



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT**

Reportable

CASE NO: 13301/2020

In the matter between:

DUMISANI JOB SITHOLE

Applicant

and

THE PUBLIC SERVICE COMMISSION

First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
PROVINCES**

Third Respondent

SECRETARY OF PARLIAMENT

Fourth Respondent

Coram: HOLDERNESS J

Heard: 26 November 2026

Further submissions: 30 January 2026

Delivered: 13 May 2026

JUDGMENT

HOLDERNESS J

[1] On 14 September 2018 a tragic event came to pass in the parliamentary building. Mr. Lennox Mzuheli Garane (“Mr. Garane”) committed suicide in his office, where he served as Section Manager in the International Relations and Protocols Division. In a note he described his actions as a ‘protest suicide’.

[2] This Uniform rule 53 review application by the applicant, Mr. Dumisani Job Sithole (“Mr. Sithole or the applicant”) who is in the employ of Parliament, concerns the report of the first respondent, the Public Service Commission (the “PSC or the Commission”), emanating from an investigation into personnel practices pertaining to the late Mr. Garane (the “report”).

[3] The PSC is established in terms of section 196 of the Constitution. According to Mr. Shukrat Makinde,¹ who deposed to the answering affidavit on behalf of the PSC, its functions include the obligation to promote the basic values of an effective public administration by, inter alia, investigating and

¹ The Director: Litigation and Legal Services at the PSC.

monitoring personnel practices in the public service and public administration of the State.

[4] In terms of section 196(2) of the Constitution, the PSC is enjoined to be *‘independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.’*

[5] The report was commissioned by the second respondent, the then Speaker of Parliament, Ms. Baleke Mbethe (Ms. Mbethe) and the third respondent, the then Chairperson of the National Council of Provinces, Ms. Thandi Modise (Ms. Modise), in their capacities as Presiding Officers and Executive Authority of Parliament (“presiding officers”).

Factual background

[6] In October 2013, Mr. Garane was appointed as Section Manager: Multilateral Relations (SMMR) for 5 years, until 30 September 2018.

[7] In January 2017, Mr. Garane became Division Manager: International Relations and Protocol.

[8] After his suicide in September 2018, the presiding officers requested the PSC to investigate the circumstances that led to Mr. Garane’s suicide.

[9] The decision to investigate was prompted by the contents of Mr. Garane’s suicide note. He titled the document *“protest suicide”*. He listed several grievances concerning the conduct of Mr. Sithole and others in the workplace.

He accused Mr. Sithole of being a bully, and he explained in the note that his attempts to address his removal from the position for which he was contracted, and placed in a different position, were not addressed through the processes of Parliament.

[10] Mr. Garane's main grievance was that he was improperly moved from the position of SMMR – a position for which he was contracted – and unilaterally reallocated to SMIR, without prior and proper consultation with him. Mr Garane's suicide note lamented that he had attempted to address this conduct through the grievance procedure provided for by Parliament, but these attempts were futile because they were obstructed by officials within Parliament.

[11] The PSC commenced its investigation by sending out an 'info alert' to all parliamentary staff on 8 November 2018. The alert requested Parliament's staff to provide all documents relevant to the terms of reference for the investigation. The Secretary of Parliament provided the PSC with the documentation obtained from staff, together with Mr. Garane's laptop on 13 November 2018.

[12] Between 17 November 2018 and 14 December 2018, the PSC conducted a total of 33 interviews with serving and former employees of Parliament. It also obtained a total of 16 affidavits from parliamentary employees, relevant to the terms of reference under investigation, which included an affidavit from Mr. Sithole.

[13] On 12 December 2018, the PSC met with the Garane family.

The provisional report

[14] The PSC analysed the information it had obtained – the documents provided to it; the interviews with parliamentary staff and Mr. Garane’s family, as well as the information on Mr Garane’s laptop. It prepared a provisional report which was sent to the Secretary of Parliament on 4 March 2019 (the “provisional report”).

[15] The provisional report provides a comprehensive assessment of the circumstances involving Mr. Garane across five specific areas of inquiry.

[16] Regarding the first term of reference, the Commission confirmed that Mr. Garane was indeed removed from his role as SMMR and transferred to a different position within the International Relations and Policy Division. While documentation showed he signed a performance agreement for the new role, the evidence demonstrated that he did so under significant objection.

[17] The second term of reference addressed the justification and legality of the removal. The Commission determined that the process was procedurally unfair and lacked necessary consultation between Mr. Sithole and Mr. Garane.

[18] The investigation rejected the management’s assertion that the move was merely a cosmetic change, finding instead that it represented a substantial alteration to the organisational structure. Furthermore, the report noted a failure to comply with the established implementation procedures for the management of the parliamentary service.

[19] In the third area of inquiry, the PSC evaluated the processing of Mr. Garane's grievances. It concluded that the parliamentary administration lacked a suitable internal grievance procedure for managers, which fundamentally compromised transparency and fairness. The report highlighted a conflict in the handling of Mr. Garane's contract renewal, noting that because Mr. Sithole was aware of the grievances against him, the matter of the contract should have been referred to the Secretary of Parliament to ensure impartiality.

[20] The fourth term of reference focused on the tragic events of 14 September 2018, and related security matters. The findings indicated that both the Organisational Welfare Unit and senior leadership failed to intervene effectively despite having prior knowledge of Mr. Garane's distress and suicide threats.

[21] On the matter of security, the report documented that Mr. Garane entered the premises without following standard X-ray screening protocols. It pointed out that these specific security vulnerabilities had been identified by the South African Police Service as early as 2004, yet Parliament and the Department of Public Works had failed to resolve them.

[22] Finally, the fifth term of reference concerned the resolution of the matter for both the institution and the bereaved family. The Commission sought specific input and proposed actions from the parliamentary administration intended to provide the Garane family with a sense of closure and to address the administrative failures identified throughout the investigation.

[23] When the PSC provided Parliament with its provisional report, it did so with a note indicating that '*the report will be finalised by the PSC upon consideration of the inputs on the provisional report*'. The PSC specifically

requested the Secretary of Parliament to provide Mr. Sithole and Adv. Phindela with the provisional report for their comment.

[24] The PSC found that Mr. Garane was indeed removed from his position of SMMR and that Mr. Sithole failed to properly deal with Mr. Garane's request for the renewal of his contract, did not uniformly apply the process of dealing with requests for contract renewals, and failed to provide reasons to Mr. Garane for the non-renewal of his contract.

[25] It further found that Mr. Sithole arbitrarily, unlawfully, and irregularly transferred Mr. Garane to a position which he had always indicated that he had neither interest in nor capacity to handle. As Mr. Sithole was aware of Mr. Garane's grievances against him, he should have formally escalated the matter to the Secretary of Parliament.

[26] In April 2019, the PSC received comments from Mr. Sithole, Adv Phindela, and Ms. Twaya. The PSC considered these comments before finalising its report.

The final report

[27] In the final report, dated 12 April 2019, the PSC confirmed the findings it made in the provisional report and made several *recommendations* to Parliament, which addressed a wide range of institutional, psychological, and security reforms designed to prevent the recurrence of the Garane kind of tragedy.

[28] A significant portion of the report focused on the structural management of the parliamentary workforce. The Commission recommended that Parliament take a formal policy decision regarding the use of fixed-term contracts for managers and professionals.

[29] To support this, it suggested that Parliament either develop robust human resources policies or consider enacting legislation similar to the Public Service Act 103 of 1994. These regulations would specifically govern the temporary assignment of duties, the transfer of employees between posts, the management of acting appointments in vacant positions, and the protocols for renewing or terminating contracts, all while ensuring strict adherence to fair labour practices.

[30] A critical administrative priority identified was the formalisation of a grievance management system that explicitly includes managers and defines the role of employee relations practitioners, coupled with the requirement to finalise the employee wellness policy and ensure that all staff members are properly trained to handle crisis emergencies, including potential suicides.

[31] Furthermore, the PSC called for a rigorous assessment of the fitness and proficiency of specific senior officials, including Ms. Tyawa, Adv. Phindela, and Mr. Sithole. This evaluation was, according to the PSC, intended to identify gaps in leadership and people management skills, with the expectation that any deficiencies be addressed through developmental programs, coaching, mentoring, or consequence management and corrective measures where appropriate.

[32] The PSC recommended that there should be an assessment into the fitness and proficiency of Mr. Sithole² to hold leadership and management positions. It

² And Adv Phindela and Ms. Tyawa.

also recommended that gaps identified by that assessment exercise ‘should be addressed through developmental programmes that may entail coaching, mentoring and formal training programmes... and other corrective measures.’

[33] The report recommended a special inquiry into the International Relations and Policy Division, focusing on internal organisational culture. It noted that toxic relationships and deep divisions in this unit predated current leadership and required the intervention of a change management expert to foster a professional and collegial environment. To provide broader institutional stability, the Commission urged Parliament to set a firm deadline for the finalisation of its ongoing institutional restructuring process.

[34] Security reforms were addressed through a recommendation to establish a joint planning committee under the National Key Point Act 102 of 1980. This body would facilitate regular engagement among stakeholders to address technical challenges with equipment, optimise the layout of access points, and leverage technology more effectively to secure the precinct. Additionally, the South African Police Service was advised to review and potentially restructure the Parliament Static Unit within the Protection and Security Services in the Western Cape.

[35] The final set of recommendations focused on the Garane family and the concept of restorative closure. The Commission proposed that Parliament implement specific measures suggested by the family and administrators to resolve the matter, including assessing the family’s need for continued counselling for at least a year and facilitating a formal visit to the family by senior officials, including Mr. Sithole, Adv. Phindela, and Mr. Mokonyana.

[36] On a practical level, the Commission suggested that Parliament consider relocating the division to a new physical space to ensure that employees are not daily confronted by the site of the tragedy.

[37] Finally, the presiding officers were directed to attend to various observations in the provisional report that correlate with the specific professional challenges Mr. Garane faced during his tenure.

[38] The respondents emphasised that the recommendations contained in the final report were merely recommendations and were not binding on Parliament. Whatever decision Parliament took arising from the recommendations was its own decision and not that of the PSC.

[39] The respondents contend that Mr. Sithole's true grievance in this application concerns Parliament's actions against him arising from the non – binding recommendations in the report.

[40] In November 2019, Parliament initiated disciplinary proceedings against Mr. Sithole. Should the charges and contents in paras [41]-[43] not be listed/discussed as part of this para, instead?

[41] The first charge alleges that he acted irregularly and unlawfully by merging the Multilateral Relations and Bilateral Sections, thereby changing the organisational structure of the International Relations Protocol Divisions without proper authorisation.

[42] The second charge focuses on the specific treatment of Mr. Garane, alleging serious misconduct in the decision to move him from his established

role as Section Manager of Multilateral Relations to the position of Section Manager of International Relations Policy Analysis.

[43] The third charge involves a failure in leadership and administrative duty, asserting that Mr. Sithole did not appropriately deal with Mr. Garane's formal request regarding the renewal of his fixed-term employment contract in August 2018.

[44] On 8 July 2020, Mr. Sithole was found guilty of the charges and was given a final written warning, which expired in July 2021.

[45] On 18 September 2020, Mr. Sithole instituted these proceedings. Two days later, he referred an unfair labour dispute to the Commission for Conciliation, Mediation and Arbitration (the "CCMA"). The dispute did not proceed as Mr. Sithole was unsuccessful in his application for condonation of the late referral of the dispute. His application to rescind the ruling refusing condonation was also refused.

[46] Mr. Sithole contends that at the heart of this matter is his contention that the report adversely affects, and is prejudicial to, his personal and professional reputation, and confirmed earlier accusations published in the media, on social media, and at the funeral of Mr. Garane.

[47] He submits that the report confirmed the public perception that he drove Mr. Garane to his unfortunate and untimely death.

The amended relief sought

[48] In terms of the further amended notice of motion³, Mr. Sithole seeks the following relief:

48.1 That the first respondent's Report and/or Findings issued and published on 12 April 2018 which was commissioned by and released to the Second and Third Respondents ("the impugned Report and/or Findings"), are declared invalid, unlawful, unconstitutional, and / or null and void.

48.2 Alternatively, that the impugned Report and/or Findings are reviewed and set aside.

48.3 Ordering that the First, Second and Third Respondents, and anyone else who opposes this application, shall pay the costs of this application, jointly and severally.

Litigation history

[49] This matter has an unfortunate and protracted history.

[50] On 11 November 2020, an order was granted by agreement directing the respondents to file the rule 53 record by 24 November 2020.

[51] The respondents filed a Uniform rule 30 ("rule 30") notice on 15 April 2021, and a rule 30 application on 3 May 2021.

[52] By agreement, the rule 30 application, which was opposed by Mr. Sithole, was set down for hearing on 16 September 2021. Judgment was delivered,

³ Mr. Sithole brought a further application to amend the notice of motion however they expressly abandoned the application for leave to amend at the hearing of this application.

dismissing the rule 30 application, on 10 March 2021, approximately 18 months after the matter was heard.

[53] The respondents delivered the rule 53 record on 9 May 2023.

[54] On 20 October 2023, Mr. Sithole filed an amended notice of motion and supplementary affidavit, together with a condonation application for the late filing thereof. The respondents filed their answering affidavits in November 2023.

[55] Mr. Sithole's replying affidavit was only filed seven months later, on 14 June 2024.

[56] When the review application was heard on 26 November 2024, I requested Adv. Khoza, who appeared on behalf of Mr. Sithole together with Adv. Ngqata, to cause an affidavit to be delivered explaining the late filing of Mr. Sithole's replying affidavit and heads of argument.

[57] An affidavit by Mr. Sithole's attorney, Ms. Zunurah Williams of Mohau Romeo Tsusi Law Inc t/a MRT Law Inc ("Ms. Williams") was delivered on 18 December 2025.

[58] Mr. Sithole explained that the late filing, by approximately six months of the replying affidavit, arose from the exhaustion of Mr. Sithole's LegalWise cover and the need for him, when settlement efforts failed, to instruct new attorneys.

[59] The applicant brought an application for condonation in June 2024. However, this application was not part of the record placed before the court at

the hearing in November 2025, due to ‘persistent administrative difficulties experienced with the court file throughout 2024 and 2025’.

[60] According to Ms. Williams, the late filing of the heads of argument arose from the timing of the settlement negotiations, and the finalisation of the amendment application.

[61] The standard principle to apply in any condonation application is the ‘interests of justice’, a ‘flexible concept without an exhaustive definition’.⁴ On this score, the Supreme Court of Appeal (the “SCA”) recently reminded of the following exposition by the Constitutional Court:

“This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this inquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the appeal and the prospects of success.”⁵

[62] It is well established that condonation is not merely for the asking, that an application for condonation must be fully motivated,⁶ and that the court, in deciding whether to grant condonation has a discretion which must be exercised judicially.⁷

⁴ *Mokoele v S* (776/2018) [2026] ZASCA 57 (22 April 2026) para 21.

⁵ Ibid. See also *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) para 22. Dictum applied in *Ekurhuleni City v Rohlandt Holdings CC and Others* [2024] ZACC 10; 2025 (1) SA 1 (CC) para 25.

⁶ *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; 2004 (1) SA 292 (SCA) para 6. Dictum applied in *Mulaudzi v Old Mutual Life Assurance Co (South Africa) and Others* [2017] ZASCA 88; 2017 (6) SA 90 (SCA) para 25...

⁷ *Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC* 2023 JDR 2033 (SCA); ZASCA [2023] 91 para 11. *Mokoela* fn 4 para 21.

[63] I am satisfied that Mr. Sithole has provided an acceptable explanation for the late filing of the replying affidavit and heads of argument, and that no incurable prejudice to the respondents has been occasioned thereby.

[64] All of the issues raised by the parties have been fully ventilated at the hearing and in supplementary submissions filed. In the circumstances, the condonation application is granted in respect of both the replying affidavit and Mr. Sithole's heads of argument.

The grounds upon which the decisions are challenged

[65] Returning now to the issues at hand.

[66] The PSC was tasked with examining whether applicable legislation, organisational policies and guidelines were properly applied or complied with in relation to Mr Garane's transfer to a different internal division, the grievances he lodged concerning the transfer, and the non-renewal of his five-year contract.

[67] Mr. Sithole primarily challenges the lawfulness of two jurisdictional decisions, namely the presiding officers' decision to refer the internal parliamentary employment matter to the PSC (the "referral decision") and the PSC decision to accept and undertake the investigation (the "PSC decision") (collectively "the impugned decisions").

[68] The review of the referral decision is sought under the prayer for further and/or alternative relief.

[69] Mr. Sithole's case is that neither the presiding officers nor the PSC was authorised, in terms of the relevant legislation or the Constitution⁸ to take the impugned decisions. He accordingly seeks an order declaring such decisions to be *'unlawful and unconstitutional and reviewing and setting them aside; and declaring the report unlawful and unconstitutional, and reviewing and setting it aside on the grounds of irrationality, unreasonableness and unlawfulness, under the principle of legality.'*

The applicant's principal submissions

[70] The crux of Mr. Sithole's argument centres on the constitutional limits of public power and the strict demarcation of authority between different branches of government, specifically the executive and the legislature.

[71] The review was initially brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") (as set out in the founding affidavit). However, in the heads of argument the applicant asserts that the review is brought under the principle of legality (and no longer under PAJA).

[72] The applicant contends that the principle of legality applies to all exercises of public power, including investigative and recommendatory conduct, and that even non-binding reports are reviewable where they are produced pursuant to ultra vires, irrational, or otherwise unconstitutional exercises of public power.

⁸ The Constitution of the Republic of South Africa, 1996.

[73] Mr. Sithole asserts that the PSC lacked the necessary jurisdiction to investigate the affairs of parliamentary employees because its mandate is strictly confined to the public service as defined by section 196(2) of the Constitution⁹ and its enabling legislation, namely the Public Service Commission Act 46 of 1997, (the “PSC Act”). Since Parliament and its staff are expressly excluded from the Public Service Act 103 of 1994, they do not fall within the functional or legal reach of the PSC, so the applicant’s argument went.

[74] The applicant emphasised the well-established principle that all public power must be sourced in law, and that the PSC cannot bypass its own governing legislation, as this would violate the established principle of subsidiarity.¹⁰

[75] Mr. Sithole’s argument is that the jurisdictional defences advanced by the respondents, namely that Parliament forms part of the broader ‘public administration’ and that section 196(4)(f) of the Constitution empowers the PSC to investigate personnel and public administrative practices falling within that category, fails to identify any provision of the PSC Act, or any other empowering statute, that codifies this constitutional assertion.

[76] Mr. Sithole further takes issues with the alleged failure by the respondents to point to any authority stating that Parliament forms part of the public administration for the purposes of section 196(4)(f).

⁹ Section 196(2) provides : ‘*The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.*’

¹⁰ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 56; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC). *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

[77] Mr. Sithole further relies on the Constitutional Court judgment in *South African Municipal Workers' Union v Minister of Cooperative Governance and Traditional Affairs and Another*, in which the apex Court interpreted public service and public administration as referring only to the national and provincial spheres of government, thereby excluding the legislative branch. The Court observed that:

‘As regards the other claims, I am unconvinced that they specifically trigger the application of section 76. Section 195(4) of the Constitution deals with appointments in “public administration” and section 197 deals with the “public service”. The assessment of the High Court that “the ‘public service’ is not considered to include municipal employees’ cannot be faulted. This because “public service” and “public administration” refer only to national and provincial spheres of government.’¹¹

[78] According to the applicant, this jurisdictional limitation is supported by the PSC’s own prior institutional decisions where it refused to investigate parliamentary matters on the same legal basis.

[79] Mr. Sithole characterises the PSC’s sudden shift in stance as an irrational and unconstitutional exercise of power that offends the rule of law. He contends that the presiding officers also acted without lawful authority because they have no power to refer internal personnel matters to an external executive body, especially when such administrative functions are legally reserved for the Secretary to Parliament as the accounting officer.

[80] In addition to the jurisdictional challenge, the investigation is described by Mr. Sithole as methodologically irrational and procedurally deficient, as the investigative body of the PSC, in Mr. Sithole’s view, failed to maintain an open and enquiring mind by ignoring relevant exculpatory evidence and neglecting to

¹¹ *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs & Others* [2017] ZACC 7; 2017 (5) BCLR 641 (CC) para 68.

interview material witnesses, and in so doing, violated the principle of legality which demands rationality in both process and outcome.

[81] Mr. Sithole furthermore denies that the matter is moot, asserting that the lawfulness of public power remains a live controversy and that an invalid report continues to have practical legal effects as an official record.

[82] Finally, Mr. Sithole sought to justify the delays in the application, citing the unprecedented disruptions caused by the national lockdown, maintaining that the interests of justice require the court to overlook any perceived delay to prevent the entrenchment of unconstitutional conduct.

The respondents' grounds of opposition

[83] The first, second, and third respondents (the “respondents”) oppose the relief on four primary bases.

[84] First, that the application is moot and this Court – as a court of first instance – does not have jurisdiction to entertain it. They aver that Mr. Sithole brought this review application because he was unsuccessful in overturning the disciplinary action taken by Parliament against him before the CCMA, and he now seeks to undermine the conclusions reached in the disciplinary proceedings by contending that they were premised on a flawed report.

[85] Secondly, that Mr Sithole delayed bringing this application for more than a year after becoming aware of the PSC’s report. He initially contended¹² that the review must succeed in terms of PAJA, yet, he has not sought an extension in terms of section 9 of PAJA for the late launching of the review.

¹² In his founding affidavit.

[86] Thirdly, that the challenge is misguided in law, as the report does not constitute a ‘decision’ because it is neither final nor binding. The respondents highlighted that the courts have consistently made it clear that a recommendation does not have a ‘direct, external legal effect’. There is, accordingly, no decision capable of being reviewed and set aside.

[87] Fourthly, that the primary basis for this review rests on an incorrect understanding of the PSC’s powers. Mr. Sithole contends that the PSC is only entitled to investigate the public service and has no power to investigate employment matters concerning Parliament.

[88] The respondents argued that this argument is flawed, as it overlooks section 196(4) of the Constitution,¹³ which empowers the PSC to investigate both the public service and the public administration. Parliament forms part of the public administration, and the PSC has an original constitutional power to conduct an investigation in respect of the public administration.

First ground – the application is moot

[89] The central contention is that the litigation no longer presents a live controversy and that any order granted by the court would serve no practical purpose.

¹³ In terms of Section 196(4)(g) the powers and functions of the Commission are:

- (f) either of its own accord or on receipt of any complaint-
 - (i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature.
 - (ii) to investigate grievances of employees in the public service concerning official acts or omissions and recommend appropriate remedies.
 - (iii) to monitor and investigate adherence to applicable procedures in the public service; and
 - (iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and
- (g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

[90] In amplification of the above, the respondents argued that the applicant, Mr. Sithole, seeks to challenge the report primarily to protect his reputation and counter media narratives suggesting he was responsible for the tragic events involving Mr. Garane. However, the report was commissioned specifically to assist the family and Parliament in finding closure, a purpose distinct from the disciplinary actions subsequently taken by Parliament.

[91] The respondents emphasised that the findings of misconduct against Mr. Sithole were established during Parliament's own internal disciplinary inquiry, not solely by the Commission's report. Mr. Sithole already attempted to overturn these findings through the CCMA and was unsuccessful.

Second ground – the applicant unreasonably delayed bringing the application

[92] If the Court is satisfied that the application presents a live issue for determination, the respondents contend that the applicant must still satisfy the court that he approached it without unreasonable delay, whether under PAJA, alternatively, the principle of legality, both of which require applicants to act expeditiously in approaching the courts. They emphasised that the reasons for this are well-established: the rule of law requires legal certainty, clarity, and predictability.

[93] In *Khumalo and Another v MEC for Education, KwaZulu Natal*,¹⁴ the Constitutional Court held that this requires a consideration of whether the delay is unreasonable or undue; and whether the court should overlook the delay.¹⁵

¹⁴ *Khumalo and Another v MEC for Education, KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC).

¹⁵ *Ibid* paras 49-52.

[94] The unreasonableness of the delay turns on the explanation provided and whether the full period for the delay is accounted for.

[95] The respondents argued that Mr. Sithole's explanation for the delay is entirely unsatisfactory and demonstrate that the true purpose of his application is not to set aside the report, but rather to undermine the disciplinary proceedings against him. They highlighted that it was only after the attempts to challenge the disciplinary proceedings failed, that Mr. Sithole directed his attack to the report.

[96] The respondents contend that no basis is laid for the Court to overlook the delay because no practical purpose is served by considering the report of the PSC issued more than 6 years ago, the prospects of success in setting aside the report are poor because the report is not reviewable; and, even if the report is reviewable, the grounds of review are entirely without merit, as they proceed from a misunderstanding of the law and the facts.

Delay and the Declaratory Relief

[97] The respondents further assert that the question of delay applies to both the review relief and the declaratory relief.

[98] It is trite that declaratory relief is discretionary. The court's power to grant this relief is regulated by section 21(1)(c) of the Superior Courts Act, 10 of 2013. A court may exercise its discretion to grant a declaratory order where there is '*an existing, future or contingent right or obligation*'.

[99] The respondents argued that Mr. Sithole makes out no case for this Court exercising its discretion to grant declaratory relief. He does not explain what right or obligation warrants this Court exercising its discretion in favour of granting the relief, and the application is not one that concerns the broader public interest – it only concerns Mr. Sithole’s attempt to impugn the proceedings by Parliament against him through an ‘erroneous’ challenge to the PSC’s report.

[100] A delay in approaching the courts for declaratory relief is a reason not to grant the relief. In *NAPTOSA and Others v Minister of Education, Western Cape Government and Others*,¹⁶ this Court explained that:

‘I consider that the substantial delay in bringing these proceedings is another reason for exercising discretion against the grant of a declaratory order. It is well established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is necessary that a record of proceedings be put before the court, a declaratory order could serve as a review. A court, in exercising its discretion whether to grant a declaratory order should, accordingly, in an appropriate case weigh the same considerations of ‘justice or convenience’ as it might do in the case of an interdict or a review.’¹⁷

Third Ground - the PSC report is not reviewable, and the declaratory order is misplaced

¹⁶ *NAPTOSA and Others v Minister of Education, Western Cape Government and Others* [2000] ZAWCHC 9; 2001 (2) SA 112 (C).

¹⁷ *Ibid* at 126 E-G.

[101] This ground of objection arises from the respondents' contention that the PSC report cannot be subjected to a judicial review because it does not constitute a final administrative decision.

[102] They assert that a review is only permissible against actions that have a direct, external, and legal effect, and one that prejudices the rights or interests of the applicant. Because the report, and the recommendations contained therein, are non-binding in nature, they lack the legal finality required to trigger a review.

[103] The report merely permits a different functionary to consider the conclusions reached and to decide whether and how to act thereupon.

[104] The respondents contend that the decision of the functionary who acts on an investigation report may be impugned through a review, but the underlying report may not. In this regard, reliance was placed on the Constitutional decision in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*, where the court held that:

'It is what the organ of State decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.'¹⁸

The merits of the review and declaratory relief

Mootness

¹⁸ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC) para 38.

[105] It is common cause that the recommendations contained in the report have been acted upon by Parliament. Disciplinary proceedings were brought against the applicant, and he was found guilty of all three charges and issued with a final written warning which has expired.

[106] In *Minister of Justice and Correctional Services v Estate Stransham-Ford and Others*,¹⁹ and in the more recent decision of *MEC for Health, Gauteng v Dr Regan Solomons (Regan)*,²⁰ the SCA confirmed the rule against High Courts determining moot matters where it held that:

‘This Court, in *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others (Stransham-Ford)*, made it clear that it was not open to high courts sitting as courts of first instance to make orders on causes of action that had been extinguished merely because they think that their decision would have broader societal implications. The Court in *Stransham-Ford* said courts of first instance are not vested with the same power conferred upon a court of appeal, which may exercise its jurisdiction to determine a matter because ‘a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required.’’ (emphasis added).

[107] I accept that the implemented disciplinary findings and CCMA ruling exist independently of the report and that if the report were to be reviewed and set aside, it would not undo the legal consequences thereof. The legal sanction (the final written warning) has been imposed and lapsed on 13 July 2021. It therefore cannot be overturned.

¹⁹ *Minister of Justice and Correctional Services v Estate Stransham-Ford and Others* [2016] ZASCA 197; 2017 (3) SA 152 (SCA) para 25.

²⁰ *MEC for Health, Gauteng v Dr Regan Solomons* (1089/2023) [2024] ZASCA 184 (30 December 2024) para 28.

[108] This all needs to be considered against the backdrop that as a High Court, this court's jurisdiction is limited to resolving actual, ongoing legal disputes.

[109] The applicant argued that the decision to refer and the decision to accept the referral, both of which are impugned, and whether the PSC lawfully exercised the power to investigate the matter, remains a clear and justiciable issue, as those decisions, in fact and in law, still exist, and the report is a public record.

[110] The applicant further contended that the relief sought has a practical effect, as it corrects an unlawful exercise of public power and restores the constitutional boundaries between parliament and the PSC, preventing future transgressions and ensuring that the public record does not bear the imprint of unconstitutional conduct.

[111] In my view, the review of the court, which is recommendatory in nature, no longer presents a live or triable issue.

[112] The high water mark of the applicant's case in this regard appears to be his contention that the setting aside of the report is necessary to vindicate his constitutional rights. It is not clear in what manner this can be achieved, particularly having regard to what in my view has been a failure to show that his constitutional rights were infringed by the report, or that the setting aside will have the effect of restoring his allegedly violated rights.

[113] The applicant failed to show that he will be adversely affected if the review is unsuccessful. This court does not sit to determine legally interesting questions.

[114] It is clear from the *Regan*²¹ decision that even if an issue of constitutional importance arises, it is not an issue which on its own can be determined by a court of first instance.

[115] One of the issues which this Court pointedly raised with the applicant is why, if his rights were being infringed by the investigation, did he not bring interdict proceedings to stop the investigation from proceeding or the report from being provided. His advocate, Mr. Khoza, was unable to answer and noted that this issue was not dealt with in the applicant's papers.

[116] The fact that the report has damning consequences does not assist the applicant. Even if the review were to be successful, it will not reverse the findings or reputational consequence for the applicant. The reputational consequences result from what Parliament decided to do with the report. He was disciplined and a sanction was imposed. The applicant participated in those disciplinary proceedings, and he was unsuccessful.

[117] The challenge to this report is quintessentially a legal issue. What this Court is asked to decide will have no effect on the applicant.

[118] On this basis alone, the application must fail. Mootness is a bar to this Court exercising its jurisdiction to hear the matter because no practical purpose will be served by the declaratory relief sought by Mr. Sithole, as well as the alternative review relief.

[119] Mindful of the SCA's injunction for lower courts to deal with all issues which present before them, even if a single issue may dispose of a matter.²²

²¹ Ibid fn 26 para 27.

²² *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC) para 21; *Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others* 2018 (1) SA 471 (SCA) para 26; *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) para 18.

[120] The implementation of the recommendations alone may not render the relief sought moot. The cardinal question is whether, such report, if indeed it is a reviewable decision, has a direct and external legal effect on the applicant's rights. I shall return to this issue below.

Is the delay unreasonable?

[121] Mr Sithole relies on the disciplinary proceedings against him as the explanation for his delay. The obvious flaw in this reason for delay is that the disciplinary proceedings are separate proceedings from the PSC's report.

[122] The respondents argued, correctly in my view, that Mr Sithole should (and could) have challenged the report immediately after becoming aware of it. He chose not to do so and has failed to provide a cogent explanation for his failure to do so.

[123] In my view, absent such an explanation, the delay in bringing the review proceedings is unreasonable and the reliance on the alternative relief, under the principle of legality, appears to be an impermissible attempt to circumvent the provisions of PAJA, including the 180 day time bar.

[124] Turning now to the central issue – is the report of the PSC reviewable?

[125] It is undisputed that the report and the recommendations contained therein were not binding on Parliament.

[126] The Constitutional Court in *Viking Pony* found it 'unlikely that a decision to investigate and the process of investigation, which excludes a determination

of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.’

[127] It therefore falls to be determined whether the findings and recommendations contained in the report are final and determinative of Mr. Sithole’s rights.

[128] In my view, the answer must be no. The findings represent the views, culminating in non-binding recommendations of the PSC and serve to identify irregularities rather than resolve them in terms of a binding and final decision or action.

[129] A further string to the applicant’s bow is that the Commission cannot investigate parliamentary employees, but only employees in public service.

[130] In terms of section 196(4)(f) of the Constitution, the PSC is specifically empowered to investigate personnel practices and public administration practices and report to the relevant executive authority and legislature. This provision indicates that the PSC’s investigative mandate encompasses reporting to legislatures, which implies a degree of oversight over personnel and administrative practices within these bodies.

[131] While section 197 of the Constitution primarily addresses the structure and functioning of the public service, it does not explicitly limit or extend the PSC’s investigative powers to the legislature. However, section 196(4)(f)(i) provides a clear basis for the PSC to investigate and report on personnel and public administration practices to the legislature. It therefore appears that its mandate includes such investigations.²³

²³ See also *South African Municipal Worker 's Union v Minister of Co-Operative Governance and Traditional Affairs* (3558/2013) [2016] ZAGPPHC 733 (23 February 2016) para 111. Section 196(4) enumerates the PSC’s

[132] I am therefore satisfied that the Commission acted within its legal powers when it accepted the request to investigate the circumstances surrounding Mr. Garane's suicide and when it conducted such investigation and prepared the report.

[133] Moreover, notwithstanding Mr. Sithole's contentions to the contrary, there does not appear to be any indication that the steps taken in the investigation culminating in the report were irrational, procedurally unfair or biased. The allegations of bias arise from Parliament's subsequent decision to discipline the applicant rather than the conduct of the Commission itself.

[134] As the report does not reach the threshold of a reviewable decision, the review application must fail on this fundamental basis.

[135] Regarding the declaratory relief sought, I find that the applicant has failed on the papers to establish a right to such relief. He has not shown that there is any broader public interest at stake. This relief must therefore also fail.

Can the applicant seek the review of the impugned decisions under 'further and / or alternative relief'?

[136] The applicant filed a further note to address the question of whether the Court is empowered, under the rubric of the prayer for 'further and/or alternative relief' to grant an order reviewing and setting aside the impugned decisions.

powers and functions, which include investigating, monitoring, and evaluating the organisation and administration of the public service, as well as personnel practices.

[137] Relying on the principles set forth in *Luwalala and Others v Port Nolloth Municipality*,²⁴ the respondents argue that such relief is impermissible.

[138] For the alternative relief to be valid, it must be supported by the facts already on record and must not introduce an entirely new cause of action.²⁵

[139] The applicant contended that the relief sought in this instance is entirely consistent with the facts already pleaded, as the applicant's case has always been that the presiding officers lacked the legal authority to refer the matter and that the PSC lacked the jurisdiction to investigate it. Because these factual and legal foundations were established in the founding affidavit to challenge the final report, no additional facts are required to challenge the preceding decisions that led to that report.

[140] Furthermore, the applicant argues that the alternative relief is a logical extension of the main relief requested. The notice of motion originally sought to set aside the final report of the Commission. Since the report is the direct product of the initial decisions to refer and investigate, those underlying decisions are inextricably linked to the report itself.

[141] If the court finds a lack of authority at the start of the process, the proper legal remedy is to set aside the decisions that set the process in motion. The relief is thus a necessary complement to the express claim rather than a departure from it.

[142] The applicant emphasised that the respondents were well aware of the applicant's intentions, as it was expressly noted in the replying affidavit that they would seek this specific review under the alternative relief prayer if

²⁴ *Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C).

²⁵ *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272.

necessary. Additionally, a formal application to amend the notice of motion was served on the respondents shortly before the hearing, and the legal and factual basis for the relief was fully ventilated and that no prejudice would result from the court granting such an order.

[143] The applicant contended that the respondents' reliance on the *Luwalala* judgment is misplaced, as in that matter the party attempted to use the prayer for alternative relief to introduce new legal grounds, such as land ownership and statutory contraventions, which had not been foreshadowed in the founding papers, whereas in the current matter the applicant merely seeks a specific remedy based on the same jurisdictional challenge that he has always relied upon.

[144] I accept that the respondents would not have been taken by surprise by the relief sought under the heading of further and / or alternative relief, however, in my view, it takes the matter no further. For all the reasons set out above, the applicant has failed to make out a case for the review and setting aside of the impugned decisions and this relief, under whichever rubric it is brought, cannot be granted.

Costs

[145] Turning now to the issue of costs. The applicant's stance regarding costs was that the respondents' conduct should be censured, as both Parliament and the PSC acted with the full knowledge that the Commission lacked jurisdiction over parliamentary personnel, as they acknowledged in the report that parliamentary administration exists outside the public service, and by its previous refusal to investigate a similar matter for that very reason.

[146] The applicant argued that by advancing a jurisdictional defence that contradicts their earlier stance, the respondents are attempting to retrospectively justify an exercise of public power they knew they did not have, which he characterises as a serious violation of the principle of legality.

[147] The applicant contends that an adverse costs order is necessary to uphold the rule of law, and that the complexity and constitutional weight of the litigation justification for the costs of two counsel.

[148] Should the court find against the applicant, he argued that the *Biowatch*²⁶ principle should protect him from an adverse costs order, as the application was brought in good faith to clarify the limits of institutional power and address matters of significant constitutional importance.

[149] The respondents argued that *Biowatch* does not apply where litigation is manifestly inappropriate, such as when the issue is moot. They highlighted that the applicant was aware of the mootness of his application and yet persisted with that challenge.

[150] In support of their contention that the costs should follow the event, the respondents further highlighted that the manner in which the applicant has conducted the application is also inappropriate. The replying affidavit was filed seven months out of time, without seeking an indulgence or applying for condonation for the late filing thereof. The applicant also filed his heads of argument after the respondent, wilfully disregarding the practice directions of this Court and sought an amendment on the day of the hearing.

[151] The respondents sought an order for the costs of two counsel where employed, with costs of counsel to be taxed on Scale C.

²⁶ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

[152] In my view, the applicant would have at all times been aware of the insurmountable challenges he faced in obtaining the relief sought. In my view, his decision to persist in the face of the grounds of opposition raised and the manner in which he conducted the litigation, as argued by the respondents, is manifestly appropriate and does not qualify for the protection afforded by *Biowatch*.

[153] I am satisfied that the matter warranted the employment of two counsel and considering the complexity of the matter, costs of counsel on Scale C is appropriate.

Conclusion

[154] In the circumstances the application falls to be dismissed with costs, including the costs of two counsel where so employed, such costs to be taxed on Scale C.

Order

[155] The following order shall issue:

- (a) The application is dismissed with costs
- (b) Including the costs of two counsel where so employed, such costs to be taxed on Scale C.

M HOLDERNESS
JUDGE OF THE HIGH COURT

Appearances

Applicant: Adv S Khoza and Adv K Ngqata

Instructed by: Mohau Romeo Tsusi Law t/a MRT Law Inc

Respondents

First to Third Respondents: Adv WRE Duminy SC and Adv K Perumalsamy

Instructed by: The State Attorney