



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

- (1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED: NO

(4) DATE: 10 February 2026

(5) SIGNATURE: _____

Case No: 79041/2018

In the matter between:

Solidarity

Applicant

And

National Commissioner of the
South African Police Service, N.O.

First Respondent

Minister of Police N.O.

Second Respondent

South African Police Service

Third Respondent

Phetso Anna Sebilwane and Others

Fourth to Seventy

Sixth Respondents

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 10 February 2026.

JUDGMENT

COLLIS J

1] This is an application for leave to appeal against the judgment and order of this Court delivered on 26 March 2024.

2] The court *a quo* dismissed Solidarity's application to review and set aside the implementation of the South African Police Service's "Non-Statutory Forces" project ("NSF project") and ordered Solidarity to pay the costs.

3] Leave to appeal is sought in terms of section 17(1) of the Superior Courts Act 10 of 2013 ("*the Superior Courts Act*") to the Supreme Court of Appeal, alternatively to the Full Court of the Gauteng Division, on the grounds listed in the application for leave to appeal namely:

3.1 Delay and Condonation: The court *a quo*'s refusal to condone the late institution of the review.

3.2 Locus Standi: The court *a quo*'s finding that Solidarity lacked standing.

3.3 Justiciability (Administrative Action vs Labour Matter): The court *a quo* characterising the dispute as a "labour issue", not cognisable in a PAJA or legality review.

3.4 Errors in Merits and Lawfulness of the NSF Project: The court *a quo* failed to properly assess the legality and rationality of the NSF project on its merits.

3.5 Costs Order: The punitive costs order against the applicant.

4] The respondents oppose the relief sought and submitted that Solidarity has no reasonable prospects of success on appeal.

5] As per this Court's judgment it was found that:

5.1 There was no basis for granting condonation for Solidarity's delay in bringing its review application.

5.2 Solidarity *lacked locus standi* to bring the application; and

5.3 Review proceedings under PAJA were not competent, as the implementation of the NSF Project by SAPS did not constitute administrative action.

TEST FOR LEAVE TO APPEAL

6] Section 17(1) of the Superior Courts Act provides that leave to appeal may be granted "only" if the court is of the opinion that (a)(i) the appeal would have a reasonable prospect of success, or (a)(ii) there is some other compelling reason why the appeal should be heard (for example, conflicting judgments on the matter).

7] This dual requirement has been construed as raising the bar for the granting of leave: an applicant must now convince the court on proper grounds that there is a reasonable chance of success on appeal, as opposed to merely a *prima facie* case or arguable issue. In other words, "*more is required... than that the case is arguable on appeal or that it is not hopeless*" – there must be a sound, rational basis to conclude

that the appeal could succeed (see *S v Smith* 2012 (1) SACR 567 (SCA) at paras [7] & [8]).

8] At the same time, section 17(1)(a)(ii) recognises that leave may be granted for compelling reasons, even where prospects of success are not strong. Our courts have emphasised that if important issues of law, constitutional matters, or questions of public importance would be raised by the appeal, these factors can constitute “compelling reasons” justifying that the appeal be heard. The SCA in *Ramakatsa and Others v ANC* [2021] ZASCA at para [31] confirmed that even if the applicant fails to demonstrate clear prospects of success, the court “*must still enquire into whether there is a compelling reason to entertain the appeal*”, such as an “*important question of law or a discreet issue of public importance that will have an effect on future disputes*”. However, even in such cases, the merits of the appeal remain relevant and often decisive in the overall interests of justice.

9] In summary, leave to appeal is not a mere formality. The threshold is deliberately high: the applicant must show that there is a realistic chance of reversal on appeal (not just a remote possibility), or that the matter warrants the attention of an appellate court due to wider importance or conflicting jurisprudence. The Supreme Court of Appeal has cautioned that judges hearing leave applications must engage in a

Careful, impartial analysis of the facts and law to assess whether another court could come to a different conclusion. The test is applied with due regard to the principle of judicial humility; the court *a quo* should not over-zealously defend its own judgment, nor should it refer matters to appeal that are “indubitably correct” (per *Shinga v S* 2007 (2) SACR 28 (CC) at para 53).

10] In the present application the applicant submitted that this case implicates constitutional rights and principles: including the right to just administrative action (PAJA and legality, under sections 33 and 1(c) of the Constitution), the right to equality (section 9, particularly the limits of fair discrimination under section 9(2)), and broader rule-of-law values of transparency, accountability and lawful governance (sections 1(c) and 195 of the Constitution).

11] The applicant further submitted that the present case raises constitutional issues, the threshold for leave must be applied mindful of the interests of justice, to ensure that arguable constitutional grievances are not shut out without consideration by a higher court (*Ramakatsa SCA* at paras [11] & [12]; see also *Phillips v NDPP* 2003 (6) SA 447 (SCA) at para 20).

12] This counsel for the applicant argued within this context, the constitutional dimension of the issues is an important backdrop both to the prospects of success and to the compelling reasons for appeal.

REFUSAL OF CONDONATION

13] In respect of condonation the court a quo had found that:

13.1 Solidarity failed to adequately explain the delay in bringing the review application, which was filed outside of the prescribed 180-day period under the Promotion of Administrative Justice Act¹("PAJA").² The court a quo accepted that Solidarity had been aware of the NSF project since at least 2016,³ yet failed to bring the review proceedings within 180 days hereof and had not explained the whole period of the delay;⁴

13.2 furthermore that the applicant's delay beyond the prescribed 180-day period was *ipso facto* unreasonable under PAJA and that Solidarity had not shown that the interest of justice required that condonation be granted as required in terms of section 9 thereof;⁵

¹ Act 3 of 2000.

² Judgment, p 000-13, para 29 – p 000-18, para 41.

³ Judgment, p 0025, para 63-64.

⁴ Judgment, p 000-25, paras 63 – 64, para 66.

⁵ Judgment, p 000-18, para 42 – p 000-26, para 67, especially p 000-22-000 23, para 55-59.

13.3 In addition that Solidarity had not placed any evidence before the court to gainsay the *prima facie* inference that the delay was unreasonable;⁶

13.4 the court a quo also found that as a matter of fact, the delay was unreasonable⁷ as nothing precluded Solidarity from launching its review and seeking leave to amend its papers when the record became available under Rule 53; the fact that SAPS failed to provide it with documentation to support its review was thus not a factor contributing to the delay or rendering it reasonable as required as a first step in bringing a legality review.⁸

13.5 For the above reasons the court a quo concluded that Solidarity had not established any basis for the court exercising its discretion to nevertheless overlook the delay in the interests of justice or in the public interest.⁹

14] On point the argument advanced by Solidarity is that the court a quo having refused condonation under PAJA, then inconsistently noted

⁶ Judgment, p 000-24 para 62.

⁷ Judgment, p 000-26, para 67

⁸ Judgment, p 000-25, para 65 read with Buffalo City quoted at p 000-24 para 60.

⁹ Judgment, p 000-26, para 68.

(at paragraph 104) that PAJA might not even apply, since the impugned conduct might not even be "*administrative action*."

15] Notwithstanding that, the applicant argued that the court a quo did not consider applying the more flexible legality standard for delay and simply proceeded to dismiss the application outright on the basis of lateness.

16] On this ground the applicant submitted that there exists a reasonable prospect that another court would find that the delay should have been condoned or that the legality review should have been entertained despite the delay.

17] Solidarity sought condonation in terms of section 9 of PAJA, alternatively, for the review to be considered "*on the ground of legality in the event of no condonation being granted*"¹⁰.

18] In assessing the merits of Solidarity's review application, the court dealt with and rejected each of the grounds upon which the review was

¹⁰ FA, 02-47, para 110.

based and refused condonation under PAJA and in terms of the principles governing legality reviews.

19] In *Brightwater*¹¹ the court noted that the discretion exercised under s. 172(1)(b) of the Constitution is '*a discretion in the true sense*' and that it can only be interfered with on appeal if it is satisfied that the discretion was not exercised judicially, or that it had been influenced by wrong principle or a misdirection on the facts or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

20] In its judgment this court had found that in the case of a legality review, condonation need not be explicitly sought.¹²

21] In *Buffalo City*,¹³ the court there held that the approach to undue delay in the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to a condonation application brought in terms of section 9(1) of the PAJA.

22] In assessing whether there was a delay the first enquiry is whether the organ of state delayed in bringing the review application. This is a factual inquiry on which a value judgment is made. Delay means a

¹¹ *Brightwater*, supra, at par. 21.

¹² Judgment p 000-23, para 60.

¹³ *Buffalo City* (supra), at par. 42.

period longer than that required by a litigant acting promptly and facing no obstacles.¹⁴

23] Once it is determined that there has been a delay, the court must consider whether it is reasonable or not. In deciding whether the delay was unreasonable, the court must look at the explanation for the delay, which must cover the whole period. Without an explanation the delay is unreasonable. If the delay is unreasonable and there is an unsatisfactory explanation for the delay, the next question is whether the court should overlook the unreasonable delay.¹⁵

24] The approach to whether to overlook an unreasonable delay is a flexible one, grounded on proven facts and objectively available considerations.¹⁶ This requires a '*factual, multi-factor and context sensitive*' enquiry in which a range of factors are considered and weighed.¹⁷

25] The first is potential prejudice to affected parties, the possible consequences of setting aside the impugned decision, and the possible amelioration of prejudicial consequences by the granting of a just and equitable remedy.

¹⁴ Central Energy Fund SOC Ltd and Another v. Venus Rays Trade (Pty) Ltd and Others (4305/18) [2020] ZAWCHC 164 (20 November 2020), at par. 289.

¹⁵ Central Energy Fund, *supra*, at par. 289.

¹⁶ Central Energy Fund, *supra*, at par. 290.

¹⁷ Valor IT v Premier, North-West Province & others [2020] 3 All SA 397 (SCA) at par. 30.

26] None of these factors were addressed by Solidarity in their founding affidavit.

27] The second is the nature of the impugned decision, which requires a consideration of the merits of the legality challenge and the extent and nature of the illegality. Strong prospects of success may thus excuse an inadequate explanation.¹⁸

28] In *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others*,¹⁹ the Supreme Court of Appeal provided a useful exposition of the principles applicable to delays in launching legality reviews with reference to the relevant authorities. In dealing with the *court a quo*'s refusal to overlook what had been found to be an unreasonable and unexplained delay, the Supreme Court of Appeal stated:

"[63] ...Therefore, it is now timely to determine whether the admitted delay was, as the high court found, both unreasonable and unexplained. In the event that the delay is found to be

¹⁸ Valor, *supra*, at par's 38 – 39. In this matter there was a very substantial delay and the explanation for it was wanting. However, because there were strong prospects of success, the Court was prepared to overlook the delay. See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) at par. 17.

¹⁹ (610/2021) [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) (14 June 2023).

unreasonable, it will be necessary to determine whether it should nevertheless be overlooked.

[64] It is as well to remember that here, we are dealing with a legality review which is not subject to the time constraints prescribed by s 7(1) of PAJA.

[65] Nevertheless, even before the advent of our constitutional order and the enactment of PAJA, our courts had long held that reviews must, as a general rule, be instituted without undue delay. The rationale for this time-honoured requirement was explained by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others as follows:

'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 eg Oudekraal Estates (Pty) Ltd v City of Cape Town and others [2004] 3 All SA 1 (SCA) 10b-d, para 27). The raison

d'etre 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 eg Wolgroeiers Afslaers (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 Setsokosane Busdiens (Edms) 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 39 C-D.)

The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg Setsokosana 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).'

[66] Cameron J endorsed this abiding principle in Merafong City Local Municipality v AngloGold Ashanti Limited and reiterated that:

'... 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 upon the decision but also for the efficient functioning of the decision-making body itself.'

[67] In Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (Khumalo) Skweyiya J, whilst acknowledging the indisputable existence of the delay rule, observed that courts nevertheless have a discretion to overlook a delay where appropriate. He said:

'[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.'

[68] In support of this statement Skweyiya J relied on s 237 of the Constitution and held:

'... Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.

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.

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.' (Footnotes omitted.)

[69] However, it is as well to remember, as the Constitutional Court in Sita emphasised, that '[n]o discretion can be exercised in the air' and that '[t]here must be a basis ... to do so'. The Constitutional Court there concluded that '[t]hat basis may be gleaned from facts placed [before the court] by the parties or objectively available factors'.

[70] Reverting to the aspect of the discretion vesting in a court to condone a delay in instituting review proceedings, it bears emphasising that the Constitutional Court cautioned that:

'While 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", it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review' ..."

29] In dealing with the so-called Biowatch principle and the ability of an appeals court to interfere with the exercise by the lower court of a discretion, the Supreme Court of Appeal stressed:

"[89] Accordingly, the power of an appellate court to interfere with the exercise of such a discretion is circumscribed. The ambit of this power was described by the Constitutional Court in Biowatch Trust v Registrar Genetic Resources and Others thus:

'the ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Thus where the discretion contemplates that the Court may choose from a range of options, the discretion would be a discretion in the strict sense ...

"[T]he ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.'

The rationale for this principle is, as Cloete J aptly observed, that a narrow discretion 'requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion'.

[90] *In Florence v Government of the Republic of South Africa* the Constitutional Court elaborated on this theme and said:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'

[91] *Therefore, for interference by this Court with the exercise by the high court of its discretion not to overlook the delay in this case to be warranted, it must be satisfied, for example, that the high court's discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Moreover, as the Constitutional Court emphasised in *Giddey NO v JC Barnard and Partners*, that '[I]f the court [of first instance] takes into account irrelevant considerations, or bases the exercise of its discretion on wrong principles, its judgment may be overturned on appeal'..."*

30] In the present matter, the court evaluated the delay on the basis propounded by the Constitutional Court in *Buffalo City*,²⁰ which the court held is equally applicable to both PAJA and legality reviews.²¹ Applying these principles, this Court exercised its discretion and found that the delay in the bringing the review proceedings could not be condoned and should not be overlooked and the reasons for not granting condonation was expressly dealt with in its judgment.

APPLICANTS LOCUS STANDI

31] In its judgment the court *a quo* upheld a preliminary point that Solidarity lacked *locus standi* to bring the application.

32] At paragraph 91 of the judgment, the court *a quo* concluded that Solidarity does not have the necessary standing either on behalf of its members or in the public interest. The court *a quo* concluded that the relief sought (to protect the rights of Solidarity's members to apply for promotion) involved "personal rights" of individual members which Solidarity could not enforce on their behalf. In its judgment the court *a*

²⁰ *Buffalo City Metropolitan Municipality v Asia Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

²¹ Judgment, p 000-23, para 57.

quo, required Solidarity to identify each specific member and their individual right to be “promoted”.

33] The court *a quo* further held that Solidarity’s reliance on section 195 of the Constitution (which enshrines values of public administration) was “misplaced” because section 195 does not itself confer enforceable rights. In support of this view, the court *a quo* cited the Constitutional Court’s decision in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) for the proposition that section 195 cannot found a cause of action by itself. Ultimately, the court *a quo* held that Solidarity “*lacks the necessary locus standi to bring this application,*” and considered this preliminary point dispositive.

34] In this regard counsel for the applicant had argued that there is a compelling prospect that an appellate court would overturn the finding of no standing. In this regard, counsel relied on the provisions of Section 38 of the Constitution which explicitly provides that “anyone” listed in that section has the right to approach a competent court alleging that a right in the Bill of Rights is infringed or threatened.

35] The list of persons in section 38 includes: *"anyone acting in their own interest"; "anyone acting on behalf of another person who cannot act in their own name"; "anyone acting as a member of, or in the interest of, a group or class of persons"; "anyone acting in the public interest"; and "an association acting in the interest of its members."*

36] In addition, the applicant had argued that the respondents on point did not dispute that Solidarity brought the application both in its own interest and in the interests of its members. Instead, the respondents in its papers conceded that Solidarity's members include SAPS employees who would be affected by the NSF project.

37] As mentioned, the court a quo had found that Solidarity lacked the necessary *locus standi* to bring the application, either on its own behalf and on behalf of its members.

38] On behalf of the applicant it was submitted that Solidarity's case for standing comfortably fits at least two of these categories: viz. (a) Solidarity is an association acting in the interest of its members (thousands of SAPS employees who are not beneficiaries of the NSF project and stand to be prejudiced by its implementation), and (b) Solidarity is acting in the public interest to uphold the rule of law and constitutional principles in the governance of the SAPS.

39] Furthermore, that this Court ignored a plethora of precedents upholding Solidarity's *locus standi* in analogous cases. Notably, in the two urgent applications brought under this same case number in 2017, where the High Court accepted Solidarity's standing to seek interdictory relief regarding the NSF project preventing implementation pending a review.

40] The prior judgments (which form part of the record) it was submitted definitively dealt with Solidarity's standing, yet the court *a quo* afforded them no consideration.

41] Since delivery of the court a quo's judgment, another High Court judgment has been delivered which directly contradicts this Courts' finding on Solidarity's standing. In *Solidarity v Minister of Health and Others* (GP case no. 33367/2022, 4 October 2023, per Unterhalter J) where the court considered a similar objection to Solidarity's standing in a legality review and where the court concluded that trade unions are "*an important constituency in our national life*" and that they (like all South Africans) have a legitimate interest in ensuring the executive obeys the law. He concluded: "*Solidarity thus has standing to bring this case. The objection to its standing must fail.*"

42] It is well established that courts should adopt a generous approach to standing in constitutional matters, so as not to shut the doors of justice to genuine litigants raising issues of public concern (see *Ferreira v Levin* NO 1996 (1) SA 984 (CC) at para165; *Kruger v President of RSA* 2009 (1) SA 417 (CC) at para 23).

43] The above authority emanating from the same Division now creates a conflict in jurisprudence on standing of the applicant that should be resolved on appeal. This, this Court finds, constitutes a compelling reason why the appeal should be heard in terms of section 17(1)(a)(ii) of the Superior Courts Act.

44] Having concluded that leave to appeal should be granted this Court expresses no further view on the merits of the remaining grounds of appeal.

45] Consequently, leave to appeal is granted to the Full Court of the Gauteng Division with costs of the application for leave to appeal to be costs in the appeal.



C. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES

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: Adv. P Dhlamini

Instructed by: Sekati Monyane Attorneys Inc.

Date of hearing: 22 August 2025

Date of judgment: 10 February 2026