure for contempt proceedings. Such a prescribed procedure has not been invoked by the applicants.

[12] Assuming that this Court has powers to condone the late delivery of the answering affidavit, I should take into account the provisions of clause 11.4.2 of the Practice Manual, which provides that there is no need to apply for condonation for the late filing of an affidavit unless the party upon whom the affidavit is served also serve a notice of objection within ten days of receipt failing which the right to object shall lapse. The answering affidavit in *casu* was served on 28 January 2021. The applicants had a right to object by the latest 11 February 2021. The applicants did not file a notice of objection. However on 15 February 2021, the applicants delivered a replying affidavit. The contents of the replying affidavit suggests an objection to the answering affidavit. It was held that a party may object in a replying affidavit⁶. However by 15 February 2021, the right to object had lapsed. The right having lapsed, the Director General was not obligated to seek condonation.

[13] For all the above reasons seeking condonation is a step not required and was perhaps taken *ex abundanti cautela*.

Preliminary points

[14] Before I deal with the merits of the present application it is apposite to first deal with the preliminary points raised by the respondents. The first point deals with the nature of the present dispute. The respondents take a view that

⁶ See *Temba Big Save CC v Mlamli Kunyuza and others* case JA40/2015 dated 28 June 2016 (LAC) see also *Bon Accord Environmental Forum v The Department of Mineral Resources: Chief Inspector of Mines and others* case J2688/18 & JR1948/18 dated 13 January 2021.

the true nature of the present dispute is about a matter of mutual interest alternatively a benefits dispute. I disagree with this view. The founding affidavit is clear that the present application is one seeking a review and a declarator. Accordingly, this first point is not upheld.

- [15] The second point relates to lack of condonation and or prescription. A review in this matter is brought in terms of section 158(1)(h) of the Labour Relations Act⁷ (LRA). The section does not prescribe a time period within which to launch the application. That being the case, a condonation application is not required. In this matter there is no debt involved and as such the Prescription Act⁸ does not find application. The applicants are questioning the legality of the decision not to implement cost-of-living adjustments determined in terms of section 18. The thrust of the applicants' case is not that NPA owes the DPPs and CCPs an amount of money, but that its decision not to pay is unlawful and offends the principle of legality. If the applicants are right, the relief to be afforded to them is to set aside the decision and declare the correct legal position. Therefore no obligation to pay any money or owing of money is involved in this application. However Mr Boda SC appearing for the respondents submitted that prayer 3 of the notice of motion is a monetary claim susceptible to being extinguished by prescription. I do not agree. The applicants are simply asking the Court to direct the respondents to effect something and not to pay something. Mr Ramogale appearing for the applicants, in retort placed reliance on the decision of the Supreme Court of Appeal (SCA) in *Barnett and others v Minister of Land Affairs and others*⁹. In that judgment the SCA applied the concept of continuous wrong. As pointed out by the SCA that principle only found application against a case of alleged contravention of the decree and the common law. This after the SCA gave the term 'debt' a wider meaning to include a claim for enforcement of an owner of rights to property.

⁷ No. 66 of 1995, as amended.

⁸ No. 68 of 1969.

⁹⁹ 2007 (6) SA 313 (SCA)

- [16] A continuous wrong is one that is still in the course of being committed and is not wholly past¹⁰. A claim of being owed money is not one that is in the course of being committed. Therefore, reliance on *Barnett* was wholly misplaced. However as pointed out above, I do not see a claim for money in this instance. Mr Boda SC made reference to paragraphs 50 and 51 of the founding affidavit to buttress the point of prescription. That in my view does not help the respondents. The decision sought to be reviewed is the one of not implementing as opposed to one of implementing. Paragraphs 50-51 refer to the implemented cost-of-living, which the applicants contend that if the decision not to implement is unlawfully taken, as a consequence thereof, this Court must direct the respondents to effect payment to them. In a review where no time period is prescribed, what finds application is the common law principle of delay. In due course, this Court shall consider whether the delay ought to be ignored or not. Accordingly, the second point is equally not upheld. Assuming that directing the respondents to give effect is a distinct debt – obligation to do something or refrain from doing something¹¹ - the conclusion I reach at the end renders the determination of the issue moot.
- [17] The third point relates to *lis pendens* and forum shopping. The respondents equate this dispute with another dispute pending in the bargaining council regarding an alleged unfair labour practice. An unfair labour practice dispute is completely different from a review and a declarator. Mr Boda SC wisely abandoned this point during argument.
- [18] The fourth and last point relates to the factual existence of the PSC outcome. The suggestion is that on application of the principle set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*¹², until the outcome of the PSC is reviewed and set aside, such remains and bears legal consequences. Equally, Mr Boda SC wisely jettisoned this point during argument.

¹⁰ *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A)

¹¹ See *Desai NO v Desai* 1966 (1) SA 141 (A).

¹² 2004 (6) SA 222 (SCA).

- [19] The applicants contend that the decision to refuse the implementation of the cost-of-living adjustment is at odds with the provisions of section 18 of the NPAA. Section 1(c) of the Constitution propagates a rule of law. Any decision contrary to the law offends the foundational principle of legality.

Evaluation

- [20] The fulcrum of this application is the proper interpretation of section 18 of the NPAA. The relevant parts of the section reads as follows:

‘Remuneration of Deputy Directors and prosecutors

- (1)(a) Subject to the provisions of this section, any deputy director or prosecutor shall be paid in accordance with the scale determined from time to time for his or her rank and grade by the Minister after consultation with the National Director and the Minister for the Public Services and Administration, and with the concurrence of the Minister of Finance... Provided that such determination is not required in respect of any cost-of-living adjustment of such scale.
- (b) Cost-of-living adjustments of the scale determined by the Minister in terms of paragraph (a) shall be effected in accordance with the cost-of-living adjustments determined for legally qualified personnel in the Public Service.’

- [21] The Constitutional Court in *Kubiyana v Standard Bank of South Africa*¹³, laid down the following principle with regard to statutory interpretation:

“It is well established that statutes must be interpreted with due regard to their purpose and within their context. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded

¹³ 2014 (3) SA 56 (CC)

for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.

- [22] When it comes to interpretation in general, this Court takes cue from *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁴, where the Supreme Court of Appeal had aptly stated the following:

'Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production'.

[My underlining and emphasis].

- [23] I disagree with a submission that the Minister responsible for Justice has been stripped of the power to determine the cost-of-living adjustments since the amendments introduced by section 9 of JMA. In order to interpret section 18 regard must also be had to the provisions of section 15 read with section 16 of the NPAA.

- [24] In terms thereof, the power to appoint lies with the Minister responsible for justice. However, section 17 provides that the remuneration, allowances and other terms and conditions of service and service benefits of the National Director; a Deputy National Director and a Director shall be determined by the President of South Africa. The simple reason for this power is that in terms of section 10 the President is empowered to appoint the National Director and may in terms of section 11 appoint the Deputy National Directors and in terms of section 13 appoint Directors.

¹⁴ 2012 (4) SA 593 (SCA).

- [25] Owing to the fact that the Minister responsible for Justice is empowered to appoint the DDPPs and CPCs, it follows axiomatically that he must be empowered to determine some terms and conditions of service. Expressly section 18(1)(b) suggests plainly so that the cost-of-living adjustments of the scale are to be determined by the Minister. Once so determined, they shall be carried into effect in accordance with the cost-of-living adjustments determined for legally qualified personnel in the Public Service.
- [26] The *proviso* in subsection 18(1)(a) simply means that in determining the salary scale, the conditions may be such that the Minister may not be required to determine the cost-of-living together with the salary scale and may do so separately. The word “*provided*” bears as a dictionary meaning on the condition or if. Such does not suggest a prohibition. In my view it means that the Minister has an option to determine the salary scale only without the cost-of-living adjustments. The legislature employed the phrase ‘not required’ as opposed to prohibited. The dictionary meaning of the word ‘require’ is to have as a requisite or necessity; need or depend on, also to stipulate as obligatory by authority. Therefore in my interpretation of the phrase ‘provided that such determination is not required in respect of any cost of living adjustment of such scale’ simply means that if determination of cost of living adjustment is not needed or obligatory the Minister may leave it out of account. Any other interpretation will clash with the express and clear provisions of 18(1)(b) and shall lead to absurdity.
- [27] However, if the Minister does determine, as he or she is empowered to do, by section 18 (1) (b), the adjustments, such adjustments would be carried out in accordance with the cost-of-living adjustments determined by the Public Service for legally qualified persons. The cost-of-living for the Public Service employees are to be determined by the Minister of Public Service and Administration. The one determined by the Minister of Public Services and Administration for employees who are legally qualified in the Public Service may be effected in tandem with the ones determined by the Minister responsible for justice in respect of the DDPPs and CPCs. The literal meaning

of the word “*effected*” is the power to produce an outcome or achieve a result. The words “*in accordance with*” literally means in agreement with, consistent with, in harmony with, in concert with or in conformity with. Regard being had to the meaning of the phrase it is so that two determinations are anticipated which would be in harmony with each other. It cannot be ignored that the legislature requires consultation between the two Ministers when determining salary scales, rank and grade of the DDPPS and CPCs. Thus comparing notes, as in using the same determination for senior managers is anticipated and is not inimical to any of the statutory powers.

[28] The word ‘*determined*’ literally means decided upon as by an authority. Therefore, the authority to decide upon the cost-of living adjustments for people who are legally qualified are to be determined in conformity with each other by the Minister responsible for Justice and the Minister of Public Service and Administration. Both a legal advisor of a department and a public prosecutor are legally qualified persons. Thus it makes logical sense for their cost-of-living adjustments to be in conformity with each other albeit determined by different Ministers. This view finds fortification from section 19 of the NPAA. The section provides that the other conditions of service shall be determined in terms of the provisions of the PSA. *Other* means additional or extra. In terms of section 2A(b)(i) of the PSA, conditions of service means annual salary adjustments, salary scales or levels, performance bonuses, pay incentives or pension benefits. In my view a cost-of-living adjustment must be a pay incentive.

[29] In summary, I disagree with a submission that cost-of-living adjustments cannot be determined by the Minister responsible for Justice. I also disagree with a view that the NPA in its capacity as an employer is acting unlawfully by deciding not to implement the cost-of-living adjustments punted for by the applicants. In my view, the decision of the NPA conforms to the provisions of section 18 of the NPAA. In a legality review, which section 158(1)(h) is one, of importance is whether the decision impugned complies with the prescripts of

the law and if it does *cadit quaesto*. In my view, it is *cadit quaesto* for the applicants with regard to the section 158(1)(h) application.

Is the applicant entitled to a declaratory relief?

- [30] The declaration sought by the applicant is that of declaration of rights as opposed to declaration of unlawfulness *per se*. They require the Court to first review and set aside the decision not to implement, whereafter, the Court to declare their rights within the law – section 18 of the NPAA, since the decision would have been found to be unlawful and set aside. Corbett CJ in *Shoba v OC Temporary Police Camp, Wagendrift Dam*¹⁵, laid the following principle with regard to declaratory reliefs:

“An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case ... But because it is not the function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding ...”

- [31] As it shall be demonstrated later in this judgment, the declaratory order, if made would have no binding effect on any of the respondents. In *Proxi Smart Services (Pty) Ltd v The Law Society of SA and others*¹⁶, the High Court, correctly, in my view, held that the Court will not grant a declaratory order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute. In this regard, the provisions of section 18 as discussed above are perspicuous. The applicants are not entitled to a cost-of-living adjustment as punted for by them as allegedly stipulated in section 18 of the NPAA. In short the decision not to implement is one that is lawful and unassailable.

¹⁵ 1995 (4) SA 1 (A) at 14F-I

¹⁶ 2018 (5) SA 644 (GP)

Was there an unreasonable delay.

[32] The respondents take a view that the applicant's actionable cause arose in 2012, thus having delayed in approaching the Court this application must be refused on application of the common law rule of delay. In 2012, what happened is the amendment of section 18 and not the birth of the applicants' action. Put differently, it is when, on their contention the legislature changed the law to suit their cause. It is incorrect to allege that when the law changes to suit a particular situation the causes of action begin to run. It is common cause that before approaching this Court, the parties approached the PSC in order to exhaust the available internal remedies. The outcome of the internal remedies so invoked was made known to the applicants on 19 April 2017. It does appear that the decision not to implement was taken and communicated to the applicants on 18 April 2017 when Mr. Silas Ramaile SC representing the NPA refused to implement the cost-of-living adjustment punted for. Advocate Abrahams did not entertain the attempt to overrule Ramaile SC after the matter was escalated to his office on 25 April 2017. Thereafter, it took the applicants three months after the decision by Ramaile SC to approach this Court. It bears mentioning that as held in *Williams v Benoni Town Council*¹⁷, a dispute exists when one party maintains one point of view and the other a contrary view or a different one. When that position has arisen, then there is a dispute. In my view the decision under attack materialized on 18 April 2017.

[33] This delay is relatively not excessive. In *MEC for Economic Development, Environment & Tourism v Mogahlane*¹⁸, the Labour Appeal Court found that the delay of six months was unreasonable. It may be so that the six weeks period determined for other reviews in this Court may serve as a guideline for a reasonable period. However, in this matter shortly after the offending decision, the applicants escalated the matter to the accounting officer of the employer who on the evidence presented failed to respond. Although the

¹⁷ 1949 (1) SA 501 (W).

¹⁸ [2019] 4 BLLR 347 (LAC)

applicants took another eight weeks or so after the decision by Ramaile SC that delay is excusable in the circumstance of this matter. Recently, the Constitutional Court in *Notyawa v Makana Municipality and others*¹⁹ had the following to say:

[50] As was noted in *Khumalo*, prejudice that may flow from the nullification of an administrative decision long after it was taken may be ameliorated by the exercise of the wide remedial powers to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution. At common law, our courts avoided prejudice to respondents by declining to entertain a review application. Our law has since moved on and PAJA affords courts the wide remedial power which may be exercised to protect the rights of innocent parties. That power mirrors in exact terms the power contained in section 172(1)(b).

[51] It must be emphasised that when a court exercises the discretion, it must always keep in mind the development brought about by the Constitution and PAJA ... What is important is to note that the exercise of discretion is no longer regulated exclusively by the common law principles which did not permit the flexibility of reversing unlawful decisions while avoiding prejudice to those who had arranged their affairs in terms of the unlawful decision.

[34] The message above seems loud, lucid and clear. It is no longer permissible for a Court of law to avoid its constitutional obligation simply because of the passage of time. In line with the constitutional imperatives of the rule of law, it does seem that a Court of law is more compelled to ascend to the altar, where an allegation is raised – not proven – that a particular decision is threatening the rule of law. Jafta J added that where the unlawfulness of the impugned decision is clearly established, the risk of reviewing that decision on the basis of unreliable facts does not arise.

¹⁹ (2020) 41 ILJ 1069 (CC).

- [35] In my mind a party seeking a review of a decision on the basis of illegality, bears the *onus* to show the alleged illegality. The other party, the respondents in this case, bears very little risk, which may translate to a mere inconvenience, which may be remedied with an appropriate order of costs, if the party heard, after a passage of time, fails to show the alleged unlawfulness. On the other hand, where a Court of law refuses to hear a matter in the face of apparent unlawfulness, in my mind, that Court would be failing the foundational principle of the rule of law.
- [36] A rule of law is achievable through a functional judiciary. Section 165 (1) of the Constitution vests judicial authority in the courts. Although the common law rule of undue delay still serves an important purpose, in my view when regard is had to section 1(c) read with sections 165(1), 34, 39(2) and 173 of the Constitution, unless a hopeless case is so presented, courts must rise to the occasion and defend, where necessary, the rule of law, to ensure a functional State. Our constitutional democracy is young and fragile and it deserves judicial activism. The basis of the common law rule of delay is in the main prejudice. If indeed, the law properly interpreted ushered the rights punted for by the applicants, it is difficult to appreciate any demonstrable prejudice on the part of the respondents. They cannot claim that they had arranged their lives on the strength of an illegality.
- [37] The applicants have provided reasons why they approached this Court late. In *SITA SOC Ltd v Gijima Holdings (Pty) Ltd*²⁰, the Court asked the question: did the award (impugned decision) conform to the legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under a legality review. The Constitutional Court went on to reconfirm this in *DoT v Tasima (Pty) Ltd*²¹ with regard to the issue of delay. In *Gijima*, before dealing with the delay issue the question was posed: What impact, if any, should this delay have? After *Gijima*, the Constitutional Court again in *Buffalo*

²⁰ 2018 (2) BCLR 240 (CC).

²¹ 2017 (2) SA 622 (CC).

*City Metropolitan Municipality v Asla Construction (Pty) Ltd*²² laid the basis for the delay rule in legality reviews. The majority stated that the approach to overlooking a delay in a legality review is flexible. It set out that it involves taking into account a number of factors. The first of which is (a) potential prejudice to affected parties – this is ameliorable, (b) the nature of the impugned decision – this may drive the Court to the merits of the review, (c) the conduct of the applicant – state litigants are compelled to act with haste given the available resources, (d) Court compelled to declare the conduct unlawful – as duty bound by section 172 (1) (a) of the Constitution.

- [38] The two step approach remains. The first is, is the delay unreasonable? In my view, the delay in this matter is not unreasonable. The second is, should this delay be overlooked? Even if the delay is unreasonable, having considered the evidence of the applicants and having weighed the factors mentioned above, with flexibility of course, I choose to overlook the delay and entertain the matter. I regard the matter to be important to all the parties concerned, an additional factor to be weighed, in my view, when considering whether to overlook the delay or not.
- [39] It ought to be emphasised, the delay rule only prevents a court of review to entertain the application and does not prevent the court once the delay is overlooked to still dismiss the review on its merits. In *Merafong City Local Municipality v AngloGold Ashanti Ltd*²³, the majority judgment made an order remitting the matter back to the High Court to consider the lawfulness of the Minister's decision. In *Heath v President of the Republic of South Africa*²⁴, it was stated that the Court is obliged to adopt a two stage approach, if it finds that the delay is reasonable that is the end of this enquiry and the review proceeds.²⁵ The delay rule is nothing but a procedural obstacle, which a Court of law must be slow to allow the delay to prevent the Court from looking into a challenge to the lawfulness of the exercise of public power.

²² [2019] ZACC 15.

²³ [2016] ZACC 35.

²⁴ [2018] 1 All SA 740 (WCC).

²⁵ *Ibid* at para 22.

[40] Accordingly, in my view the delay is reasonable. If I am wrong in my assessment, in my discretion, I choose to ignore the delay and entertain the review and the declarator as I did above.

[41] In the results, the following order is made:

Order

1. The application for review and a declarator are dismissed.
2. There is no order as to costs.

GN Moshwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr T Ramogale

Instructed by: Ntshebe Inc Attorneys, Johannesburg.

For the Respondents: Mr F Boda SC and Ms S Tilly

Instructed by: State Attorney Pretoria.