(1)	REPORTABLE: **YES**
(2)	OF INTEREST TO OTHER JUDGES: **YES**
(3)	REVISED: **YES**

3 July 2026

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: 2026 – 092263

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES	**Applicant**
and	
M E KGOWE	**First Respondent**
A W ZWANE	**Second Respondent**
I O BANDA	**Third Respondent**
POLICE AND PRISONS CIVIL RIGHTS UNION	**Fourth Respondent**
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL	**Fifth Respondent**

Heard: **9 June 2026**

This judgment was handed down electronically by circulation to the parties and legal representatives by email and by uploading onto Case Lines. The date and time for hand-down is deemed to be 3 July 2026.

<u>Summary</u>: Urgency – applicant satisfying considerations of urgency – matter involving issue of legality having some inherent urgency – no substantial

redress in ordinary course – interest of justice that matter urgently decided – matter decided on basis of urgency

Review application – s 158(1)(h) of LRA – principles considered – legality review involved – principles applicable to legality review considered – applicant compelled to remedy unlawfulness / irregularity – application by applicant qualifies as proper legality review under s 158(1)(h)

Legality review – delay in instituting of review – principles considered – no condonation required – what must be considered is first whether delay reasonable – if delay unreasonable then whether it should be overlooked – reasonableness depending on length of delay and explanation – *in casu* part of delay reasonable and part unreasonable

Legality review – whether to overlook delay – principles considered – involves holistic enquiry – nature of impugned decision, prospects of success, prejudice and interest of justice considered – proper case made out to overlook delay

Conclusion of settlement agreement – settlement agreement unlawfully concluded – delegated authority not complied with – circumstances under settlement came about irregular and unlawful – settlement agreement unlawfully concluded and set aside

Rectification – rectification by conduct pleaded – cannot ratify agreement unlawfully concluded – cannot comply with delegation requirements after conclusion of settlement agreement – requirements must be complied with before conclusion of agreement

Legality review – consequential relief – court has wide discretion – agreement set aside – unfair dismissal dispute of employees settled by way of settlement agreement remitted for arbitration on merits

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The current matter is once again an example of the challenges faced where it comes to the State conducting employment relations. It entails this Court having to become involved in what can readily be said to be the managing of internal affairs in the State as employer, because of irregularities perpetrated in the conducting of such employment relations. It is an undesirable state of affairs. The Court does so at the request of the State itself, by way of what is commonly known as a self-review. These interventions should be a rarity. But unfortunately, they are not. As pertinently said in *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd*[1]: *'… self-review is now a burgeoning and troubling phenomenon. As recorded by the Constitutional Court in Asla, corruption and maladministration are inconsistent with the rule of law and are the antithesis of open, accountable and democratic government. … We must all of us, in every branch of the state and civil society, make every effort to protect public moneys and ensure that our country's necessary developmental goals as envisaged by the Constitution, in the interest of all our people, are met …'*. And in *Altech Radio Holdings (Pty) Ltd and Others v Tshwane City*[2] the Court held: *'… State self-review is a novel, but burgeoning, species of judicial review that has occupied the attention of our courts in a number of recent decisions. Although it seems axiomatic that unlawful conduct must be undone, to borrow from Dr Seuss, "simple it's not" …'*.

[2] This kind of self-review, in the context of employment relations under the LRA, is provided for in in terms of Section 158(1)(h) of the Labour Relations Act (LRA)[3]. It is such an application that is now before me, brought on the basis of urgency by the applicant to review and set aside a settlement agreement concluded between the applicant and the first, second and third respondents, in terms of which the unfair dismissal disputes pursued by these respondents to the fifth respondent as applicable bargaining council was settled. In terms of the settlement, these respondents were reinstated with effect to the date of their dismissal with full back pay. It was for all intents and purposes a capitulation. The applicant challenged the validity of this settlement agreement on a variety of grounds, all founded on the general principle of legality.

[1] 2021 (4) SA 436 (SCA) at para 47.
[2] 2021 (3) SA 25 (SCA) at para 1.
[3] Act 66 of 1995 (as amended).

[3] The application appears to have been bought on 22 April 2026. The respondents were given ten days to file an answering affidavit. A comprehensive answering affidavit was indeed filed on 2 June 2026. A replying affidavit followed two days later. The application was set down on 9 June 2026, and came before me on that date. Considering all of the issues involved, and the implications of any judgment I would give in this matter, I decided to reserve judgment. I how hand down judgment.

[4] For ease of reference, I will refer to the applicant in this judgment as '*the DCS*', and the first, second and third respondents jointly as '*the employees*'. The fourth respondent will be referred to as '*POPCRU*', and the fifth respondent as '*the GPSSBC*'.

<u>The relevant facts</u>

[5] Despite fairly extensive affidavits, I believe that the core facts in this case are in essence either undisputed or common cause. But insofar as there any exist factual disputes, I shall decide those in line with the principles enunciated in the well-known judgment of *Plascon Evans Paints v Van Riebeeck Paints*[4]. In short, it follows that it is the admitted or undenied facts together with the facts as stated by the POPCRU and the employees that must be utilized in deciding this matter. The only exception would be if POPCRU and the employees simply offers a bald denial, or the facts as stated by them are patently false, absurd or fanciful.[5] The factual matrix as set out below is arrived at based on the application of these principles.

[6] In 2022, the Departmental Investigation Unit (DIU) of the DCS investigated allegations of fraudulent activity at the Krugersdorp Community Corrections

[4] 1984 (3) SA 623 (A) at 634E-635C, where the Court said: '*… in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order …*'. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 53; *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27; *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38.

[5] See *Minister of Justice and Correctional Services and others v Tshifhango and Another* [2019] 7 BLLR 627 (LAC) at para *26; TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another* (2017) 38 ILJ 2721 (LAC) at para 29; *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC) at para 12.

Office relating to the offender monitoring system. The allegations involved the falsification of parolee supervision records. According to the DCS, the employees falsified the records of parolee supervision visits, particularly with regard to logging and recording visits of parolees than actually never took place. The difficulty with this conduct was that the employees misrepresented that they were monitoring parolees, when that was not the case. It would be an offence of dishonesty.

[7] A comprehensive investigation was conducted, followed by an equally comprehensive investigation report was issued on 17 April 2023, setting out in detail all the facts and allegations against the employees, with documentary evidence. The employees were then each individually charged for misconduct, which charges all related to misrepresentation relating to the falsification of the parole monitoring system. They were subjected to individual disciplinary hearings before an independent chairperson. They were found guilty of all the charges against them, by way comprehensive written findings issued by the chairperson, and were subsequently dismissed on 13 February 2024. They pursued internal appeals, which were all declined in the course of March 2024.

[8] The employees then each pursued individual unfair dismissal disputes to the GPSSBC under case numbers GPBC 530 / 2024, GPBC 554 / 2024 and GPBC 555 / 2024, respectively. The disputes were subsequently consolidated. The disputes remained unresolved following conciliation, and then proceeded to arbitration at the GPSSBC. In the arbitration proceedings, the DCS was initially represented by Mr Setlhodi, who had also been the initiator in the disciplinary proceedings. However, Mr Setlhodi resigned before the disputes could be arbitrated, and the matters were then allocated to Mr G S Mtshweni (Mtshweni), being the Deputy Director: Prosecutions, to attend to. The employees were represented by POPCRU in the arbitration.

[9] On 24 March 2025, Mtshweni submitted an internal memorandum to Mr S S Mkhize (Mkhize), being the Acting Director: Code Enforcement, in which memorandum Mtshweni sought a mandate to settle the disputes of the employees pending before the GPSSBC, with arbitration being immanent. In the memorandum, it appears that Mtshweni represented to Mkhize that the DCS had insufficient evidence to prove the misconduct, and there was no

reasonable prospects of success in defending the matter. A draft settlement agreement was provided with the memorandum. Mkhize then approved the request for a mandate to settle on that same day.

[10] The arbitration then convened on 27 March 2025. At the arbitration, the proposed settlement agreement was then concluded, with some amendments. What was agreed to in this settlement agreement is firstly that the employees be reinstated effective 1 May 2025 on the same terms and conditions of employment. It was also agreed that the employees be paid back pay with effect from their date of dismissal on 13 February 2024 and until the agreed date of reinstatement, which back pay would be paid on or before 31 May 2025. The employees agreed to withdraw their disputes. And finally, the DCS would not be responsible for the pension payments that had been made to the employees in the interim. The parties also agreed that the settlement agreement may be made an arbitration award in terms of section 142A(1) of the LRA.

[11] Pursuant to the aforesaid terms of the settlement agreement, it was then indeed made an arbitration award under section 142A(1). The employees were also paid their back pay in terms of the said agreement on 23 June and 23 October 2025.

[12] The settlement agreement came to the attention of the DIU on 12 May 2025. The DIU then raised specific concerns about the circumstances in which the settlement had been concluded. In an internal memorandum dated 12 May 2025 to the Acting Director of the DIU, it was requested that an investigation be conducted into the conclusion of the settlement agreement. In the memorandum, it was recorded that Mtshweni's contention that there was no evidence to prove the misconduct and that there were no prospects of success to defend the matter was not correct. It was further stated that Mtshweni never consulted with investigators in the matter or the witness involved. It was specifically questioned whether due diligence was undertaken in settling the matters.

[13] Pursuant to this memorandum requesting an investigation into the settlement agreement, the DCS considered it prudent to obtain proper legal opinion on

the matter. In a memorandum on 4 July 2025 to the Director Litigation, the Acting Director of the DIU requested that such legal opinion be obtained whether the settlement agreement could be reviewed and set aside, based on the irregularities alluded to in the memorandum of 12 May 2025. The Director: Litigation approved this request for a legal opinion on 7 July 2025. The State attorneys was then instructed on 11 July 2025 to brief counsel to obtain such an opinion.

[14] Counsel was then instructed and there were several consultations between counsel and the relevant responsible persons at the DCS. Counsel was also provided with all the documents, including the investigation reports. The legal opinion from counsel came to hand on 28 November 2025. In that opinion, counsel opined that the settlement agreement was susceptible to being set aside on various grounds. This included that there was no prior consultation with the DCS's Finance department as prescribed by the relevant delegation of authority.

[15] The current urgent application then followed on 22 April 2026. The delay in bringing this application is an issue that will be pertinently dealt with later in this judgment.

<u>Urgency</u>

[16] The first issue to consider is that of urgency. POPCRU and the employees have specifically taken issue with the existence of urgency, in essence contending that the DCS has unduly delayed and procrastinated when pursuing this case, that any urgency is self-created, and the time taken from when the legal opinion as obtained and the application was brought has simply not been reasonably and satisfactory explained. They also point out that on 12 May 2025, the issue with the settlement agreement was first realised, and on 4 July 2025 legal opinion was requested, meaning that proceedings should have been instituted at that point. They further state that even when considering the issue of urgency from when the legal opinion was obtained on 28 November 2025, the application only landed at the end of April 2026 without a proper explanation for the delay. Reference is also made to the fact that the founding affidavit was deposed to on 27 March 2026, however the notice of motion was only signed on 22 April 2026.

[17] It certainly does appear, on face value, that these criticisms of the DCS's conduct by POCPRU and the employees have some substance. What is incontrovertible is that it took the DCS five months to bring the current application after it received legal opinion on 28 November 2025, and the explanation for this delay is questionable, as POPCRU and the employees properly point out. But what I do not accept as a legitimate basis for criticism is the fact that the DCS first wanted to get legal opinion before seeking to challenge the settlement agreement. It is clear to me that the DCS promptly acted to question the settlement agreement when the responsible persons at the DCS first became aware of it in May 2025. There is nothing unduly lengthy in this case where it came to getting approval to obtain legal opinion, then briefing counsel, and an opinion ultimately coming to hand. I therefore believe that the period from May 2025 to 28 November 2025 cannot serve as a legitimate consideration where it comes to dispelling urgency. The DCS acted responsibly and properly in this respect.

[18] So, the issue of urgency must be looked at as from 28 November 2025. Can it be said that the DCS should be non-suited based on urgency because of the delay that occurred as from that date, and until the application was finally brought. This is the question I turn to next, and answering this question all depends on the application of the principles relating to urgency. These principles are, as summarized in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[6], as follows: (a) the applicant has to set out explicitly the circumstances which renders the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief, the court must be even more circumspect when deciding whether or not urgency has been established; (d) urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity; (e) the possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to

[6] (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and all the authorities cited there.

remedy the situation by way of instituting litigation, the better it is for establishing urgency.

[19] In this instance, the requirement of the inability to obtain substantial redress in the ordinary course must be highlighted. A critical consideration for establishing urgency is whether an applicant would not be afforded substantial redress in due course, and the applicant must provide proper reasons in support of a case that the obtaining thereof would not be possible.[7] If there is in fact substantial redress available in the ordinary course, urgent relief should be declined, but if not, then urgent relief should ordinarily be granted. This was made clear in *Madonsela v Legal Practice Council and Others*[8] as follows:

> 'It is trite that what amounts to substantial redress depends on the circumstances of the case, and the nature of the rights involved, and is a distinct issue from that of a lack of an alternative remedy. Thus, if the applicant can demonstrate that she will not be afforded substantial redress at the hearing in due course, then the matter should be accorded urgency. If, however, such substantial redress is available in due course, then the court ought to refuse to accord the matter urgency.'

[20] The above being established and the criticism of POPCRU and the employees on urgency properly noted, what does the DCS have to say about this? I am compelled to say that where it comes to explaining the five months' delay from 28 November 2025, the explanation by the DCS in the founding affidavit is paper thin. The only explanation of some substance related to what can be called the traditional holiday season in December and half of January where the entire country partakes in what had been described as a 'collective slumber'. In *Transport and General Workers Union and Others v Hiemstra NO and Another*[9] it was held: '*… I would be unduly shortsighted to fail to*

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[7] See *Mojaki v Ngaka Modiri Molema District Municipality and Others* (2015) 36 ILJ 1331 (LC) at para 17; *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 ILJ 2148 (LC) at para 11; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6; *Vanguard of Organised Labour v Mahlangu and Another* (2026) 47 ILJ 619 (LC) at para 7.

[8] (2025) 46 ILJ 2664 (LC) at para 18.

[9] (1998) 19 *ILJ* 1598 (LC) at para 7. See also *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1528 (LC) at para 3; *National Education Health and Allied Workers Union (NEHAWU) obo Second to Seventeenth Applicants and others v Metrofile (Pty) Ltd and Others* [2019] JOL 41572 (LC) at para 14.

acknowledge that it is a norm of South African society that during the period mid-December to early January the nation slouches to a near halt. This customary annual shutdown may not have excused the appropriate degree of expedition in a matter which was truly urgent but it can hardly be said that the nature of this matter was one in which it was inexcusable not to disturb our collective slumber …'. It is fairly trite that in this period, persons are on leave and little gets gone. I will thus afford the DCS the benefit of the doubt where it comes to this period.

[21] But then what about the period after January 2026? The founding affidavit is largely silent where it comes to providing an explanation for this period. Instead, the DCS focusses squarely on its inability to obtain substantial redress in the ordinary course and the fact that it is suffering undue and excessive prejudice should the *status quo* endure. At least, when confronted with this lack of explanation by way of the answering affidavit, the DCS does seek to address it on reply. It explains that it is not a simple and straight forward matter in getting actual litigation going once the legal opinion was obtained. It was still necessary to canvass that opinion with various stakeholders and departments in the DCS, which includes operations, legal services and finance. Also, the National Commissioner must be consulted, as he would have to depose to the founding affidavit. It is explained that the DCS is an organ of state, which necessitates prescribed processes and consultations to take place before litigation is launched into, which is what accounted for the delay.

[22] I nonetheless, despite this further explanation by the DCS, still have issues with the explanation for the period after January 2026. I believe the DCS could have acted with far greater expedition, once the holiday season ended, and everyone was back at work. But one cannot completely turn a blind eye to the fact that the kind of flexibility and ability to take prompt action that exists in the private sector, does not exist in the highly regulated public sector. I do accept that many hoops must be jumped through before legal proceedings can be instituted in the public sector. It appears plausible that a variety of stakeholders have to first be consulted, and this takes time. Then there is also the obvious time that needs to be taken to properly and with due circumspection draft, settle and sign the founding affidavit, and to compile the

annexures. Many a case has been scuppered due to over hasty action. Despite all these considerations, and as POPCRU and the employees properly point out, the founding affidavit was deposed to on 27 March 2026, which means that the entire exercise preceding the actual institution of the litigation in this case to the point of a signed founding affidavit took some two months. Is this too long? In my view, yes. But should it *per se* dispel urgency without more? I do not think so. The point remains that at least, something was being done throughout and the realities of life in the public service cannot be ignored. It is thus a factor to consider, but not the decisive factor.

[23] But where the DCS is properly open to being frowned upon is the period from 27 March 2026, when the founding affidavit was signed, and 22 April 2026, when the notice of motion was signed. There is no explanation for this period of some four weeks. I cannot understand why this would take so long. I thus accept that this is an undue and unexplained delay of the kind that could serve to dispel urgency. Ordinarily, this could have been the end of it for the DCS on the issue of urgency, was it not for the further considerations of prejudice, the nature of the dispute, and the inability to obtain substantial redress in the ordinary course, which I will now consider.

[24] According to the DCS, where an organ of state seeks to arrest the continuing implementation of an allegedly unlawful exercise of public power, and where public funds and institutional consequences continue to accumulate, it carries with it at least some inherent urgency. This is because a situation where public power has been unlawfully exercised, which is something distinct and separate from the abuse of public power, it cannot be allowed to perpetuate and the Court should in principle always be inclined to consider resolving such an anomaly urgently, when asked. In my view, there is some merit in these contentions, which actually go directly to the notion of being unable to obtain substantial redress in the ordinary course. In *Apleni v President of the Republic of South Africa and Another*[10] the Court decided:

> '… the applicant also relies on urgency, with reference to specific examples, by stating that the suspension of a director-general has a substantial negative effect on service delivery and critical projects that the Government Department

[10] [2018] JOL 39179 (GP) at para 10.

was carrying out. Certain of those critical functions require experience and institutional knowledge, and are not functions that should be fulfilled by someone acting in the position of Director-General. It is that context also that applicant alleges that it was critical that the unlawful and irrational suspension be set aside as a matter of urgency. There were significant projects that were being delayed and hampered because of the instability that his suspension has caused. He also alleged that the Minister was abusing her powers, and was clearly attempting to remove him from his position so that she could influence the operational decisions of the Department. I hold that the application is urgent. Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the rule of law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally be urgently considered.'

[25] The above dictum in *Apleni supra* has been consistently applied in the Courts, since.[11] In particular, it has also been applied in this Court. Two pertinent examples bear mention. In *Sibanyoni v Speaker, City of Mbombela and Others*[12] the Court held:

> 'The respondents correctly pointed out that the applicant's case on urgency was sparse other than relying on the public interest and/or illegality or unlawful decision to place her on special leave. It is however my view that to look at the grounds of urgency in isolation rather than as a whole is incorrect. Even if a single ground of urgency might lack merit, one or two other grounds may sustain the grounds for urgency. Of course the proviso is whether other requirements of urgency related to substantial redress in due course and acting with the necessary haste in order to prevent a harm are evident.
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> In *Apleni v President of the Republic of SA & another*, the court held that where allegations are made relating to abuse of power by a minister or other public officials, which may impact upon the rule of law, and may have a detrimental impact upon the public purse, the relevant relief sought ought

[11] See *Makgata v Fetakgomo Tubatse Local Municipality and Others* 2025 JDR 3234 (LP) at para 45; *Mbude v Premier of the Eastern Cape and Others* 2022 JDR 1289 (ECB) at paras 25 – 26; *Manamela v National Commissioner South African Police Service* 2023 JDR 2471 (GP) at paras 13 – 14; *Aviation Co-Ordination Services (Pty) Limited and others v Airports Company South Africa SOC Limited and Others* 2024 JDR 4751 (GJ) at paras 13 – 14.

[12] (2024) 45 ILJ 2808 (LC) at paras 15 – 16. See also *Sithole v Dannhauser Local Municipality* [2024] ZALCD 47 (8 November 2024) at paras 6 -8; *Moinwe v Joe Morolong Local Municipality and Others* [2025] ZALCJHB 180 (9 May 2025) at paras 11 – 14; *Vilakazi v Mpumalanga Tourism and Parks Agency and Others* [2024] ZALCJHB 437 (22 October 2024) at para 6.

normally to be urgently considered. [8] It is not suggested that the complaint in this case is about abuse of power. This application is about an exercise of public power by the council, and there is no reason why the principle set out in *Apleni* should not find application, as that exercise of public power by council, as shall further be demonstrated in this judgment, impacts upon the rule of law.'

And in *Nxano and Another v Enoch Mgijima Local Municipality and Another*[13] the Court had the following to say:

'Nonetheless, I have also considered whether the applicants have substantial redress at the hearing in due course. As mentioned above, the applicants contend that the basis for the termination of their employment with Enoch Mgijima Municipality was irrational, invalid and unlawful. In *Apleni v President of the Republic of SA & another*, referred to by the applicants, the court opined that, in instances where allegations relate to abuse of power by public officials which may impact upon the rule of law, the relief sought should, as a rule, be urgently considered. As observed also in the authorities referred to in *SA Broadcasting Corporation (Soc) Ltd v Keevy & others*, albeit in review applications, a delay which is merely a procedural obstacle should be dealt with judiciously so that it does not preclude the court from dealing with the merits where a probe turns on the lawfulness of the exercise of public power.

I am accordingly satisfied that the matter must be dealt with on the merits and by way of urgency.'

[26] So, even if the wafer thin explanation by the DCS for the bulk of the delay after January 2026 is considered as it stands, the case for urgency can still be saved considering the nature of the issues at stake, and in particular, because the DCS is seeking to remedy the unlawful exercise of public power that is currently still leading to ongoing prejudice. The judgment in *National Professional Boxing Promoter's Association v Minister of Sports Art and Culture and others*[14] is an apposite example of the point, where the Court, after having accepted that there was an undue delay, nonetheless decided:

'From the facts, serious allegations are made pertaining to the exercise of power by the Executive Authority of the Arm of State. If the matter were to be

[13] (2021) 42 ILJ 2650 (LC) at paras 7 – 8.
[14] 2024 JDR 2630 (GP) at para 18.

enrolled to be heard in the normal course, members of the applicant would not be afforded substantial redress due to, amongst others, the difficulties in quantifying their losses. In the circumstances I am satisfied that the matter is sufficiently urgent.'

[27] Then there is the issue of continued prejudice, *per se*. The fact is whilst the issue of the validity of the settlement agreement remains undecided, the DCS remains compelled to pay the employees their ordinary remuneration every month, even if it does not use their services. The difficulty then is that should the DCS ultimately be successful in having the settlement agreement set aside, all these payments to the employees would then be considered fruitless and wasteful expenditure, and considering that the employees are in essence persons of straw and the large quantum of the amounts involved, it is unlikely that such payments would ever be recovered. A contractual or damages claim for the refund of these payments would likely yield little. This excludes the existence of a suitable alternative remedy and would be irreparable harm. It is true that payments have already been made, but at least these proceedings can stop further prejudice going forward. The aforesaid considerations also tie in with the inability to obtain substantial redress in the ordinary course, as even a successful case years down track in the ordinary course will leave the DCS, in respect of these financial considerations, with no value for its success. As explained in *Rham Equipment (Pty) Ltd v Lloyd and Others*[15], albeit in the context of a stay of execution being urgently sought: *'… unless the stay of execution is granted, the applicant will loose his right to dispute his indebtedness. It is furthermore also undisputed on the papers that the respondent is a man of straw and that it is likely that the applicant will have no recourse against him should the sale in execution be allowed to proceed...'*. And in *Denel SOC Ltd v National Union of Metalworkers of SA on Behalf of Petersen and Another*[16] the Court held:

'Therefore, real and substantial justice requires that the contested default award be stayed otherwise an injustice will result. There is a real and substantial risk that Denel may not recover the money from Petersen once the default arbitration award is reversed after having been put into operation. Such

[15] (2008) 29 ILJ 3033 (LC) at para 13.see also *Gois t/a Shakespeare's Pub v Van Zyl and Others* (2003) 24 ILJ 2302 (LC) at para 39.
[16] (2022) 43 ILJ 2303 (LC) at paras 45. See also *Minister of Forestry Fisheries and Others v Siyabonga Fishing (Pty) Ltd* 2026 JDR 1138 (WCC) at paras 74 – 75.

constitutes irreparable harm. The balance of convenience certainly favours Denel. Denel will suffer greater harm should the stay be refused.'

[28] A final consideration is that the facts in this matter are uncomplicated and succinct. There is not much in form of an extensive factual chronology, coupled with substantial factual disputes that must be decided. POPCRU and the employees have been given proper and adequate opportunity to answer what the DCS had to say, and there is no suggestion that they have been prejudiced by the truncated time periods given to them within which to answer. When this matter came before me, there was a full set of pleadings and written submissions. This lends further credence to the approach that this matter should be considered at this juncture. The following *dictum* in *The Democratic Alliance v The National Commissioner of Correctional Services and Others*[17] is apposite:

> '… Comprehensive affidavits have been filed, including heads of argument on the merits, and the matter is ripe for hearing. The Respondents cannot now allege that the matter is not urgent when they conceded the urgency of Part A and when the application was treated as urgent all along. The alleged lack of urgency falls to be dismissed on this ground alone.'

[29] The point is that the current state of affairs cannot be allowed to perpetuate. It would not be in the interest of justice to do so. The DCS suffers harm on a continuous basis. And not only that, but the employees also live under a sword, not knowing what could happen to them going forward, with continued accruing liability should the DCS ultimately win. Everyone is best served, and justice actually demands, that this issue be resolved once and for all. The following *dictum* in *Ditsobotla Local Municipality and Others v Bojosinyane and Others*[18] is insightful:

> 'In this Court's view a delay in the hearing of the application will not serve the public interest. It will only add to the instability and uncertainty which, it seems, now pervade the municipality's operations. If the allegations by the applicants are anything to go by, the respondents are destabilising the municipality and harming its operations. The mischief that such instability creates in public

[17] 2022 JDR 0306 (GP) at para 13.
[18] 2025 JDR 1396 (NWM) at para 17.

> bodies is self-evident. This Court therefore found that the application was indeed urgent and that it should be heard as such.'

[30] In summary, whilst I agree with POPCRU and the employees that there is quite a lengthy delay that has not been properly explained, this in itself is insufficient to scupper urgency in this particular case. The other factors relating to urgency carry the day for the DCS. These factors are the following: (1) the inability to obtain substantial redress in the ordinary course; (2) the fact that the DCS's claim is squarely founded on remedying the unlawful exercise of public power together with the continuing prejudice that goes with it; (3) the DCS could suffer irreparable harm if this matter is not decided now and that it has no realistic alternative remedy available that could mitigate this; (4) POPCRU and the employees have had a proper opportunity to completely answer this case; and (5) it is in the interest of justice to finally decide this matter on an urgent basis. I will therefore decide this matter as one of urgency.

<u>Review principles</u>

[31] The proper point of departure in deciding this case is a reference to section 195(1) of the Constitution, which provision *inter alia* prescribes as follows:

> 'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted. …
>
> (d) Services must be provided impartially, fairly, equitably and without bias. …
>
> (f) Public administration must be accountable. …'

[32] In terms of section 195(2), the above principles apply to all organs of state and in the administration of every sphere of government. This would include the DCS, who is consequently obliged to act to remedy a failure, where that failure is at odds with giving effect to these guiding principles in the Constitution. These kinds of cases are also always unique in that the State as an employer

is in essence seeking to challenge its own conduct, as perpetrated by its own functionaries.[19] It is, as said earlier, a self-review.

[33] The Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[20] considered the application of Section 195 of the Constitution where it came to the employment relationship between the State as an employer and its employees, and in particular where it came to the conduct of public service functionaries in respect of the employment relationship pertaining to such employees. The Court held as follows:[21]

> 'Section 195 provides for a number of important values to guide decision makers in the context of public sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in s 195(1)*(f)* and *(g)* and the requirement of a high standard of professional ethics in s 195(1)*(a)*. Read in the light of the founding value of the rule of law in s 1 *(c)* of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.'

[34] Therefore, and should it come to the attention of a responsible functionary in the DCS that a decision has been taken in the context of employment relations that is unlawful or irregular, and in particular contrary to binding legal prescripts, that responsible functionary has a duty to act to remedy the situation. The point is that which is irregular or unlawful must be lawfully corrected. This was dealt with *Merafong City v AngloGold Ashanti Ltd*[22] in the following manner:

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[19] See *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 ILJ 613 (CC) at para 32.
[20] (2014) 35 ILJ 613 (CC).
[21] Id at para 35.
[22] 2017 (2) SA 211 (CC) at para 61. See also *New Integrated Credit Solutions* (*supra*) at para 40; *Petersen and Others v South African Social Security Agency* 2025 (3) SA 153 (SCA) at para 9; *Zingeni v General Public Service Sector Bargaining Council and Others* (2026) 47 ILJ 448 (LC) at para 66.

> 'This was out of kilter with Merafong's duty as an organ of state and a constitutional citizen. This court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help'. What is more, in *Khumalo* this court held that state functionaries are enjoined to uphold and protect the rule of law by inter alia seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty 'to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on whose behalf it exercises power'. Public functionaries 'must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it'. Not to do so may spawn confusion and conflict, to the detriment of the administration and the public.'

[35] In terms of section 158(1)(h) of the LRA, the Labour Court may: *'… review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law'.* This provision, as read with section 195 of the Constitution, is clearly the proper avenue for a responsible functionary at the DCS to seek to correct an unlawful decision and / or irregularities in the context of the conclusion of the settlement agreement with the employees. This is exactly what it did. In fact, such proceedings under section 158(1)(h) would be the only basis upon which to seek such correction, because where it comes to challenges by the State itself against conduct or actions of its own functionaries, the State has no recourse to the normal dispute resolution processes under the LRA. In *Hendricks v Overstrand Municipality and Another*[23] the LAC dealt with the applicability of the dispute resolution system under the LRA to these kinds of challenges by the State as employer, and said:

> 'The underlying guiding rationale of the ratio decidendi in *Gcaba* and *Chirwa* is that once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA. The ratio cannot justifiably be extended to

[23] (2015) 36 ILJ 163 (LAC) at para 27.

> deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. …’

[36] In sum, there is a clear duty on a responsible functionary to correct an unlawful decision and / or an irregularity. It is thus untenable to accept that the responsible functionary and the employer itself must then just live with what happened and be left without a remedy. The only feasible remedy that can be applied is an application in terms of Section 158(1)(h) of the LRA, brought by the responsible functionary, to remedy that which had gone wrong.

[37] The utilization of section 158(1)(h) indeed contemplates a review application. This being the case, it must then be established on what review grounds such a review application must be brought. This has received the attention of the LAC on several occasions. In *Hendricks supra*[24], the Court held:

> ‘In sum therefore, the Labour Court has the power under s 158(1)*(h)* to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds 'permissible in law'.

The Court in *Merafong City Local Municipality v SA Municipal Workers Union and Another*[25] similarly pronounced:

> ‘The Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)(h). It has the power (and jurisdiction) to review them on any grounds 'permissible in law'. Permissible grounds in law would include the constitutional grounds of legality and rationality …’

And lastly, in *Booysen v Beaufort West Municipality and Another*[26] it was decided:

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[24] Id at para 29.
[25] (2016) 37 ILJ 1857 (LAC) at para 38.
[26] (2026) 47 ILJ 129 (LAC) at para 20.

> ‘The municipality’s criticism of *Merafong* is unwarranted. This court has, in different instances, confirmed the Labour Court’s jurisdiction and power to review the decisions and acts of the state as employer contemplated in s 158(1)*(h)* on any grounds permissible in law, which include the constitutional grounds of legality and rationality …’

[38] It has now been authoritatively determined that a self-review by an organ of state does not contemplate a review under the Promotion of Administrative Justice Act (PAJA)[27]. It is squarely a legality review. As held in *New Integrated Credit Solutions supra*[28]: *‘… It is now firmly established that self-reviews by organs of state are not reviews in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), but rather are legality reviews …*’. The aforesaid being so, the Court in *Premier, Gauteng and Others v Democratic Alliance and Others*[29] described the applicable principle of legality in the case of legality reviews in following manner:

> ‘The principle of legality has developed significantly in our jurisprudence since *Fedsure* and the grounds for a legality review have expanded along with it. They now include lack of authority, abuse of power, and jurisdictional facts, which are all subcategories of lawfulness. The rationality of the action in question may also be challenged as a further and separate ground of review.’

The Court in *Hendricks supra*[30] also considered the principle of legality, and held:

> ‘…. Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.’

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[27] Act 3 of 2000.
[28] Id at para 34. See also See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at paras 37 – 38; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 45.
[29] 2022 (1) SA 16 (CC) at para 67.
[30] Id at para 28.

[39] In dealing specifically with the meaning of 'legality' in the actual context of a review application under Section 158(1)(h), the Court in *Khumalo*[31] held:

> '… The principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. …'

[40] In *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena*[32] the Court held that the principle of legality had developed over the past decade, to the extent that a parallel system of review for action which falls outside of the strict definition of administrative action, has developed. Having so held, the Court then proceeded to set out this development as follows:[33]

> '… Public functionaries are required to act within the powers granted to them by law. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) at para 58, furthermore, see the seminal judgment in *Pharmaceutical Manufacturers Association of SA & another*: *In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at para 85, where the court laid down the core element of legality as follows:
> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

The Court in *Weder*[34] then proceeded to consider this component of rationality as part of the legality enquiry, and held:

> 'In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no

[31] (*supra*) at para 28.
[32] (2014) 35 ILJ 2131 (LAC) at para 33.
[33] Id at para 34.
[34] Id at para 35.

other purpose or an ulterior motive. See *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 47. Furthermore, in *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC) at para 39 Yacoob ADCJ held:

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the *means* to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the *process as a whole*.''

[41] As final reference in this respect, I refer to *Mohlomi v Ventersdorp/Tlokwe Municipality and Another*[35] where the Court succinctly described what must be established in order to succeed with a legality review, in the following manner:

'In summary therefore, where a litigating party seeks to challenge a decision in the context of the public service employment environment, on the basis of a review application under s 158(1)*(h)* of the LRA, founded on the constitutional principle of legality, the party seeking to review such a decision must show that the decision failed to meet the following essential requirements:

29.1 the decision was rationally connected to the purpose for which the power was given to it, thus meaning that the decision would not be considered to be arbitrary;

29.2 the decision accounted for all the relevant facts informing the decision, to the extent that the decision made can be said to be rational;

29.3 the process giving rise to the decision was lawful and fair; and

29.4 the decision itself was lawful, meaning that it is not a decision that falls outside the scope of the power afforded to the functionary.

Thus, should any applicant for review succeed in showing that any one of these requirements has not been satisfied, then the decision taken would be reviewable in terms of s 158(1)*(h)* of the LRA, based on the principle of legality.'

[42] Therefore, and based on the aforesaid discussion, I am convinced that the review application by the DCS under section 158(1)(h) is competent and is properly founded on the principle of legality. In a nutshell, the DCS submits that it is confronted with a situation of unlawfulness and irregularity, in that the

[35] (2018) 39 ILJ 1096 (LC) at para 29.

decision taken conclude the settlement agreement with the employees was in violation of the delegated authority and that the decision to settle was founded on wrong advice which was both unreasonable and irregular.

The issue of the delay

[43] *In casu*, there is very much a live issue about the delay occasioned by the DCS in bringing the current review application. This has been pertinently raised by POPCRU and the employees in their answering affidavit. It is undeniable, on the facts, that the DCS first appreciated there could be difficulties with the settlement agreement on 12 May 2025, when the issue was first raised. The review application was ultimately brought on 22 April 2026. This is just short a year later. What does that mean for the application, considering that there is no time limit within which a review application in terms of Section 158(1)(h) must be brought? Obviously, it cannot be said that the delay is inconsequential and that the DCS can bring the application when it chooses, as this will in itself infringe on the Constitutional imperative of legality.[36] However, it must always be borne in mind that there is a reason why no specific time limit to bring a review application under Section 158(1)(h) has been prescribed, which reason was explained by the Court in *Khumalo*[37] as being the necessity to open the actions and conduct of public functionaries to ongoing scrutiny and transparency. The Court in *Khumalo* further explained the rationale for this approach as follows:[38]

> '… the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia by seeking the redress of their departments' unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural

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[36] This was explained in *Khumalo* (*supra*) at para 46 as such: '*… Section 237 of the Constitution provides: 'All constitutional obligations must be performed diligently and without delay.' 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 …*'. See also *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at para 22 where it was held: '*… It is important for the efficient functioning of public bodies … that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule … is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view, more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. …*'.
[37] Id at para 44.
[38] Id at para 45.

> 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.'

[44] It is unfortunately true that self-review applications by organs of state are often associated with excessive delays. As a result, and even though a legality review application does not have a time limit directly linked to it, it has been consistently held that such delay could serve as a basis to non-suit the applicant even in such an application. It has also been held that an actual condonation application is not required,[39] but the issue of the delay must be assessed in line with certain pertinent principles. This has now become known as the *Khumalo* principles, and emanate from the following *dictum* in *Khumalo supra*:[40]

> 'In Gqwetha the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of 'all the relevant circumstances'); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.
>
> In terms of the first leg of the enquiry, any explanation offered for the delay is considered. ….'[41]

And as to the exercise of the discretion whether or not to overlook the delay, the Court in *Khumalo* held:[42]

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[39] See *Petersen* (*supra*) at para 10; *State Information Technology Agency SOC Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2850 (LC) at paras 7 – 9; *MEC for Economic Development, Environment and Tourism, Limpopo Province v Mogahlane* (2019) 40 ILJ 315 (LAC) at para 16.
[40] Id at paras 48 – 50.
[41] The Court was referring to the judgment in *Gqwetha* (*supra*) at para 22. See also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 48; *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at para 46 – 47; *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA at para 28; *Mogahlane* (*supra*) at para 17.
[42] Id at paras 52 and 57.

> '… On this leg of the test, the majority in *Gqwetha* held that the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision. In the context of public sector employment, the value of security for employees and in mitigating the arguably inherent inequality of the workplace must be kept in mind. …
>
> An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge ….'

[45] The *Khumalo* principles were specifically dealt with in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[43] where the Court decided:

> 'The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.
>
> The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two step Khumalo test to ascertain whether the delay is undue and, if so, whether it should be overlooked.
>
> The second principle relating to delay under legality is that the first step in the Khumalo test, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. But, as was held in Gijima, where there is no explanation for the delay, the delay will necessarily be unreasonable.'

[46] But the Court in *Buffalo City* did not stop there. It in essence decided that the application of the *Khumalo* principles is not a compartmentalised enquiry.

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[43] 2019 (4) SA 331 (CC) at paras 50 – 52.

Rather, it is a holistic determination, involving issues similar to deciding to condonation applications, namely considering the extent of the delay, the explanation for it, the prospects of success on the merits, as well as the prejudice to the parties. The Court explained[44]:

> 'The approach to overlooking a delay in a legality review is flexible. In *Tasima I*, Khampepe J made reference to the 'factual, multi-factor, context-sensitive framework' expounded in *Khumalo*. This entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this court's power to grant a just and equitable remedy and this ought to be taken into account. The interrelationship between prejudice and delay was explained by Khampepe J in *Tasima I*:
> 'But what is the prejudice suffered by Tasima in overlooking the delay? Condoning the delay does not prevent them from enforcing the court orders that have been granted in their favour. In addition, the contract extension itself has already expired. Setting aside the extension at this point should not, therefore, impact negatively on Tasima going forward. It is also a factor that this court may rely on its s 172(1)*(b)* powers to ameliorate the prejudice suffered. It bears repeating that Tasima has, in addition, benefitted greatly from the extension. In my view, the prejudice suffered is minimal, particularly in comparison to the prejudice to be suffered by the Department and the Corporation if the counter-application is not condoned. This is consonant with the dicta in *Khumalo* that, "consequences and potential prejudice . . . ought not in general, favour the court non-suiting an applicant in the face of the delay".'

[47] This holistic approach has also been applied by the LAC in *MEC for Economic Development, Environment and Tourism, Limpopo Province v Mogahlane*[45]. The Court in that case in particular considered the issue of the prospects of

[44] Id at paras 54 – 55. See also *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para 49; *New Integrated Credit Solutions* (*supra*) at paras 36 – 38; *Valor IT v Premier, North West Province and Others* 2021 (1) SA 42 (SCA) at para 30; *City of Johannesburg Metropolitan Municipality and Others v Independent Municipal and Allied Trade Union and Others* (2017) 38 *ILJ* 2695 (LAC) at paras 55 and 57; *Engineered Systems Solutions* (*supra*) at para 30.

[45] (2019) 40 ILJ 315 (LAC).

success of the review application as an important component to deciding whether any delay should be overlooked, where the Court said:[46]

> … I am of the view that there is no point in overlooking an undue delay if there are no prospects of success on the merits. In other words, if there is no merit in the legal challenge to the impugned decision, no purpose would be served by overlooking the delay. Significantly, in *Khumalo*, the Constitutional Court held:
> 'An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.'
>
> A second factor relevant to overlooking delay is the nature of the impugned decision. This, in essence, requires a consideration of the merits of the legal challenge against that decision. …'

[48] A last consideration is determining when the calculation of the delay in question must start. This was answered in *Buffalo City supra*[47] as follows: '… *(I)n both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken.'*

[49] In summary, therefore, what must first be considered, where it comes to the delay occasioned by the DCS in instituting the current review application, is the length of the delay, together with the explanation provided by the DCS for it. These considerations will determine if the delay is reasonable. If the delay is reasonable, it can for that reason be overlooked. However, if the delay is found to be unreasonable, then it must be decided if can still be overlooked, based on the considerations I have summarized above.

<u>Analysis</u>

[50] As a point of departure, it must be accepted that there is a delay *in casu*. But when does that delay start? In my view, that would be when the DCS first contemplated that there could be something amuck with the settlement

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[46] Id at para 18.
[47] Id at para 49. See also *Engineered Systems Solutions* (*supra*) at para 27; *New Integrated Credit Solutions* (*supra*) at para 34.

agreement. On the facts, this would be on 12 May 2025. With the review being brought on 22 April 2026, the delay is just short of 12 months. This is obviously a material delay.

[51] The next step would be to consider what explanation is provided by the DCS for the delay. This has to some extent already been dealt with under the hearing of urgency earlier in this judgment. In my view, the explanation can be divided into two parts, which can perhaps best be described as the first part which is the acceptable part, and second part which is the unacceptable part.

[52] The first and acceptable part of the explanation involves the period from 12 May 2025 to end January 2026. As I have already touched on, one cannot turn a blind eye to the manner how organs of state operate. All the noble imperatives of expeditious action taking aside, a realistic approach is always necessary. In the private sector, decisions to act can be taken promptly. But in the public sector not so much. This is because of the highly regulated nature of the public sector, which regulatory measures are often statutorily entrenched[48] and need to be adhered to in order to be legal. After all, the very case at hand is founded on the non-compliance with such a measure. When taking the decision to approach a Court to litigate, there are inevitably a number of functionaries involved that have to be consulted, and permissions obtained. The issues must be properly considered. It will be short sighted not to appreciate that this may take time, especially considering the criticism that have emanated from the Courts where litigation has been pursued without proper consideration.[49] What transpired in this case between May and November 2025 speak to the ordinary application of these processes. It is not as if years went by with nothing being done.

[53] To put matters in proper context, it does appear that when the DCS became aware of the difficulties with the settlement agreement, it did not sit on it, so to speak. The irregularity was immediately reported to higher authority, with a request that it be investigated. The mandate to investigate was granted

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[48] This would include regulations promulgated under empowering statutes.

[49] See for example *Ntombela and Others v United National Transport Union and Others* (2019) 40 ILJ 874 (LC) at para 70; *Mashishi v Mdladla NO and Others* (2018) 39 ILJ 1607 (LC) at para 14; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 14; *Mokoena v Merafong Municipality and Others* (2020) 41 ILJ 234 (LC) at para 36.

promptly. What followed was an investigation that lasted less then two months, which, in the context of the public service, is not an unreasonable period. Immediately following the outcome of the investigation with showed a *prima facie* justification for the complaint, and on 4 July 2025, authority was sought to obtain a legal opinion. Again, there was no procrastination, and authority was granted within days. The state attorney was immediately instructed. Counsel was then briefed and consulted, and documents provided. Counsel's opinion was provided on 28 November 2025 to the effect that the review would have prospects of success on a number of grounds. The time taken for counsel to provide a proper opinion in my view not unreasonable, having due regard to all that needed to be considered. The explanation to this point, I believe, is entirely reasonable, makes sense, and cannot speak to undue procrastination.

[54] The case in *Siyangena Technologies (Pty) Ltd v Passenger Rail Agency of South Africa and Others*[50] is comparable *in casu*. There the delay was also explained by PRASA (the state entity in that matter) on the basis that it needed to first establish the true reasons for the impugned decisions by way of a comprehensive investigation to be conducted. This resulted in a delay of approximately 10 months. The Court decided as follows in this regard:[51]

> 'The High Court, relying on *Buffalo City*, exercised its judicial discretion and granted condonation for the delay of 10 months, taking into account the nature of the impugned decision; the conduct of PRASA; and prejudice to the public purse. It said that Siyangena's complaint of prejudice could be ameliorated in the form of an appropriate remedy. It was not contended in this court that the High Court exercised its discretion on wrong principles or misdirected itself in any way. …
>
> I can find no ground to interfere with the High Court's decision to condone the delay of 10 months. This period of delay was not unreasonable in the circumstances. PRASA acted expeditiously once the true reasons for the impugned decisions came to light. In the context of a litany of breaches of the procurement system, condonation had to be granted in the interests of justice.'

[50] 2023 (2) SA 51 (SCA).
[51] Id at para 31 and 33.

[55] Then comes the December / January holiday season. Yes, it can be said that holidays should not be taken, and time should immediately be devoted to the current matter. But again, this is not realistic. We all know what happens in this period. The answer is very little. Most persons, and in particular legal representatives and senior functionaries would be on leave. The Courts are closed. Idealism aside, it is not unreasonable to accept that in this period, it is unlikely that anything constructive could have happened where it came to pursuing the litigation, as it would involve the drafting and settling of litigation papers, and deposing thereto, which need the undivided attention of persons.

[56] Thus, and for the first period of delay, I believe the explanation provided is reasonable. It therefore properly accounts for at least nine months of the total delay of just short of a year.

[57] This brings me to the second and unacceptable period of delay. In this respect, the DCS does not fair as good. The explanation is principally founded on a contention that once the holiday season was over, stakeholders needed to be consulted, proper instructions to legal representatives needed to be given, papers drawn and commissioned, and a final decision to bring the proceedings had to be made. The explanation on face value may be appealing, but it is lacking in sufficient particularity. The mere bald and general statements to this effect provided by the DCS is insufficient to serve as an acceptable explanation. Far more particularity as to dates, times and events relating to these activities needed to be provided. This is exacerbated by the fact that the founding affidavit was signed on 27 March 2026, however the notice of motion was only signed on 22 April 2026, which period is entirely unexplained. In my view, this means that the period from end January 2026 to 22 April 2026 when the application was brought, is in essence not reasonably and properly explained, and therefore this period of delay can be considered to be unreasonable.

[58] Because at least part of the delay is unreasonable, it must next be decided whether this delay should be overlooked. In this respect, and in line with the principles discussed above, I will have regard to specifically three considerations. The first is the nature of the impugned decision, and tied with this would be the prospects of success of the review application. The second

is the issue of prejudice. And third, I will consider whether any prejudice can at least be significantly ameliorated by way of a proper order of consequential relief should the settlement agreement be set aside.

[59] Where it comes to the nature of the impugned decision as considered with prospects of success, the judgment in *Valor IT v Premier, North West Province and Others*[52] is apposite to the case *in casu*. In that case, the Court considered a supply and service agreement that had been cancelled by the Department concerned, because the head of Department did not have the authority to contract. An application to challenge the cancellation was then brought by the service provider. The application was considered by a state law advisor which gave wrong advice that the service provider's application to challenge the cancellation should be settled on terms favourable to the service provider because of a lack of prospects of success to defend it. Based on this advice, the Department then concluded a settlement agreement that was made a court order.[53] The Court acknowledged that in these circumstances:[54] '*… Once the matter had been settled, the provincial government had little choice but to comply with the order to which it had agreed. It was only when it obtained independent legal advice that it found out that the state law advisor's advice had been wrong, and that it should cancel the agreement again. In due course, the counter-application was brought to set aside the SDA and everything that followed it. This accounts for the period between the first cancellation and the second cancellation*'. In the context of these facts, the Court decided:[55]

> 'One of the factors that must be considered whenever condonation is sought is the applicant's prospects of success on the merits. It must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point).

[52] 2021 (1) SA 42 (SCA).
[53] See paras 35 – 36.
[54] Id at para 37.
[55] Id at paras 38 – 39.

> As I shall demonstrate in the following paragraphs, the provincial government's prospects of success on the merits are strong: the scheme in terms of which VIT purported to provide services, and for which it was handsomely remunerated, was unlawful from start to finish. As a result, even if it were to be found that the explanation for the provincial government's delay was wanting, the interests of justice, in the light of its strong prospects of success, require condonation to be granted.

[60] The comparisons between *Valor IT* and the case *in casu* are immediately apparent. In the current mater, the employees have been dismissed for misconduct relating to dishonesty following a comprehensive internal investigation and proper disciplinary and appeal proceedings, and the case was being defended on the merits by the DCS at arbitration. When the matter was entrusted to a new functionary (Mtshweni) that had not been involved in the matter before, and who did not consult any of the involved persons, that functionary advised that prospects of success were poor and the matter should be settled. It was then settled on most favourable terms for the employees, involving nothing less than a complete capitulation. When this settlement came to the attention of responsible functionaries and in particular the investigator who had first investigated the matter, it was immediately pointed out that the advice that prospects of success to defend the dismissal was poor, was wrong and motivation was provided why this contention was made. Later advice revealed the further anomaly that the terms of the delegated authority were not adhered to in concluding the settlement agreement (this is dealt with later in this judgment). All said, the settlement agreement was unlawful from start to finish, as the basis for concluding it was founded on wrong advice and the agreement was not even properly authorised. The interest of justice requires that the delay be overlooked.

[61] On the merits of the review *per se*, there can be no doubt that if the settlement agreement was unlawfully concluded, the review application must succeed and the settlement agreement must be set aside. In this respect, there are two considerations. First, there is the issue of non-compliance with Delegation 102. And second, there is the wrongful and irregular manner in which the settlement agreement was recommended and came about.

[62] I will start with Delegation 102. Its terms are clear. It places a specific condition for delegation to any functionary to conclude a settlement agreement in an employment dispute under the LRA, that Finance must first be consulted. The motivation for this kind of provision is in my view obvious, being that these kinds of settlement agreements would more often than not have material financial implications. The case *in casu* is no different. Without even considering the prospective monthly salary payments paid to the employees after the date of reinstatement, the back pay portion alone, as agreed to in the settlement agreement for the three employees, exceeded R1 million. It thus makes sense that Finance must first be consulted on the terms of any proposed settlement, to confirm that it is financially viable and provided for, considering that state organs like the DCS operate under budget constraints, and must account for spending of public funds.

[63] The whole issue about Finance being consulted was a bone of contention between the parties, and will be specifically dealt with later in this judgment. Suffice it say at this point, it is my view that it is effectively undisputed that Finance was not consulted prior to the conclusion of the settlement agreement. POPCRU and the employees countered this by saying that Finance must have been consulted after the agreement was concluded, and that it did not matter that Finance was not consulted beforehand, as Finance would likely have nothing to say about it and would likely have approved the settlement or at least not objected to it. But this is simply not the point. It does not matter what Finance may or may not have done, if it was consulted. It remains indispensable that it must first be consulted. To ascribe to this kind of argument propagated by POPCRU and the employees would mean that such condition for delegation would be entirely negated, because all that needs to be done as a later stage is for anyone to say that it does not matter, because Finance would have been all right with it. What is then the purpose of prior consultation being specifically required? The simple point is that the settlement has direct adverse financial implications, in that it is coupled substantial financial and institutional consequences. As such <u>prior consultation</u> with Finance, before the settlement is concluded, is essential, as part of the mandatory safeguards regulating the commitment of public funds.

[64] Thus, Delegation 102 is the regulatory framework in terms of which Mtshweni would be empowered to conclude the settlement agreement. If it is violated, then Mtshweni and / or Mkhize (as final approver) would have had no authority to conclude the settlement agreement. And that must render the settlement agreement unlawful.

[65] How does POPCRU and the employees then answer this? In my view, they seek to put up what is nothing else but an unsubstantiated and speculative factual smoke screen. In reality, they cannot dipsute that Finance was not consulted beforehand. The National Commissioner of the DCS has pertinently said in his founding affidavit that Finance was not consulted. What POPCRU and the employees say is that multiple functionaries have a role to play in giving effect to the settlement agreement, including HR, who had to prepare their own memoranda to support the implementation of the settlement agreement to ensure matter was approved on the correct level. It is further stated that Finance must have considered such a memorandum from HR, and Finance itself had to prepare its own memoranda to support the implementation of the settlement agreement to ensure it was approved on the correct level. Based on these references to what must have happened, POPCRU and the employees complain that these memoranda were not discovered by the DCS in this case, and some kind of inference should be drawn from this failure in favour of a conclusion that proper approvals must have been granted. The contention raised in this context, in short, is that the DCS must have consulted with Finance and obtained their view about the relevant budget constraints, fiscal accountability, and statutory obligations, in order to implement the settlement agreement, meaning Finance was aware of the agreement and must have ratified it.

[66] It is clear that on the facts, the entire case advanced by POPCRU and the employees in this regard is founded on supposition and speculation. There was actually no direct or even proper evidence to contradict the pertinent contention by the National Commissioner that Finance was not consulted. This affirmation was repeated in the replying affidavit. And in any event, why would Finance be consulted about something that was already a *fait accompli*, had been actually made an arbitration award, and where compliance was mandatory, no matter what, unless it was lawfully set aside. I am convinced

that what happened, after the settlement agreement was concluded, was a situation of what can be described as mechanical implementation without consultation and decision making involved.

[67] But more importantly, even taking the contention by POPCRU and the employees as it is pleaded, it misses a fundamental point. On their own version, Finance was consulted after the fact. That does not assist their cause, nor is it an answer to clear requirements and purpose of Delegation 102. For the reasons already dealt with above, it is essential that Finance is consulted before the agreement is concluded. If it was not, then Mtsweni had no authority to conclude the settlement agreement. And as such, it is unlawful. In *Manana v King Sabata Dalindyebo Local Municipality*[56] the LAC was seized with a case where the municipality failed to honour its obligations in terms of a settlement agreement, and the employee party then sought to enforce the settlement agreement in the Labour Court. The employee contended that the director: corporate services of the municipality was either properly authorised or professed to have been properly authorised to settle the dispute on behalf of the municipality. The municipality disputed such contended authority to settle and contended the settlement agreement was invalid. The LAC said that:[57] '*… It is well accepted that whenever the principle of legality is implicated, an agent who seeks to act on behalf of the organ of state, pertinently a local government, must be specifically authorised …*'. That Court then concluded:[58]

> 'The peremptory provisions of s 59 regulate the delegation of authority and have established the boundaries beyond which the municipality may not venture. The system of delegation of authority in a local government is not gratuitous. Still, it ensures that appropriate checks and balances are in place to prevent abuse of power and to ensure that decisions are made within the bounds of the law. Mr Nodo's conduct in concluding the settlement agreement on behalf of the municipality is at variance with the injunctions of s 59. It is therefore apparent that the invocation of ostensible authority is untenable, as what Mr Manana seeks, if granted, would amount to sanctioning illegality.'

[56] (2025) 46 ILJ 1899 (LAC).
[57] Id at para 15.
[58] Id at para 16.

[68] The point can be further illustrated by the judgment in *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others; SA Democratic Teachers Union and Others v Minister of Public Service and Administration and Others; Public Servants Association and Others v Minister of Public Service and Administration and Others; National Union of Public Service and Allied Workers and Others v Minister of Public Service and Administration Others*[59] (*Minister of Public Service* judgment). That case concerned the issue of a challenge to increases afforded to employees pursuant a sectoral collective agreement, based on the fact that the collective agreement was unlawfully concluded for want of compliance with the empowering regulatory provisions. The Court held that:[60] '*… In deciding whether there has been compliance with the statutory injunction, what is important is the object sought to be achieved by the injunction and whether this object has indeed been achieved. The central element is to link the question of compliance to the purpose of the provision …*'.[61] The Court, having so held, decided as follows:[62]

> 'Regulations 78 and 79 were promulgated by the Minister of Public Service & Administration under s 41 of the Public Service Act, and must be read and interpreted in conjunction with it. Under regulation 78(2) the minister may enter into a collective agreement only if the fiscal requirements contained in regulation 79 are met. In terms of regulation 78(3), the minister is authorised to negotiate a collective agreement on behalf of the State, as the employer, in the PSCBC. Regulation 79*(c)*, in turn, authorises the minister to enter into a collective agreement with financial implications only if the minister concerned can cover the costs of the collective agreement from his or her departmental budget, or on the basis of a written commitment from Treasury to provide additional funds, or, if the costs can be covered from funds from other departments or agencies, with their written consent coupled with Treasury approval.
>
> These are conditions precedent to the minister's exercise of the power to negotiate and conclude collective agreements on behalf of the State …'

59 (2022) 43 *ILJ* 1032 (CC).
60 Ad at para 72.
61 The Court in *Minister of Public Service* (*supra*) at para 73 also said that: '… *It is also a fundamental principle of our law that an actor must be legally empowered to perform any act in question and that public power may only be exercised by a lawfully constituted authority …*'.
62 Id at paras 85 – 86.

The Court then concluded:[63]

> 'The end result is that the State's failure, in its capacity as the employer, to comply with the requirements of regulations 78 and 79 renders the resultant collective agreement entered into between the parties under the LRA invalid and unlawful. To hold otherwise would amount to validating the mischief the relevant constitutional provisions and regulations seek to prevent.'

[69] The judgment in *Minister of Public Service* also has another nuance applicable to this case. In that case, there was a two years' delay in bringing the application, and this delay was effectively unexplained. The Court needed to consider whether should non-suit the challenge *per se*.[64] The Court then, considering the nature of the case relied on by the State, reasoned as follows:[65]

> '…According to the State, the material change of circumstances, and the applicants' negative attitude towards re-negotiation and revision of clause 3.3, rendered the enforcement of the collective agreement practically impossible. Taking into account the fact that the conclusion of the collective agreement in question was from the outset in breach of the provisions and the Constitution, it ought not to have been implemented at all. Given the circumstances preventing compliance with clause 3.3, the inevitable conclusion is that the Labour Appeal Court rightly condoned the delay by the State to challenge the legality of the impugned collective agreement. Regard being had to that court's treatment of the dispute between the parties, I am satisfied that all the factors for and against the condonation of the delay were properly considered. …'

[70] Again, the comparisons to the case *in casu* are clear. The purpose of Delegation 102 is to ensure proper fiscal oversight before settlement agreements are concluded. Fiscal oversight is an essential competent to

[63] Id at para 89.
[64] At para 93, the Court in *Minister of Public Service* identified the issue as follows: '*The long-standing rule is that legality reviews must be initiated without undue delay and that the courts have the discretion to refuse a review application because of the delay or to overlook the delay. As this court has held on several occasions, undue delay should not be tolerated as it brings about various difficulties ranging from prejudice to the other party, weakening a court's ability to consider the merits of a review and undermining the public's interest in certainty and finality. It is common cause that the State challenged the validity of the impugned collective agreement after two years of its conclusion when it had performed its obligations in terms clauses 3.1 and 3.2 of the collective agreement …*'.
[65] Id at para 104.

incurring State expenditure by way of settlement agreements. The failure to comply with it must render a settlement agreement unlawful, and to speculate what may have happened if Finance was consulted, or that Finance may have been consulted after the fact, is irrelevant. The enquiry stops with the fact that Finance was not consulted beforehand. And added this, instances such as these strongly motivate the overlooking of any delay, with the delay *in casu* being far shorter than the delay in *Minister of Public Service.*

[71] POPRCU and the employees argue that by implementing the settlement agreement and paying the employees their back pay, the DCS had '*ratified*' the agreement. They plead that: '*if the applicant were serious about the invalidity of the settlement agreement, it had ample time to put a stop to the payments made to us. Instead, however, the applicant processed the payments to us on the Persal system in accordance with the settlement agreement. It therefore follows that the applicant ratified (at least by its conduct, if not explicitly) any procedural or other defects in the settlement agreement by processing the payments to us in accordance with the settlement agreement …*'.

[72] So, the case of ratification is not based on Finance after the fact considering and then approving the settlement agreement. It is based solely on the conduct of the DCS in complying with the back pay portion of the agreement and making payment to the employees. However, ratification by conduct where the original agreement was unlawfully concluded at the outset, is not permissible. As the Court in *Santam Insurance Ltd v Booi*[66] made clear: '*… the contention does not accord with the settled principle of our law that a purported juristic act which is a nullity cannot be ratified. Further, the criticism levelled by Kerr (op cit at 100, footnote 215) is valid and should be heeded. If an act performed by a person with no capacity were to be accorded provisional validity pending ratification or not, the 'opposing' party will be in an impossible position. He can neither treat the act as a nullity nor, prior to the appointment of a curator, terminate the 'relationship' by way of notice to the incapacitated person …*'.

[66] 1995 (3) SA 301 (A) at 302I-303A. See also *Kruger v President of Republic of South Africa and Others* 2009 (1) SA 417 (CC) at para 64; *Earthlife Africa and Another v Minister of Energy and Others* 2017 (5) SA 227 (WCC) at paras 69 – 70.

[73] Some examples illustrate the point. In the context of a resolution signed on behalf of a company to appoint an attorney where the board was not properly constituted, the Court in *Naude NO and another v Louis Pasteur Medical Investments Ltd and Others*[67] accepted that the resolution was a nullity, and held that: '*… The resolution taken on 11 August 2022 is a nullity. A nullity cannot be ratified …*', and the Court then concluded that the appointment of the attorney was not lawful, despite a later attempt to ratify it. Further, the following *dictum* in *Democratic Alliance v Minister of International Relations and Cooperation and Others*[68] is pertinent:

> 'Put differently, given that the national executive has sought parliamentary approval for the notice of withdrawal and the repeal of the Implementation Act, has this question not become academic? It is not, for two reasons — one constitutional and another practical. Constitutionally, an important constitutional principle of doctrine of separation of powers is implicated. Because the national executive had purported to exercise power it constitutionally does not have, its conduct is invalid and has no effect in law. Whatever Parliament does about the subsequent request to it by the national executive to approve the notice of withdrawal would not cure its invalidity. As Hoexter states, '(a)n invalid act, being a nullity, cannot be ratified, validated or amended'.

[74] One last issue on the notion of ratification on the basis of the conduct of the DCS relied on by POPCRU and the employees remains to be considered. It must be remembered that as matters stood in 2025, as a fact, there existed a settlement agreement that was made an arbitration award and the DCS was compelled to comply with it, without more. As such, it was always susceptible to enforcement. Where it came to the monetary potion of the agreement, it was enforceable through execution by the Sheriff. Whilst this reality existed, and before the settlement agreement is actually set aside, the DCS is compelled to make payment in terms thereof and in reality, had no other choice. Should it simply have unilaterally decided not to comply because of the advice received that the agreement was invalid, that would be impermissible

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67 2022 JDR 3253 (GP) at paras 12 – 13. See also *Stellenbosch Ratepayers' Association v Stellenbosch Municipality* 2009 JDR 1227 (WCC) at para 9.
68 2017 (3) SA 212 (GP) at para 59.

self-help.[69] In *Manana v King Sabata Dalindyebo Municipality*[70], which is a different judgment to the one quoted earlier in this judgment, the SCA in this instance dealt with resolution adopted by a Municipal Council, and accepted that it was not open to officials, even if they have a well-founded belief that it was invalid, to not apply it. The Court reasoned:[71]

> '… it seems to me that it would be conducive to disorderly public administration if officials were entitled to choose between executing or not executing a duly adopted resolution of the council depending upon their belief as to its validity - whether or not the belief is well-founded. In the absence of authority to that effect, or a principled explanation for why that should be so, neither of which is before us, I think the submission must be rejected. A municipal council acts through its resolutions. No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.'

[75] Consequently, the settlement agreement, which was concluded without proper compliance with Delegation 102, was unlawfully concluded and as such must be set aside.

[76] Further, I must say that I also find merit in the second complaint of unlawfulness raised by the DCS. The facts in this regard are undeniable. It was not as if the employees were arbitrarily dismissed without proper cause. There was a substantial investigation beforehand, with a comprehensive investigation report, and it is clear to me that some effort went into it. It is based on this report that proper consideration was had to whether the

[69] As explained in *MEC for Health, Eastern Cape and Another V Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at para 89: '*… the department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration …*'. See also *Public Servants Association obo Ubogu v Head, Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC) at paras 66 – 67; *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 11.

[70] (2011) 32 ILJ 581 (SCA) at para 21.

[71] Id at para 22. See also *Valor IT* (*supra*) at para 43; *SA Municipal Workers Union on Behalf of Mosoma v Greater Tubatse Local Municipality* (2021) 42 ILJ 1047 (LAC) at para 35.

employees should be disciplined. A proper disciplinary hearing was convened in line with all prescripts, in which the misconduct charges against the employees were fully ventilated. This appears to have taken place over a number of days. In a comprehensive written finding, an independent chairperson, after considering all the evidence, decided to recommend the dismissal of the employees. And this was followed by a proper internal appeal. For the DCS to, after all this effort, expense and time spent on these cases, then simply at arbitration come and effectively abandon everything to the extent that it can be said the employees were never even disciplined, makes no sense to me. In fact, and considering what the cases were all about and the effort put into it, such a scenario, if properly considered, would be highly unlikely, not only on the facts, but because it will be colossal waste of resources and expenses.

[77] So how did the settlement come about? It appears that it was as a result of unfortunate unforeseen intervening circumstances and wrong advice. Setlhodi was attending to the matter throughout, but resigned. This brought Mtsweni into the picture, who was not involved in the case at all and had no knowledge of its merits. On the facts, he never consulted with the investigator or any of the parties in the matter before venturing an opinion that defending the cases of the employees had no prospects of success. Considering the evidence provided as part of the founding affidavit, I must confess that have difficulty in understanding how Mtshweni could say there are no prospects of success in establishing that the employees committed the misconduct and were properly and fairly disciplined and dismissed. I must reiterate that I make no finding on the merits of the dismissal disputes, and I refer to it purely in the context of illustrating that the advice by Mtshweni to recommend settlement of the case was wrong.

[78] It is true that as an annexure to the answering affidavit, Mtshweni deposed to an affidavit to explain his conduct. He confirms he 'inherited' the cases and studied the investigation report to conduct what he calls an 'independent assessment'. It is however clear that he did not consult any of the investigators or the persons actually involved in the matter (such as witnesses) about these views. His views are solely founded on his own reading of the investigation report, even on his own version. He does say he applied his own mind to the

facts when deciding to recommend a settlement. But what is apparent from this affidavit is that the recommendation by Mtshweni was the sole causa for the decision being made to settle the dispute. He decided the merits of the case on his own, off the investigation report, as if he was some kind of arbitrator or reviewing authority. But to me, it is apparent that the advice provided by Mtshweni was not rational nor reasonable, considering all the facts contained in the substantial documentary evidence he had available to him, coupled with the fact that he did not consult with anyone to actually bring him up to speed on the case. Was it not for this wrong advice by Mtshweni, the settlement agreement would never have been concluded.[72] The circumstances giving rise to the settlement agreement thus constitutes an irregularity.

[79] What makes all of this even worse, in my view, is that the settlement agreement is not a compromise designed to avoid the costs and possible risks in arbitration proceedings. Ordinarily, settlement agreements in employment disputes involve some sort of give and take. But what happened with the settlement agreement in this case was an out-and-out capitulation. Again, considering all that had gone before, this is in my view inexplicable.

[80] Therefore, I am convinced that the settlement agreement came about in an unlawful and irregular manner. It came about solely on the basis of advice given by Mtshweni, which was wrong and improperly provided. As such, it is irrational and unreasonable, and violated the principle of legally. For this reason as well the settlement agreement falls to be set aside.

[81] POPCRU and the employees have a last arrow in their quiver. They have contended that because the settlement agreement has been made an arbitration award under section 142A of the LRA, it stands beyond contestation. I do not agree with this proposition. Making a settlement agreement an arbitration award does not turn it into something like a Court order which must be adhered to unless it is *per se* specifically challenged. In terms of section 142A(1), a settlement agreement can be made an arbitration

[72] I may mention that it is apparent from an annexure to the answering affidavit that Mtshweni is being investigated by the DCS for his conduct in this case.

on the basis of either one of two grounds.[73] The first is where the parties have agreed that it be made an arbitration award. The second ground applies where there is no agreement between the parties, in which case application must be made to the GPSSBC to make it an arbitration award. The current case is one where it was agreed between the parties that the GPSSBC would make the settlement agreement an arbitration award. In such an instance, no discretion is exercised and the GPSSBC will have no regard to the merits of the matter and in particular whether the agreement is valid or invalid. Further, the purpose behind making a settlement agreement an arbitration award under section 142A is to facilitate execution thereof. It enables the beneficiary under the settlement agreement to invoke all the enforcement provisions under the LRA, such as execution by the Sheriff or contempt proceedings. It does not seek to elevate the settlement agreement to a level that makes it unassailable in the normal course, even where its validly is challenged.

[82] All said, I am convinced that section 142A of the LRA cannot come to the aid of POPCRU or the employees. It cannot serve as a buffer against challenging the lawfulness of the settlement agreement, and that it can be set aside because it was unlawfully concluded in the first place. Once the settlement agreement is set aside, the basis for any determination under section 142A falls away along with it. This is because section 142A was applied on the basis of an agreement between the parties that it be applied, as contained in the impugned settlement agreement itself. Or differently put, if there is no settlement agreement in the first place, there can be no agreement to serve as the basis to make it an arbitration award under section 142A(1).

[83] I will also consider the issue of prejudice. If the settlement agreement is not set aside there will be the continued unlawful and irregular expenditure of public funds. The DCS would be compelled to continue to comply with the settlement which remains open to execution by virtue of section 142A of the LRA. As held in *New Integrated Credit Solutions supra*:[74] '*… As to prejudice, there is of course prejudice to the public purse when remuneration is agreed without regard to efficiencies and costs savings and when it is open-ended*

[73] Section 142A(1) reads: '*The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award'.*
[74] Id at para 57.

and there are no means of measuring effort against results….' And lastly, prejudice to the employees can be adequately ameliorated by way of just and equitable consequential relief, which I will deal with in the conclusion to this judgment.

Conclusion

[84] Therefore, and based on all the reasons set out above, I conclude that the DCS's application to review and set aside the settlement agreement of 27 March 2025 must succeed. It is relief competently and properly sought under section 158(1)(h) of the LRA, based on the principle of legality. Where it comes to the delay occasioned by the DCS in bringing the application, that delay must be overlooked, on the basis that a reasonable explanation has been provided for the bulk of the delay, and where it comes to the remainder of the delay, the considerations of the nature of the dispute, the clear prospects of success on review and considerations of prejudice justify that delay being overlooked.

[85] On the substance of the review, I am satisfied that the settlement agreement was unlawfully concluded, on the basis that Delegation 102 was not complied with, in that the Finance department of the DCS was not consulted prior to the conclusion of the agreement, as specifically prescribed by such delegation. There is a specific purpose for prior consultation with Finance, which means it simply cannot be ratified or remedied after the fact. Thus, the conclusion of the settlement agreement without such prior consultation is unlawful. I am also satisfied that considering the circumstances giving rise to seeking the mandate and then approving to settle, this was sought and approved on the basis of clearly wrong advice, and in an irrational and unreasonable manner, which equally violated the principle of legality. Without this wrong advice and unjustified basis in seeking settlement, the settlement agreement would not have been concluded. The settlement agreement thus falls to be reviewed and set aside.

[86] The consideration of prejudice equally favours the DCS. It will suffer continuous financial harm, whilst this matter remains undetermined. It is tantamount to being required continuously to incur irregular expenditure, which

must be prevented. Further, it is likely that the DCS will have difficulty in recovering what has been paid to the employees from them, considering the sums involved, and this risk cannot be allowed to perpetuate.

[87] But importantly in this case, the employees are not left without remedy or further recourse. They had pursued an unfair dismissal dispute to the GPSSBC, and the settlement agreement was concluded in the context of those proceedings. It must follow, in my view, that if the settlement agreement is set aside, the *status quo ante* must be restored, and the employees can then proceed to request the GPSSBC to reconvene the arbitration. If they are successful in that arbitration, they could still get full redress, which would include reinstatement. It is now trite that the Court have wide powers to grant any suitable consequential relief in the instance where a decision is set aside based on the principle of legality.[75] As opined in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[76]: '*… Under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity. …*'. Exercising that wide power in this instance leaves me compelled to direct, in addition to setting aside the settlement agreement, that the unfair dismissal dispute of the employees be remitted back to the GPSSBC for arbitration on the merits.

[88] All said, it is in the interest of justice and in accordance with the principle of legality that the settlement agreement be set aside, and the unfair dismissal dipsute of the employees be remitted back to the GPSSBC for arbitration on the merits.

[89] The DCS has asked for an order, in terms of a proposed draft order, that I direct that all payments made by the DCS to the employees to date 'stand over' pending the final determination of the unfair dismissal disputes. I see no need to make such an order. It is up to the DCS to take whatever means it considers prudent to recover the same, should it ultimately be successful.

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[75] *New Integrated Credit Solutions* (*supra*) at para 57; *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* 2023 (5) SA 601 (SCA) at para 9; *Johannesburg Social Housing Company Ltd v Quickprop Systems (Pty) Ltd and Others* 2025 JDR 3351 (GJ) at para 46.
[76] 2018 (2) SA 23 (CC) at para 53.

There is no need for this Court to become involved in this at this juncture. And if the DCS is not successful, then obviously what had already been paid by the DCS to the employees would be considered by the arbitrator when consequential relief is decided by him or her. This should be left up to the arbitrator to determine.

Costs

[90] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Whilst the DCS was successful, I do not believe that the POPCRU and the employees acted unreasonably in opposing the application, and they certainly at least had an arguable case. Further, what is at stake in this case is a self-review, where the DCS is asking this Court to assist with remedying its own failures. Succeeding in such a venture should not attract the benefit of a costs order in the circumstances of this case, where the employees were in reality fortunate bystanders. I also consider that there is obviously still some litigation between the parties to follow, and I do not believe it is fair to mulch any party with a costs order in such ongoing proceedings. Finally, I am guided by the judgment in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[77] where it comes to the issue of costs in employment disputes in this Court, making a costs order in this case inappropriate. Exercising the wide discretion I have, I believe that this is a case where no costs order would be appropriate and fair.

[91] For all the reasons as set out above in this judgment, I make the following order:

Order

1. The application is heard as one of urgency in terms of Rule 38.

2. The applicant's application in terms of section 158(1)(h) of the LRA is granted.

[77] (2018) 39 ILJ 523 (CC) at para 25. See also *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC) at para 35.

3. The settlement agreement concluded between the applicant and the first, second and third respondents, dated 27 March 2025, and concluded under the auspices of the fifth respondent under case numbers GPBC530/2024, GPBC554/2024; and GPBC555/2024, is set aside.

4. Consequentially, the arbitration award made in terms of section 142A(1) of the LRA by agreement between the applicant and the first, second and third respondents, whereby the settlement agreement referred to in paragraph 3 of this order was made an arbitration award under the auspices of the fifth respondent, is set aside.

5. The unfair dismissal disputes pursued by the first, second and third respondents under case numbers GPBC 530 / 2024, GPBC 554 / 2024 and GPBC 555 / 2024, are remitted to the fifth respondent for arbitration of such disputes on the merits thereof before an arbitrator appointed by the fifth respondent.

6. The fifth respondent is directed to enrol the unfair dismissal disputes of the first, second and third respondents for arbitration on an expedited basis.

7. There is no order as to costs.

SNYMAN AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate S Bismilla

Instructed by: The State Attorney (Pretoria)

For the First to

Fourth Respondents: Advocate J Basson

Instructed by: Ngada Attorneys Inc