REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11645/2021

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

12 April 2022 **ROLAND SUTHERLAND DJP**

In the matter between**:-**

TRANSNET SOC LTD **1ST APPLICANT**

SPECIAL INVESTIGATING UNIT **2ND APPLICANT**

And

CRRC E-LOCO SUPPLY (PTY) LTD (FORMERLY CSR E-LOCO SUPPLY (PTY) LTD) **1ST RESPONDENT**

BOMBARDIER TRANSPORTATION SOUTH AFRICA (PTY) LTD **2ND RESPONDENT**

CRRC SA ROLLING STOCK (PTY) LTD (FORMERLY CNR ROLLING STOCK SOUTH AFRICA (PTY) LTD) **3RD RESPONDENT**

WABTEC SOUTH AFRICA TECHNOLOGIES (PTY) LTD (FORMERLY GENERAL ELECTRIC SOUTH AFRICA TECHNOLOGIES (PTY) LTD) **4TH RESPONDENT**

This judgment was handed down by being downloaded to caselines and by email transmission to the parties. the deemed date and time if delivery is 10h00 on 11 April 2022.

JUDGMENTH

HEADNOTE
Rule 30 application.
The applicant launched a self-review application under the principle of legality seven years after the transaction – one of the respondents, CRRC, instead of filing an answer or a rule 6(5)(d) notice, brought a substantive application to dismiss the review on the sole ground of delay – the applicant then brought a rule 30 application to dismiss that (Delay) application
Held:
The rules of court did not permit a party to evade entering into the 'main case' by a risk-free ancillary application
The Gauteng Commercial Court Rules, which were designed to achieve efficiency in litigation, inter alia, by way of the intervention during the preparation stage by a judge case-managing the matter and thereby impose procedures at variance with the uniform rules of court, could not be interpreted to include a power being vested in that judge to unilaterally invent or sanction a process that contradicted the rights of the parties.
The 'delay' issue was in any event not a discrete issue that was separable from a consideration of the 'merits' of the review and from the discretionary power of a court when having declared a tender process unlawful to nevertheless decide what might be a just and equitable order in which the reason for the delay and the nature of the irregularity was to be weighed.
The rule 30 application was granted.

SUTHERLAND DJP:

Introduction

[1] Three related applications are implicated in this matter.

[2] First, the applicant (Transnet) instituted self-review proceedings to have certain tenders, and the consequent contracts with several respondents (the contractors), declared unlawful and to be set aside. (The review application) The chief grounds relied on are irregularities allegedly perpetrated by servants of Transnet in the tender and contracting process by way of skewing the process to deliberately favour the contractors. The relief sought includes a disgorging of

profits by the contractors and related relief. The contractors, understandably, oppose this relief.

[3] Second, the first respondent–contractor, CRRC-Loco Supply (Pty) Ltd (CCRC), thereupon brought a separate substantive application for a final order dismissing the review application. It did so without entering into the review application by either filing an answering affidavit or a Rule 6(5)(d) notice.[1] The rationale expressed by CRRC is that the review can be disposed of by addressing the allegedly discrete issue of the long delay in bringing the review application. (The Delay application)

[4] Third, the matter immediately before the court is a Rule 30 application (the Rule 30 application) brought by Transnet, to pray for the dismissal of the Delay application on the grounds that it is an irregular step.[2]

The principal issues

[5] The merits *per se* of the review application are irrelevant for present purposes. What is critical to the present application is that the review application has been brought under the principle of legality, as post-*Gijima*, [3] it had to be, and not under the Promotion of Administrative Justice Act 1 of 2000 (PAJA). Therefore, no express statutory time period

[1] Rule 6 (5) (d):

> 'Any person opposing the grant of an order sought in the notice of motion must —
> (i) within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application, …;
> (ii) within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents; and
> (iii) if he or she intends to raise any question of law only he or she must deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.'

[2] Rule 30:

> '(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
> (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged…
> (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
> (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.'

[3] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) para [37] – [38]*

exists within which to bring the review, as would have been the case under PAJA. The alleged irregularities occurred about seven years before the application was launched. This long elapse of time is the trigger for the present controversy.

[6] The founding affidavit of Transnet is voluminous. The record of decision was called for and a record has been provided which has not yet ceased to be a source of controversy in itself. However, the debate on the adequacy of the record may be ignored for present purposes. No answering affidavits have yet been filed by any of the contractors. The contractors, other than CRRC have not participated in the Delay application and are not implicated in the Rule 30 application, but plainly they would also benefit from the Delay application succeeding.

[7] There is no quarrel from Transnet with the contractors resisting the review on grounds of delay and it stands ready to meet such a case, if raised. However, Transnet contends that the question of delay cannot be addressed as a discrete issue divorced from a consideration of the merits of the review. On that premise, it is contended that it is improper to endeavour to have the delay issue dealt with before the contractors have entered into the main case, ie the review application. It is contended by Transnet that a substantive application to quash the review is an irregular step and that the contractors must elect to either file an answering affidavit or file a Rule 6(5)(d) notice raising delay as their sole ground of defence.

[8] CRRC is open and forthright about its conscious desire to avoid entering into the main case. The stance taken by it is eminently understandable. It deserves a fair exposition. Seven years after the event, Transnet announced that it had acted unlawfully and seeks a review. Transnet, thereby, has destabilised the comfort of the contractors who, long ago, as they understand matters, delivered in terms of their obligations. There is at least a risk, if not a probability, that the delay point will be the defining issue in the review application. Therefore, the question posed is whether the contractors must, in the light of that factor, invest money and effort on a grand scale to meet the voluminous application by Transnet to self-review, on the supposed merits? Should ultimately, the delay point triumph, it is contended, a waste of resources would have ensued. Thus, runs the argument, it is sensible to

try the delay issue now, separately, which approach might spare much court-time and private resources.

[9] The idea of sparing time and resources by discretely addressing a single issue that can dispose of a case is not alien to our legal tradition; Rule 33(4), used in actions, is the clearest expression of that policy choice.[4] Of course, an issue that would be suitable for a Rule 33(4) separation is an issue which is truly discrete and is capable of disposing of the whole case. No less important, the deliberation on a genuinely discrete issue must be a 'convenient' way of litigating the case, a factor requiring a fact-specific assessment of the given case in the context of its own circumstances.

[10] It is acknowledged on behalf of CCRC that the Delay application is a novel proceeding but is nevertheless, so it is argued, justified by its practical utility. From that premise, an argument was advanced about the peculiar opportunities for pragmaticism which can or ought to flow from the special features of the Commercial Court system which operates within the Gauteng Division of the High Court, which apply to this case.[5] This consideration, so runs the argument, can be linked to section 173 of the Constitution and the High Court's inherent jurisdiction to regulate its own processes.[6] The Delay application, so it is argued, is

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[4] Rule 33(4):
'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

[5] In terms of a directive by the Judge President, special rules for commercial cases have been issued aimed at offering litigants a speedier, less cumbersome and more efficient procedure to litigate commercial disputes, than is offered by the Uniform Rules of Court. It contemplates a significant deviation from the Rules of court, especially by abolishing conventional discovery and substituting a focused bundle of essential documents and by requiring all evidence in chief to be adduced on affidavit. The matter is also subjected to close management by a judge assigned to oversee the preparation and hear the matter. Among the chief valued-added attributes is that the case managing judge hears all interlocutory disputes informally or formally which reduces delays which might occur in waiting for one's turn on the ordinary roll. The system also applies to applications where the case management role of the judge is the key attribute on the premise that such supervision can move the case along speedily. A case is certified a commercial matter upon request by one or both parties. In this case all the parties have agreed to subject themselves to the Commercial Court rules. (See: Full text of the Directive in *Erasmus, Superior Court Practice, H5*.)

[6] Section 173 of the Constitution:
'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

an appropriate expression of what the Commercial Court system envisages can be accomplished in the interests of efficient litigation.

[11] Notwithstanding these commendable considerations about savings of time and money and effort, they cannot find application in a vacuum. In this case, the defining context must be the law about self-review. Herein lies the terrain of the key arguments advanced in the debate. More particularly, it is apparent that the application of any novel procedure must be adapted to the attributes, and indeed, the strictures, that are inherent in the dynamics of a self-review application under the principle of legality and the jurisprudence that has grown up to give substance to that species of litigation.

[12] There are two notable features of that jurisprudence which form the bedrock of review under the principle of legality. These features permeate the debate in this matter; they are addressed more fully hereafter, but bear emphasis at the outset of the analysis. First, a court has no option but to declare what is unlawful as unlawful. Buried in that injunction is an implied strait-jacket; a court *mus*t examine the allegations of irregularities, come what may. An examination of the merits does not necessarily imply what *order* might or could follow. Second, notwithstanding a declaration of unlawfulness, in a given case, the appropriate relief must be 'just and equitable'.[7] This disarming and charming rubric holds within it a far more complex dynamic than the label suggests, for it can result in no consequent relief, at all, being granted, upon a declaration of unlawfulness.

[13] Accordingly, what is called for is an examination of the following questions:

13.1. What is the role of the delay defence in self-review applications and how, and when, can it be raised?

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[7] Section 172(1) of the Constitution:

> Powers of courts in constitutional matters
> When deciding a constitutional matter within its power, a court-
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including-
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

See too: *Asla, op cit, paras [67] and [71]*

13.2. What latitude, if any, does a court have to vary established procedure under the rules of court to advance the cause of efficient litigation, and, upon what juridical foundation can such power exist?

The Delay Defence in self-review

[14] The appropriate starting point is to acknowledge the constitutional *grundnorm* that the Rule of Law is supreme. Upon that foundation rests the Principle of Legality. That principle finds its most potent expression in the maxim that every exercise of a public power must be authorised by law. Any purported exercise of a public power that fails that test is unlawful.[8]

[15] Transnet is an organ of state. Its actions are, generally, exercises of public power, including the awarding of tenders. Its relationship with the contractors is based on the decision to award tenders to them. When Transnet realised that the tenders, on its version of the events, were suspect, it was obliged, at least by section 237 of the Constitution, to assess whether there had been a violation of the law by its employees and agents, and having reached that conclusion, was under a duty to put matters right.[9] The sole modality for doing so was an application for self-review.

[16] The issue of an undue delay in a review under the principle of legality was addressed in *Gijima* thus:

> '[43] Relying on s 237 of the Constitution, Skweyiya J held in *Khumalo*:
>
> 'Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.
>
> This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

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[8] *Pharmaceutical Manufacturers Association of SA and Another: In Re ex Parte President of the RSA and Others 2000 (2) SA 674 (CC) at para 17; Affordable Medicines Trust and Others v Minister of Health 2006 (3) SA 347 (CC) at para [49].*

[9] Section 237 of the Constitution: 'All constitutional obligations must be performed diligently and without delay.'

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. . . . 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.]

[44] The reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality: time is of utmost importance. In *Merafong* Cameron J said:

'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'

[45] ….

[46] ….

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

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

[48] *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.' [Footnotes omitted.]

[49] 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 a basis for us to

do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors…..

[50] Sita argued that, in a reactive challenge, the question of 'unwarranted delay' does not arise due to the fact that the challenge is raised as a defence to the relief which is sought in the main proceedings. Cameron J puts paid to this in *Kirland*. That judgment — not purporting to decide the PAJA/principle of legality controversy — held:

'PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government.

On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.' [Footnotes omitted.]'

[17] After the decision in *Gijima*, the Constitutional Court decided *Bufflalo City* v *Asla Construction.*[10] That case dissected the approach about how to deal with an undue delay issue in self-review applications. In paras [48] – [72], the Constitutional Court described four principles.[11] As I understand the Constitutional Court, the law on the correct approach to a Delay defence in a self-review case can be succinctly summarised thus:

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[10] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC).*

[11] In *Asla* four principles were described in paras [48] – [72]

(1) There is a difference in assessing a case under PAJA and under the principle of legality; this applies to procedure and in a legality review the court has a broader discretion about delay than court has about condonation in a PAJA review.

(2) The reasonableness of the delay must be assessed on the basis of the explanation offered. This is a fact - specific enquiry married to a value judgment as to whether it can be inferred that the delay is 'undue'.

(3) Whether the delay can be overlooked; there must be a factual basis for such a conclusion. This is a flexible enquiry weighing several factors:

   a. the potential prejudice to affected parties,
   b. the nature of the impugned decision; ie 'a consideration of the merits of the legal challenge against the decision
   c. the conduct of the applicant; eg was it bona fide.

(4) Even where delay has indeed been unreasonable – the court may be required by section 172(1)(a) of the Constitution to declare the impugned decision unlawful where its deficiencies are 'clear and undisputed'.

[17.1] it is improper to deal with delay before giving attention to the merits of the review,[12]

[17.2] where invalidity is indeed detected, it must be declared to be so,[13]

[17.3] the merits are relevant to what to choose to do about an undue delay when that is found to exist, [14]

[17.4] whether or not to overlook undue delay is a flexible evaluation which is driven by several factors [15]

[17.5] undue delay is bound up in the just and equitable remedy which may be that no consequent relief is granted; ie, the review might succeed but the contracts are not set aside. [16]

[18] In my view, it is readily apparent that the Delay defence is not a self-standing issue capable of separation from the merits. It is a *sui generis* defence. It is not like prescription where the elapse of time *per se* is the 'causa' and could be tried discretely as a special case *in limine*. Rather, the Delay defence is located within the range of considerations relevant to the exercise of an equitable discretion which comes into play in conjunction with a court assessing whether an irregularity has occurred, and if so, how deviant the irregularity is.

The procedural aspects relating to the Rules of Court

[19] It was argued on behalf of CRRC, by way of illustrating the predicament it faces, that had the matter been brought by way of action, it could have had the opportunity of a rule 33(4) separation of the Delay issue. The thinking is flawed. The Delay issue is not discrete, as demonstrated above, and is therefore not susceptible to the Rule 33(4)- type separation. Moreover, the requirement of convenience is a critical attribute of an appropriate Rule 33(4) order for a separation. None seems to present itself. The motive for the approach proposed by CRRC cannot fall within the scope of what 'convenience' means in a rule 33(4) proceeding. Plainly, the separate application model has advantages for CRRC and the spectre of huge

[12] ibid paras 55 – 56 and 101
[13] ibid paras 66, 71.
[14] ibid paras 53 – 58.
[15] ibid para 54.
[16] ibid para 71.

waste occurring in the fullness of time is real, but the forfeiture of such an opportunity is not to be contrasted with convenience, in the proper sense, as used in the rule, which is concerned with the forensic practicalities not strategic advantage. [17]

[20] More fundamentally, it is not open to a respondent or defendant to outflank an applicant or plaintiff by initiating a wholly separate application aimed at exploding the 'main case'. The counter-assault must engage with the adversary within the 'main case'. There is no room for a risk-free tactic in our civil procedure. Nor, in my view is there, on policy grounds, any reason to suppose that any unfairness is inadvertently caused by such a stricture.[18] Although it is arguable whether the rights a litigant may claim under the Rules of Court are properly to be characterised as 'substantive' or 'procedural', they remain rights, which ought not to be compromised without a clear and present danger that their application shall wreak injustice. This consideration rules out any purchase for an argument that the court's inherent jurisdiction could be invoked in 'the interests of justice'.[19]

[21] Moreover, the approach proposed by CRRC must unavoidably mean piece-meal litigating of aspects of the matter, a consequence that our legal tradition rejects. Nonetheless, it is true that an exception could be regarded as a veritable exception to this anti-piecemeal principle. What might the position be, were an attempt to be made for the Delay application to be squeezed into an exception-type proceeding? In an exception it is contemplated that a challenge to the initiators case on its own terms can be launched. Importantly, if that challenge fails, there remains a chance afterwards to offer a defence by filing a plea, setting out allegations of fact. In my view, this attempt would also fail because the Delay defence, in the context of self-review, is not a point of law nor, indeed, the invocation of a legal right. This is so because the delay factor is bound up in a mixture of factual findings and value

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[17] A cautionary criticism about un-insightful separations has been described in *City of Tshwane Metropolitan Council v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA).*

[18] See: *Standard Bank of SA v RTS Techniques and Painting (Pty) Ltd and Others 1992 (1) SA 432 (T*) at 440 J – 441J, on the dynamics of the motion procedure in which the functionality of the process to facilitate dispute resolution is addressed.

[19] See: *Standard Bank of SA and Another v Mpongo 2021 (6) SA 403 (SCA*) where a controversy is traversed about whether a court could exercise a discretion to select what cases it might hear and which it might decline to hear, based on several factors relating to the capacity of the court when another court has concurrent jurisdiction. The conclusion is reached that a court is not vested with such a power and the rules of court must be adhered to.

assessments about what, holistically, constitutes ‘undue’ delay in the specific circumstance. As such, delay is a mere facet of that enquiry.

[22] The argument that the dynamics of the Gauteng Commercial Court litigation model opens a door to unfettered pragmatism by the case-manager-judge is probably an exaggerated proposition. But even assuming that the Commercial Court model envisages quite novel *ad hoc* designer procedural techniques, this line of argument cannot overcome the fact that the Delay defence is not a discrete issue. No degree of pragmaticism can surmount that fact. The full extent of the space to vary the rules of court by agreement among the parties need not be further explored for the purposes of this judgment.

Conclusions

[23] In the result, the Rule 30 application must succeed, both for prosaic procedural reasons and because the attributes of the Delay defence render it unsusceptible to separation in a self-review case.

[24] Counsel who appeared in this hearing have advanced several other arguments on points of law, which though of considerable intellectual interest, need not, in the light of the key findings I have made, to be addressed for the purposes of deciding this application. They may well find expression in controversies in the future and it is prudent not to tread on arguments that may bloom in more fertile fields.

Costs

[25] The appropriate costs order is that costs follow the result. The order includes the costs of two counsel for Transnet and for the second applicant, Special Investigative Unit. The two respondents filed a single set of heads of argument, but both sets of counsel addressed the court on a part thereof. Each party is entitled to the costs of the various counsel in preparing the heads of argument. The fact that a single document was filed is not the governing characteristic of the work or of costs involved; the parties might just as well have filed two documents instead of one. Precisely how the costs of the heads should be calculated should be left to the taxing master, if it becomes controversial.

The order

(1) The rule 30 application is granted.

(2) The first respondent is directed to withdraw its delay application.

(3) The first respondent shall bear the costs of the first and second applicants, including the costs of two counsel.

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ROLAND SUTHERLAND
DEPUTY JUDGE PRESIDENT
GAUTENG DIVISION, JOHANNESBURG

Heard: **8 March 2022.**
Judgment: **12 April 2022**

For the 1st Applicant (Transnet)
Adv Q Leech SC
Adv J Griffiths
Instructed by Mncedisi Ndlovu & Sedumedi Attorneys

For the 2nd Applicant (Special Investigative Unit)
Adv A Cockrell SC
Adv M Seape
Adv K Hardy
Instructed by The State Attorney

For the 1st Respondent (CRRC)
Adv P Louw SC
Adv V Notshe SC
Adv Z Matebese SC
Instructed by B. Makukunzva Attorneys Inc.

The other Respondents did not take part in these proceedings.