

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

29/10/2025

DATE

E. Ndlovise

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: J190/23

In the matter between:

THE DIHLABENG LOCAL MUNICIPALITY

Applicant

and

MANGWAJANE MAVIS MOFOKENG

First Respondent

MAMAHLAPE CHRISTINE GALAWE

Second Respondent

TSHEPISO FLORINA RAMOSENA

Third Respondent

THABO LEHLOHONOLO DAVID MOTLOUNG

Fourth Respondent

HELENA WILLE

Fifth Respondent

THEMBA GODFREY CHOBOKOANE N.O.

Sixth Respondent

SALGBC

Seventh Respondent

IMATU

Eighth Respondent

Heard: 20 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down judgment is deemed to be 29 October 2025.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter comes before this Court as an application to declare paragraphs 5 and 6 of a compliance order issued by the regional secretary of the seventh respondent (SALGBC) on 17 February 2022 (the compliance order) to be a nullity. The application also seeks to declare the arbitration award, issued by the sixth respondent (the commissioner) on 12 July 2022 under case number C/FSD/11/21/03, a nullity to the extent that the award compels the applicant to comply with paragraphs 5 (as varied by the commissioner in paragraph 36 of the award) and 6 of the compliance order.
- [2] The applicant further seeks an order that the applicant's decisions to appoint the first to fifth respondents (collectively referred to as the individual respondents) and/or to renew their contracts after they expired, and the contracts of employment between the applicant and the respondents pursuant to such decisions, be unlawful, and that same be set aside. The applicant seeks that the declaration of invalidity operate prospectively and shall not have the effect of divesting the individual respondents from their entitlement to the remuneration that they received or are entitled to receive for services rendered.

Jurisdiction: the point in limine

- [3] At the outset, the eighth respondent (IMATU) raised a point *in limine* challenging the competence of the application. IMATU contends that the applicant is challenging a certified compliance arbitration award, which can only be challenged through review proceedings in terms of section 145 of the Labour Relations Act¹ (LRA). This jurisdictional objection requires consideration before addressing the substantive merits or procedural delays.

The competence question

- [4] Section 145 of the LRA provides a specific and comprehensive mechanism for challenging arbitration awards. The section requires that review applications be brought within six weeks of receiving the award and be grounded in established grounds of review, which are misconduct, gross irregularity, or exceeding of powers by the commissioner. The test for reviews is also one of reasonableness, i.e., whether the decision by the commissioner is one that another reasonable decision-maker could not reach.
- [5] Section 158(1)(a)(iii) of the LRA, by contrast, empowers the Labour Court to make “an order directing the performance of any particular which order, when implemented, will remedy a wrong and give effect to the primary objects of the Act”. Section 158(1)(a)(iv) empowers the Court to make a declaratory order. The applicant has not cited the section of the LRA on which the application is based. The Court will accept that the application is based on section 158(1)(a)(iii) and (iv), read together.
- [6] The provisions of section 158(1)(a)(iii) and (iv) are powers of a general nature and not a substitute for the specific review mechanism in section 145. The said sections are not an alternative vehicle for challenging the validity of certified arbitration awards where the prescribed review procedure remains available.

¹ Act 66 of 1995, as amended.

- [7] The Court, however, notes that the applicant has framed its relief extending beyond merely challenging the award. The applicant seeks a declaratory order that the compliance order is a nullity, that the decision(s) to appoint/renew the individual respondents' contracts are unlawful, and that the contracts of employment are unlawful. The relief sought goes to the lawfulness of the applicant's own decisions and not merely to the validity of the award. In principle, an organ of state retains the right to seek declaratory relief regarding the lawfulness of its own administrative action, even where that action has been the subject of an arbitration award.
- [8] The availability of seeking a review of the award in terms of section 145, however, still remains relevant to this application. Where a party has had the opportunity to utilise a specific statutory mechanism for challenging an award and has failed to do so within the prescribed timeframe, this Court should be slow to permit the same challenge to proceed under a general power in terms of section 158 of the LRA. This is so, as it reflects the principle that parties must respect the statutory framework established by Parliament and the procedural safeguards (such as time limits and specified grounds) that protect finality of awards.
- [9] The Court notes that the applicant was afforded an opportunity to respond to the compliance order, which they failed to do. If the applicant wanted to challenge the lawfulness of the compliance order, they could have done so. However, they appear to have simply ignored the compliance order. Insofar as the applicant may have believed that clause 18.1 of the collective agreement, properly interpreted, means that the right to be appointed on a permanent basis is accorded only to those employees who have been recruited and selected in accordance with the applicable statutory and regulatory matrix and who are appointed to an identifiable position in terms of the applicant's staff establishment, the applicant could have referred a dispute in terms of the dispute resolution clause contained in the collective agreement. They failed to do so and, as stated, disregarded the compliance order.

- [10] The applicant, during the arbitration proceedings, did raise the defence that the correct interpretation of clause 18.1 is that an appointment that does not fall within sections 54 and 56 of the Local Government: Municipal Systems Act², like Labour Relations Officer and other positions are permanent by their very nature, and their clearly stated presence in the municipal structure (organogram) of the applicant. The defence raised further was that the first to fourth respondents were employed on a Graduate Development Programme and not on a learner contract of employment. In respect of the fifth respondent, the applicant's defence was that she was not appointed under the Graduated Development Programme and that her contract was not specific to the position she was appointed for. It was, however, conceded that she was appointed in the Water Department and had been performing duties as an Admin Officer.
- [11] The applicant had six weeks from 12 July 2022 to bring a review application in terms of section 145. That period expired on 23 August 2022. The applicant brought this application on 15 May 2023, some nine months later. By the time this application was brought, the window for a section 145 review was conclusively closed.
- [12] The applicant's explanation for not pursuing a section 145 review is not clearly articulated. Instead, the applicant has chosen to frame this as an application for declaratory relief regarding its own decisions and added thereto the allegation that the compliance order and the arbitration award are nullities. Such relief is available in principle, but the procedural delay in bringing this application impacts the Court's decision whether to entertain an application for declaratory relief.
- [13] As such, the point *in limine* is not upheld as a complete bar to this Court's jurisdiction. It, however, remains highly relevant to the subsequent analysis of the delay and reasonableness as it demonstrates the applicant's deliberate, or at the very least the applicant's unjustified circumvention of the statutory framework

² Act 32 of 2000.

designed to regulate challenges to arbitration awards within the required, prescribed time period.

Delay in approaching the Labour Court

- [14] The applicant addresses the delay in the founding affidavit as follows. On 17 August 2022, Mr Busa Molatseli (Molatseli) instructed attorneys to obtain counsel's opinion on the enforceability of the award. Counsel advised that, as an organ of state, the applicant was under a constitutional duty to investigate any potential unlawfulness and to correct it through appropriate avenues.
- [15] Upon this advice, Molatseli instructed the attorneys to proceed. A draft application was sent to the applicant on 30 November 2022, and the applicant was required to provide instructions on several issues, including an explanation for why these matters had not been investigated earlier.
- [16] Molatseli's term of office ended on 31 October 2022. At that point, the applicant had not provided instructions on the delay. The deponent to the founding affidavit, Kadimo Masekoane (Masekoane), was appointed as acting municipal manager on 25 November 2022. When this matter came to his attention, he arranged a meeting with the attorneys and counsel on 23 January 2023.
- [17] Masekoane could not provide a detailed explanation for the delay, as his appointment came years after the events in question. He explained that the respondents were brought into the applicant's employ during the tenure of the previous municipal manager, Mr Thabiso Tsoaeli (Tsoaeli), who signed the employment contracts and their extensions. Tsoaeli passed away in approximately 2020. Molatseli inherited this unresolved matter on taking office, but did not investigate it with urgency.

Reasonable time requirement

- [18] The applicant submits that, even if there is no fully satisfactory explanation for the delay, the Court's discretion must nevertheless be exercised to overlook the delay

in the interests of justice. This submission requires the Court to apply the established principles governing applications brought outside prescribed or reasonable timeframes.

Legal Principles on Delay

- [19] South African administrative and procedural law recognises that applications to the Courts are subject to a principle of reasonableness regarding temporal proximity to the events in question. While the LRA prescribes specific timeframes for certain applications (such as the six-week window for section 145 reviews), the LRA does not expressly prescribe a timeframe for applications under section 158(1)(a)(iii) and (iv).
- [20] In the absence of an express statutory timeframe, the common law principle applies that such applications must be brought within a reasonable time. This principle is rooted in the need for finality, the prevention of prejudice through delayed litigation, and respect for the temporal architecture of the statutory dispute resolution framework.
- [21] In *Associated Institutions Pension Fund v Van Zyl and Others*³, the Supreme Court of Appeal held as follows:

'Since PAJA only came into operation on 30 November 2000 the limitation of 180 days in s 7(1) does not apply to these proceedings. The validity of the defence of unreasonable delay must therefore be considered with reference to common-law principles. It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would "validate" the invalid administrative action... The *raison d'être* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the

³ 2005 (2) SA 302; [2004] 4 All SA 133 (SCA) at paras 46, 47 and 48.

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

The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the *Wolgroeiens* case and *Setsokeane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

- (a) Was there an unreasonable delay?
- (b) If so, should the delay in all the circumstances be condoned?

(See *Wolgroeiens* at 39C-D.)

The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case... The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned...'

[22] The High Court in *Enoch Mgijima Local Municipality and Another v Dingani and Another*, In re: *Enoch Mgijima Local Municipality and Another v Dayi*; In re: *Enoch Mgijima Local Municipality and Another v Siquhaza*⁴ held as follows:

'[111] The legal position on delay has been explained a number of times by our courts. Relevantly for this matter in light of its peculiar facts, the Constitutional Court had this to say in *Gijima Holdings*:

"*Khumalo* also says that courts have a 'discretion to overlook a delay'. Here is what we said:

⁴ [2020] ZAECHGHC 42; [2020] 3 All SA 135 (ECG) at paras 111 and 112.

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

Tasima explained that this discretion should not be exercised lightly:

'While a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.' ...

From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter.'

[23] In *Weltevrede Kwakery (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*⁵ (*Weltevrede*) the Labour Court held as follows regarding what time frame would be regarded as "within a reasonable time":

'[4] The applicant submits that no application for condonation is required and the review was launched within a reasonable time. It was pointed out to Mr Kantor, for the applicant, that prior to the 2002 amendment of the LRA, the case law had equated the standard of a reasonable period for delivering an application for review in terms of s 158(1)(g) to the same standard as set for the review of arbitration awards in terms of s 145 of the LRA, ie six

⁵ (2006) 27 ILJ 182 (LC); [2006] 7 BLLR 706 (LC) at paras 4-6.

weeks (*Rustenberg Platinum Mines Ltd v Monnapula & others* [2003] 9 BLLR 909 LC at para 34 page 914; *Ruijgrok v Foschini (Pty) Ltd & another* (1999) 20 ILJ 1284 LC at 1287-8 paras 16-22).

[5] The 2002 amendment to s 158(1)(g) gave effect to the practice that had been established through the case law. Mr Kantor persisted that the reference to "subject to section 145" in s 158(1)(g) was to the grounds of review and not the time-limit. I disagree. There is nothing in the wording of s 158(1)(g) that lends itself to such a qualification.

[6] The review should have been launched within six weeks from 17 August 2004. It was launched more than five months later. That is not within a reasonable time, even on the applicant's version. The applicant was aware of and could have acquainted itself of all the information relevant for this application when it received the condonation ruling. There is, therefore, no reasonable explanation that can be distilled from the pleadings for such a long period of delay.

[24] The Labour Court in *SACCAWU obo Manzana & others v Pick 'n Pay, Kimberley & others*⁶ (*SACCAWU*) also held a reasonable time to be about six weeks. In *POPCRU obo Timla v Nozigwaba and Others*⁷ the Court held as follows:

'No time period is set by the LRA within which applications in terms of section 158(1)(g) must be lodged but decisions such as *SACCAWU obo Manzana and Others v Pick 'n Pay, Kimberley and Others* and *Weltevrede Kwekery (Pty) Ltd v CCMA and Others* state that such an application should be launched with a reasonable time and that the six week time period set for applications in terms of section 145 constitutes a guideline in this regard.' (footnotes omitted)

[25] The Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*⁸ referred to the judgments of the Labour Court in *Weltevrede* and *SACCAWU*, stating that in some instances, in the context

⁶ [2003] 10 BLLR 1065 (LC); [2003] JOL 11394 at paras 14-5.

⁷ [2015] ZALCJHB 37, case no: JR773/2014 heard on 18 December 2014 and judgment delivered on 13 February 2015 at para 5.

⁸ [2013] ZACC 49; (2014) 35 ILJ 613 (CC) at para 42 and fn 26.

of the LRA, the Courts have held a reasonable time to be about six weeks. The Court, however, went further and held as follows:

[43] Previously, section 39 of the PSA stipulated a 12-month prescription period in which a claimant could bring an action against the state for any act or omission made in terms of the Act. The time limit was subsequently repealed by section 2(1) of the Institution of Legal Proceedings Against Certain Organs of State Act (Repealing Act). At all relevant times, the PSA thus prescribed no time limits for reviews of conduct in terms of the Act.

[44] But what do we make of the Legislature's decision to remove these time limits? Does this mean that litigants are not constrained by any requirement to act timeously? In my view, the Legislature's decision to remove the 12-month prescription period opens the actions of public functionaries in terms of the PSA to ongoing scrutiny and transparency. Bearing in mind the purpose of the Repealing Act, the repeal of section 39 allows that an applicant cannot automatically be non-suited on the basis of a delay. Nevertheless, it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.

[45] In the previous section it was explained that 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 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.

[46] 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.

[47] This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

[48] In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.' (footnotes omitted)

[26] Based on the aforesaid, this Court is of the view that the six-week time period set for applications in terms of section 145 constitutes a guideline in determining whether the application was brought in a reasonable time with flexibility based on the circumstances of each case.

[27] It is therefore clear that there is a dual enquiry into the delay of a party to bring an application in terms of section 158(1)(a)(iii) or (iv) of the LRA. As to what is reasonable entails a factual enquiry upon which a value judgment is made to the

relevant circumstances, including any explanation given for the delay.⁹ The Court exercises a judicial discretion in deciding whether an unreasonable delay should be condoned. In doing so, the Court must consider the relevant circumstances, including any explanation, but also the two reasons for the 'delay rule' viz. the prejudice caused to the other party, and the public interest in achieving finality and certainty regarding the making of administrative decisions and the performance of administrative functions.¹⁰

[28] The assessment of 'reasonableness' requires a holistic consideration of

28.1. The length and degree of delay.

28.2. The explanation offered for the delay.

28.3. Prejudice to the respondents.

28.4. The prospects of success on the merits.

28.5. The broader interests of justice, including the need for finality and respect for concluded legal proceedings.

No single factor is determinative; rather, the Court must weigh them together.

[29] The above principles must be applied to the matter at hand, as set out in the paragraphs that follow.

Length and Degree of Delay

[30] The compliance order was issued on 17 February 2022. The arbitration award was issued on 12 July 2022. The present application was brought on approximately 15 May 2023, resulting in the following delays:

⁹ Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* (Juta, 3 ed, reprinted 2022) at 721. See, too, *Setsokeane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A) at 75C-E; [1985] ZASCA 121; and, more recently, *Madikizela-Mandela v Executors, Estate Late Mandela and others* 2018 (4) SA 86 (SCA); [2018] 1 All SA 669 (SCA) at para 10.

¹⁰ *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 (SCA) at 612E-613A.

30.1 From the compliance order to the application: approximately 15 months.

30.2 From the arbitration award to the application: approximately 10 months.

30.3 From the six-week review deadline (23 August 2022) to the application: approximately 8.5 months.

[31] The critical temporal marker is 23 August 2022—the deadline for a section 145 review. The applicant allowed this deadline to pass without initiating either a review application or the current application. It only brought the present application nearly nine months after that deadline had expired.

[32] In the context of labour disputes, where the LRA prioritises expedited resolution, a delay of nearly nine months beyond the prescribed review window is objectively substantial. This equally applies to the present application using the prescribed six-week period as a guideline regarding ‘in a reasonable time’. The LRA’s timeframes (six weeks for reviews, 30 days for unfair dismissal referrals, 90 days for unfair labour practice referrals) reflect Parliament’s clear intent that labour disputes be resolved speedily. A delay that is nearly nine months after expiry of the prescribed review period cannot easily be characterised as falling within any expansive conception of ‘reasonable time’.

Quality of Explanation

[33] The applicant’s explanation for the delay is multifaceted but ultimately insufficient even on the applicant’s own version. First, the applicant asserts a constitutional duty to investigate and correct unlawfulness. While section 7(2) and section 195 of the Constitution impose such duties on organs of state, these constitutional imperatives do not suspend or displace the statutory timeframes established by the LRA. An organ of state is no less bound by procedural rules than other litigants, and cannot invoke constitutional duties to justify non-compliance with express statutory deadlines, or the requirement that action must be brought within a reasonable period.

- [34] Second, the applicant relies on administrative transition—the death of the previous municipal manager, the change in administration, and the need for the new municipal manager to get up to speed. These are real practical difficulties, but they are not extraordinary circumstances. Public administration regularly involves transitions in personnel and responsibility. The fact that the matter ‘came to the attention’ of the new acting municipal manager sometime after his appointment on 25 November 2022 and before 23 January 2023 (the date he met with the attorney and counsel), suggests administrative failures rather than a genuine impediment.
- [35] Third, the applicant sought counsel's opinion within six weeks of the date of the award (on or about 17 August 2022), which shows some diligence at that stage. However, the applicant then failed to act on the advice received promptly. The period from 17 August 2022 to 15 May 2023 (nearly nine months) saw minimal discernible progress. A draft of this application was sent on 30 November 2022, requiring instructions. Even accounting for the change in municipal manager on 25 November 2022, the meeting with counsel was not held until 23 January 2023—two months after the new acting municipal manager's appointment. The application was filed in May 2023, another four months later.
- [36] The explanation is thus one of administrative inertia rather than a genuine impediment. The applicant cannot point to legal difficulty, a factual investigation that required time for the full period of the delay, or events beyond its control. Instead, the picture is one of a matter not being treated as urgent, with responsibility shifting between office-bearers and legal advisors without coordinated action.
- [37] The Court also notes that the declaratory order sought regarding the appointment of the individual respondents, the renewals, and the actual contracts of employment go back as far as 2012 up to around 2017, with there being no acceptable reasons advanced why an application was not made years ago.

Available Alternative Procedures

- [38] The applicant failed to utilise several avenues available to it. First, the applicant did not bring a section 145 review within the six-week period. This was the express statutory mechanism designed for precisely this situation.
- [39] Second, clause 22 of section F of the collective agreement provides a dispute resolution procedure for disputes regarding the interpretation or application of the collective agreement. The applicant did not invoke this procedure. Instead, the applicant simply refused to respond to the compliance order and allowed the matter to proceed to arbitration, where the award was issued against it.
- [40] Third, the applicant could have approached the SALGBC seeking exemption from or modification of clause 18.1 of the collective agreement if it genuinely believed that clause to be unlawful or inapplicable. There is no evidence of such an approach.
- [41] The availability of these alternatives demonstrates that the present application is not the only avenue through which the applicant could have addressed its concerns. By bypassing the prescribed procedures, the applicant has created the very delay it now asks the Court to overlook.

Prejudice to the Individual Respondents

- [42] By the time this application was brought (May 2023), the individual respondents had been employed by the applicant for periods ranging from 7 to 13 years. The compliance order was issued in February 2022, and the arbitration award in July 2022. The respondents received their salaries throughout this period and continue to render services.
- [43] The applicant seeks a declaratory order that the appointments are unlawful and that such declaration operates prospectively, so that the individual respondents are not divested of past remuneration. This, according to the applicant, minimises the financial prejudice to the individual respondents. However, prejudice extends

beyond financial loss. The individual respondents have been denied certainty regarding their employment status for an extended period. In fact, the use of the respondents on continuous fixed-term contracts constitutes an abuse over many years. Allowing the applicant to raise this challenge of unlawfulness after such delays compounds this prejudice. The respondents obtained finality regarding their employment when the arbitration award was issued, and to now allow this application will severely prejudice the respondents.

Prospects of Success on the Merits

[44] The applicant's prospects of success on the merits appear, on examination, to be limited. The applicant contends that the appointments, the contract renewals and the contracts are unlawful. However, examining the factual matrix, the following is evident:

44.1. The first to fourth respondents were appointed pursuant to published advertisements and in accordance with the applicant's stated programmes (Graduate Development Programme, Learner Development Programme, and, in respect to the fifth respondent, in a temporary administrative position).

44.2. The individual respondents' contracts were expressly fixed-term contracts. These contracts were lawfully concluded under the LRA, subject to compliance with section 198B (which prohibits abuse of successive fixed-term contracts).

44.3. The individual respondents' contracts were continuously extended or renewed by abusing fixed-term contracts. This is not a situation where the applicant appointed them permanently without justification, but rather where the applicant persistently renewed and abused fixed-term arrangements for its own operational reasons.

[45] The applicant's argument is that the positions were not of those envisaged by clause 18.1 of the collective agreement, i.e., 'by their very nature permanent

positions'. This contention is made on the basis that clause 18.1, properly interpreted, excludes positions that do not feature on the staff establishment. Yet, the applicant at no stage referred to a dispute regarding the interpretation and/or application of this provision in the collective agreement. This Court has serious doubts whether such an interpretation, properly interpreted, would be in line with the applicant's interpretation. The applicant's prospects of success on this interpretation question are highly contestable and depend on factual findings about the nature of the posts and the intent of clause 18.1. However, this interpretation question is precisely the type of matter the collective agreement's own dispute resolution procedures were designed to address. By bypassing clause 22 [section F], the applicant has also bypassed the prescribed process established to resolve this very question.

The Context of Abuse

- [46] Against this lies a troubling factual context. The applicant has permitted the individual respondents to work on successive month-to-month or short-term fixed contracts for some 8 to 15 years. Some of the individual respondents have completed their training (obtaining National Diplomas, trade tests, and professional qualifications). They now work, for all intents and purposes, as permanent members of staff, i.e., electricians and an administrative officer performing regular functions to the benefit of the applicant.
- [47] This arrangement is clearly in breach of section 198B of the LRA. Section 198B (3) permits fixed-term contracts of longer than three months only if *"the nature of the work for which the employee is employed is of a limited or definite duration"* or the employer can demonstrate *"any other justifiable reason"*. When an employee has been in a position for over a decade, completing qualifications and performing regular duties, neither condition is satisfied.
- [48] The applicant's predicament is of its own making. Having engaged in this prolonged abuse, the applicant now seeks a Court declaration that its abuse of fixed-term contracts was unlawful and that the individual respondents' claims to

permanent employment (whether through section 198B deeming or through clause 18.1) should be rejected.

- [49] This context affects the Court's assessment of the 'interests of justice'. While the interests of justice in appropriate and deserving matters favour allowing delayed applications to proceed, it cannot favour declaring years of abuse to now, years later, to be unlawful and as such causing the individual respondents to lose their employment.

Interests of Justice

- [50] Having established that the delay is substantial and inadequately explained, the Court must consider whether, nonetheless, the interests of justice favour hearing the application. The applicant submits that public law duties, accountability, and transparency require that the Court investigate the lawfulness of the applicant's decisions. The applicant invokes section 7(2) of the Constitution (duty to respect, promote, and fulfil rights), section 195 of the Constitution (values of accountability and transparency in public administration), and section 172(1)(a) of the Constitution (the Court's power to declare conduct invalid if inconsistent with the Constitution).
- [51] These are weighty considerations. Organs of state are indeed bound by the Constitution and by law. Where an organ of state believes it has acted unlawfully, there is merit in permitting it an opportunity to seek correction through the courts. However, these constitutional imperatives do not override the statutory framework of the LRA and the requirement of seeking relief within a reasonable period. If they did, the specific timeframes in the LRA—six weeks for reviews, 30 days for dismissal referrals, 90 days for unfair labour practice referrals—would become advisory rather than binding. This cannot be correct.
- [52] Section 210 of the LRA provides that where there is a conflict between the LRA and other law (save the Constitution), the LRA prevails. This reflects Parliament's intent that labour law shall not be subordinated to other statutory regimes. But

section 210 does not authorise the Courts to override the LRA's own timeframes unless same is contrary to the constitutional principles.

[53] Moreover, the applicant had alternative remedies at its disposal. The applicant could have sought condonation for late review under section 145. The applicant could have engaged the collective agreement's dispute procedures. The applicant could have sought declaratory relief within a reasonable timeframe shortly after receiving the award. None of these avenues were pursued.

[54] The interests of justice encompass multiple considerations:

54.1. The interest in permitting public bodies to correct genuine unlawfulness.

54.2. The interest in finality and respect for concluded proceedings.

54.3. The interest in protecting respondents from prolonged uncertainty and prejudicial delay.

54.4. The interest in maintaining the temporal integrity of the LRA's prescribed framework.

54.5. The interest in preventing abuse of the courts' discretion by parties who ignored statutory procedures.

[55] Weighing these interests holistically, they do not favour permitting this application to proceed. While the applicant's concern regarding potential unlawfulness is not frivolous, the applicant's failure to act timeously, combined with the availability of alternative procedures, means that permitting this application would effectively allow disregard for the statutory framework.

[56] Furthermore, the applicant has not offered evidence that it could not have investigated these matters with greater urgency. The advice from counsel (sought within six weeks) established the legal framework for analysis. The administrative

transition, while real, does not explain a nine-month delay after the legal position had been clarified.

The statutory framework and section 198B

[57] Although the application is dismissed on procedural grounds, it is appropriate to note that the substantive legal framework already accommodates the applicant's concerns regarding the abuse of fixed-term contracts. Section 198B of the LRA provides that employment in terms of a fixed-term contract concluded or renewed in breach of section 198B (3) is "*deemed to be of indefinite duration*". The individual respondents' employment is therefore already deemed to be of indefinite duration as a matter of law.

[58] The applicant cannot use the Courts to circumvent section 198B by obtaining a declaration that the respondents' employment was unlawful when, on the facts, section 198B of the LRA deems it otherwise.

Collective Agreement and Clause 18.1

[59] The applicant also contends that clause 18.1 of the collective agreement, which requires permanent appointment to permanent positions, was itself unlawful or inapplicable. Clause 18.1 reads:

'All appointments into positions that are by their very nature permanent positions below Sections 54A and 56 shall be on a permanent basis except for the positions that are linked to the term of office of the political office bearers, sections 54A and 56 managers.'

[60] This clause is unambiguous. It reflects a settled agreement between SALGA (the employer organisation to which the applicant belongs), SAMWU, and IMATU. The applicant does not contend that it did not agree to this clause or that it is unconstitutional. The applicant's position appears to be that the individual respondents' positions are not "*by their very nature permanent positions*" and therefore clause 18.1 does not apply. This is a question of interpretation, not of

legality. It is precisely the type of dispute that clause 22 (section F) of the collective agreement's dispute resolution procedure was designed to address.

- [61] Had the applicant invoked clause 22, a neutral dispute resolution body would have interpreted clause 18.1 and assessed whether the individual respondents' positions fell within its scope. The applicant chose not to do so. This was another procedural avenue that the applicant abandoned in favour of the delayed application now before this Court.

Conclusion

- [62] For the reasons set out above, the application cannot proceed. The delay in approaching this Court is substantial, the explanation is inadequate, and the interests of justice do not favour hearing the merits of the application. This Court cannot permit an applicant to ignore prescribed procedures and to seek relief by a much belated application for a declaratory order.

- [63] The Court recognises that the applicant has engaged in a prolonged pattern of employing respondents on successive fixed-term contracts spanning 8 to 15 years. This pattern is troubling and likely in breach of section 198B. The applicant's failure to seek a review of the arbitration award within the prescribed timeframe means the award is now final and binding. The applicant is therefore obliged to comply with the award by ensuring that the necessary approval or endorsement is obtained from the council, and the staff establishment is updated to make provision for the permanent posts of the respondents.

Costs

- [64] In terms of the provisions of section 162(1) of the LRA, this court has wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal & others*¹¹ when it comes to the issue of costs in employment disputes.

¹¹ (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC).

[65] Although this application has been unsuccessful, the Court notes that the respondents were represented by an official from IMATU, which militates against a costs award. It is therefore not necessary for this Court to consider the issue of costs any further.

[66] In the premises, the following order is made:

Order

1. The application is dismissed.
2. The dismissal is on the ground that the application was not brought within a reasonable time, and the interests of justice do not favour it being heard.
3. The applicant is ordered to comply with the arbitration award within 30 days from the date of this judgment.
4. No order is made as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: LA Roux

Instructed by: Lessing & Co Attorneys Inc.

For the First to Fifth Respondents: S Windvogel from IMATU

LABOUR COURT