CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 115/18

In the matter between:

MBULELO PAUL GLADSTONE NOTYAWA Applicant

and

MAKANA MUNICIPALITY First Respondent

MEMBER OF THE EXECUTIVE COUNCIL: CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS: EASTERN CAPE Second Respondent

PAMELA YAKO N.O. Third Respondent

Neutral citation:	*Notyawa v Makana Municipality and Others* [2019] ZACC 43
Coram:	Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mathopo AJ, Theron J and Victor AJ
Judgments:	Jafta J (majority): [1] to [56] Froneman J (concurring): [57] to [65]
Heard on:	3 September 2019
Decided on:	21 November 2019
Summary:	Local Government: Municipal Systems Act 32 of 2000 — unreasonable delay — interests of justice — Promotion of Administrative Justice Act 3 of 2000 — legality review

ORDER

On appeal from the High Court of South Africa, Eastern Cape Division:

The application for leave to appeal is dismissed.

JUDGMENT

JAFTA J (Mogoeng CJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Mathopo AJ, Theron J and Victor AJ concurring):

Introduction

[1] The main issue for determination in this application for leave to appeal is whether it is in the interests of justice to grant leave. The answer to this question depends on whether in refusing to overlook the unreasonable delay on the part of the applicant to institute review proceedings, the High Court of South Africa, Eastern Cape Division, (High Court) has failed to properly exercise its discretion.

Statutory framework

[2] In terms of section 54A of the Local Government: Municipal Systems Act[1] (Systems Act), a municipal manager is appointed by the relevant municipal council. A municipal manager is the head of the administration of each council.[2] The section

[1] 32 of 2000.

[2] Section 54A(1) provides:

"The municipal council must appoint—

obliges every council to appoint a suitably qualified candidate in terms of skills, expertise, competencies and qualifications.[3] These are prescribed by the regulations made by the relevant Minister. The provision nullifies any appointment made in contravention of the Systems Act, including an appointment of a person who does not possess "the prescribed skills, expertise, competencies and qualifications".[4]

[3] Section 54A(3) provides:

> "A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if—
>
> (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
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> (b) the appointment was otherwise made in contravention of this Act."

[4] The section lays emphasis on the appointment of suitably qualified municipal managers owing to the position they hold in the administration of a municipality. The role played by the managers is crucial to the delivery of services to local communities and the proper functioning of municipalities whose main function is to provide services to local communities. The section envisages that candidates who are best qualified for the job must be recruited. It obliges municipalities to "advertise the post nationally to attract a pool of candidates nationwide" and select from that pool a manager who meets the prescribed requirements for the post.[5]

> (a) a municipal manager as head of the administration of the municipal council; or
>
> (b) an acting municipal manager under circumstances and for a period as prescribed."

[3] Section 54A(2) provides:

> "A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed."

[4] Id.

[5] Section 54A(4) provides:

> "If the post of municipal manager becomes vacant, the municipal council must—
>
> (a) advertise the post nationally to attract a pool of candidates nationwide; and

[5] If a municipal council fails to attract suitably qualified candidates, it may approach the relevant Member of the Executive Council (MEC) with a request that a suitable official in her department be seconded to the municipality to act as a municipal manager until a suitable candidate has been appointed. If the MEC fails to do so within 60 days, the municipality in question may direct the request to the relevant Minister.[6]

[6] But where a suitably qualified person was appointed, the provision requires that a report on both the appointment process and the decision to appoint be submitted to the relevant MEC within 14 days.[7] The MEC must satisfy herself that the appointment complies with the Systems Act. If she is not satisfied that the Act was followed, the MEC is empowered to take appropriate steps to enforce compliance by the municipal council. These steps include litigation against the municipal council which has failed to comply.

[7] Section 54A(8) provides:

> "If a person is appointed as municipal manager in contravention of this section, the MEC for local government must, within 14 days of receiving the information provided for in subsection (7), take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to a court for a declaratory

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> (b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post."

[6] Section 54A(6) reads:

> "(a) The municipal council may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed.
>
> (b) If the MEC for local government has not seconded a suitable person within a period of 60 days after receipt of the request referred to in paragraph (a), the municipal council may request the Minister to second a suitable person, on such conditions as prescribed, until such time as a suitable candidate has been appointed."

[7] Section 54A(7) provides:

> "(a) The municipal council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.
>
> (b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister."

> order on the validity of the appointment, or any other legal action against the municipal council."

[8] It is quite apparent that Parliament has entrusted the MEC to monitor compliance with the Systems Act. But where the MEC fails to perform this function, the Minister may intervene and perform the function herself.[8] However, in special circumstances a municipal council may request the Minister to waive any of the requirements prescribed by the Act. The Minister may grant a waiver if good cause is shown and that the municipality was unable to attract suitable candidates.[9]

[9] Section 54A forms part of the backdrop against which the delay, which was central to the High Court's decision, must be assessed. The section prescribes short periods within which certain steps are to be taken in the process of filling in a vacancy for the post of a municipal manager. This is the position even in the case of a stop-gap. The section precludes the appointment of acting municipal managers for a period in excess of three months. And where an extension is granted by the MEC, it may not exceed a further three months. This indicates that the section envisages that the appointment of a permanent municipal manager must be done within six months.

[10] Where this is not possible, the section affords two options to municipalities. The first is to solicit a secondment of a suitably qualified official from the MEC. If the latter fails to do so within 60 days, the municipality concerned is allowed to approach the relevant Minister who is required to second a suitable official to the municipality without delay. Even where an appointment is made, the monitoring function by the MEC must be carried out within 14 days from the date on which a report is received.

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[8] Section 54A(9) provides:

> "Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that subsection."

[9] Section 54A(10) provides:

> "A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (2) if it is unable to attract suitable candidates."

For its part, a municipality is obliged to submit the report within 14 days from the date of appointment.

[11] All these tight time frames are not a surprise. The entire scheme of section 54A is predicated on having suitably qualified persons appointed as municipal managers. And having those appointments made within a short span of time because municipal managers are vital to the proper administrative functioning of municipalities.

Factual background

[12] In November 2014 Makana Municipality (first respondent) published an advert that invited suitably qualified candidates to apply for appointment as a municipal manager. Mr Mbulelo Paul Gladstone Notyawa (applicant) was one of the candidates who submitted an application in response to the advert. At the time, Mr Notyawa was a councillor at the Municipality. Six candidates including Mr Notyawa were shortlisted. These candidates were interviewed by a panel established by the Municipality. They were also required to take a competency test.

[13] Meanwhile Mr Notyawa who was a member of the African National Congress (ANC), one of the political parties represented in the municipal council, was requested by the ANC to withdraw his application. He declined. This led to his expulsion from the ANC. Nothing turns on this.

[14] The appointment process proceeded with Mr Notyawa still being one of the candidates. In March 2015 the municipal council of Makana Municipality resolved to appoint Mr Notyawa as its municipal manager. He had recused himself from the meeting that took the resolution to appoint him.

[15] As required by section 54A, a report on this appointment was submitted to the MEC for Co-operative Governance and Traditional Affairs: Eastern Cape (second respondent). Having perused the report the MEC responded by letter dated 24 April 2015 addressed to the Mayor of Makana Municipality. In it the MEC recorded

that he was not satisfied that the appointment complied with section 54 as Mr Notyawa, in the MEC's opinion, did not meet the minimum requirements under the Systems Act. The MEC demanded that the vacancy be re-advertised because none of the candidates who were shortlisted met the statutory requirements. He offered technical expertise from his department to help the Municipality in starting the process afresh. It appears that the Municipality accepted the MEC's suggestion and did not pursue Mr Notyawa's appointment. This gave rise to litigation.

Litigation in the High Court

[16] During July 2015 Mr Notyawa initiated an application in the High Court in which he sought to have reviewed and set aside decisions of the MEC and the Municipality pertaining to the failure to appoint him. This application was opposed by the Municipality and the MEC who filed opposing papers in September 2015. Mr Notyawa took no steps to ripen the matter for hearing.

[17] The Municipality and the MEC set it down for hearing on 12 February 2016, as they had lodged counter-applications for an order declaring Mr Notyawa's appointment to be null and void. On that date, Mr Notyawa sought a postponement of the matter which was opposed by the respondents. The postponement was sought to enable him to obtain a transcript of the minutes of the Municipality's meeting of 8 May 2015 so that he could supplement his founding papers. The High Court refused to postpone the matter and Mr Notyawa's legal team withdrew his review application.

[18] Upon the withdrawal of the review application, the MEC withdrew his counter-application. It appears from Mr Notyawa's affidavit that when the matter was heard on 12 February 2016, he had not filed a replying affidavit in the review application and had not filed opposing papers in the counter-applications. Papers opposing the Municipality's counter-application were filed later and in June 2016, the Municipality withdrew its counter-application. Subsequently the Municipality re-advertised the municipal manager's post.

[19] Mr Notyawa responded by launching an application to restrain the Municipality from filling the post. The application was instituted on 13 October 2016. The Municipality opposed it. Once again Mr Notyawa's affidavit reveals that he did not pursue the matter further. It is not clear from the papers what the outcome of his application was.

[20] Hardly four days later, on 17 February 2017, Mr Notyawa instituted the current application in which he sought rescission of the Municipality's decision to re-advertise the post, its decision to reverse his appointment and a declarator that he was lawfully appointed as municipal manager of the Municipality. He cited the Municipality, the MEC and Ms Pamela Yako as respondents. The latter was the administrator of the Municipality before the impugned decisions were taken and no relief was sought against her. As a result she took no part in the proceedings.

[21] The Municipality and the MEC opposed the application on various grounds which included that Mr Notyawa's appointment was invalid because he did not have experience at a senior management level within the administration of a municipality. It will be recalled that he was a councillor from 2011 to 2016. The experience he had at management level was obtained in entities which were not municipalities. The respondents also raised the issue of delay. They pointed out that the application was late by about 23 months and as a result Mr Notyawa was not entitled to bring it without condonation being granted under section 9 of the Promotion of Administrative Justice Act[10] (PAJA). They asserted that the applicant had failed to make out a case for a PAJA condonation.

[22] In reply Mr Notyawa confirmed that the application was not brought under PAJA and that as no reference was made to PAJA, the suggestion that PAJA applied was misplaced. He alleged that the application was "brought as a common law review" and that "the test for any delay in bringing the application is that it must be brought within

[10] 3 of 2000.

a 'reasonable period' of time". He then referenced paragraphs 20-37 of his founding affidavit as supporting the request for condonation.

[23] The High Court took the view that the impugned decisions constituted administrative actions to which PAJA applied and proceeded to evaluate the explanation contained in paragraphs 20-37 against the PAJA standard for condoning delay. In summary, the explanation was that Mr Notyawa did not pursue the first application to finality because he needed a transcript of the Municipality's meeting of 8 May 2015 and hence he unsuccessfully sought a postponement of the matter on 12 February 2016. But this did not explain Mr Notyawa's inaction for periods of time that ran into months. The High Court pointed out that, on the authorities of the Supreme Court of Appeal, section 9 of PAJA required a substantive application for condonation and that Mr Notyawa had failed to make such application.[11]

[24] But even if the matter was approached on the charitable footing that a substantive application was made on the papers, said the High Court, the explanation furnished for the delay was unsatisfactory. It did not cover the entire period of more than 20 months. For example, no explanation was given for inaction between September 2015 when the respondents filed answering affidavits in the withdrawn review and 12 February 2016 when Mr Notyawa withdrew it, following the refusal to postpone.

[25] In a comprehensive analysis of the explanation, the High Court pointed out that no explanation was furnished for why the transcript of the meeting of 8 May 2015 was not sought timeously in terms of rule 53 of the Uniform Rules of Court. That Court also noted that it was the respondents who set the matter down for hearing on 12 February 2016 in circumstances where Mr Notyawa had displayed a lack of desire to proceed with the matter, as he had not filed a reply.[12]

[11] *Notyawa v Makana Municipality* 2017 JDR 1429 (ECG) (High Court judgment) at paras 47-50.

[12] Id at paras 54-5.

[26] The High Court also observed that there was no explanation for Mr Notyawa's inaction for the period between 12 February and October 2016 when the application for an interdict was launched. No explanation, the High Court further held, for taking no steps between October 2016 and February 2017. In the circumstances the High Court concluded that the delay was unreasonable.[13]

[27] The High Court proceeded to consider whether that delay may be overlooked. The Court took into account the fact that throughout the entire period the Municipality had to operate without a permanent municipal manager and that was prejudicial to it. The Court also noted that when the matter was heard on 26 July 2017, in terms of section 57(6) of the Systems Act, Mr Notyawa could only be appointed until August 2017. In terms of section 57(6) a municipal manager who is already in office when municipal elections take place may continue to hold office for not more than 12 months from the date of those elections. Municipal elections were held on 3 August 2016. Therefore, the High Court concluded that the matter had become moot. Added to these factors was the fact that, in the opinion of the High Court, the prospects of success on the merits were poor.

[28] The conclusion relating to prospects was premised on the undisputed facts that Mr Notyawa had no experience and expertise in the administrative functioning of a municipality. His own curriculum vitae revealed that he has never worked for a municipality, except as a councillor whose role does not involve performance of administrative functions. Evidently the position adopted by the MEC with regard to compliance with the Systems Act was not unreasonable. If he was of the opinion that there was no compliance, the MEC was entitled to demand that the Act be followed.

[29] Consequently the High Court exercised its discretion against condonation. That Court pointed out that even if the matter were to be approached on the assumption that

[13] Id at para 57.

it was a legality review, it would have come to the same conclusion. The High Court reasoned:

> "In the result, the applicant did not bring the required application in terms of section 9 of PAJA for an extension of the 180-day period and even if he had he would not have established that it would be in the interests of justice to grant such an extension. I would add that even if this was a legality review, the application of the delay rule would not have favoured the applicant. The delay was self-evidently unreasonable and not fully explained, and the same factors that I have considered would have militated against the granting of condonation. It follows that the application to review the impugned decisions cannot be considered."[14]

[30] The High Court dismissed the application with costs and refused to grant Mr Notyawa leave to appeal. His petition to the Supreme Court of Appeal was also dismissed for lack of prospects of success. He now seeks leave from this Court.

Leave to appeal

[31] By now it is settled that in order to succeed, the application for leave must establish that the case falls within the jurisdiction of this Court and that it is in the interests of justice that leave be granted. There can be no doubt that this matter engages that jurisdiction. It involves the exercise of public power which raises a constitutional issue.

[32] The question that remains for determination is whether the interests of justice favour the granting of leave. In the absence of other compelling reasons like the public interest in the final resolution by this Court of the issues raised, leave may be granted if there are reasonable prospects of success in reversing the decision of the High Court which Mr Notyawa seeks to overturn.[15] In a case like the present where no other considerations warrant the adjudication of the appeal, the prospects of success against

[14] Id at para 61.

[15] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 29-30 and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415 (CC) at para 6.

the impugned decision become decisive of the inquiry. For it would serve no useful purpose to grant leave in a case such as this if there are no prospects that the challenged decision would be set aside.

[33] As a result the scope of the present inquiry depends on the nature of the decision taken by the High Court. It will be recalled that the High Court has declined to condone Mr Notyawa's delay in instituting the review application and effectively refused to adjudicate the merits of his application. In doing so the High Court was unquestionably exercising a narrow or strict discretion which may be interfered with on appeal only if specific grounds have been established. But before we consider if any of those grounds exist here, we must make a few observations.

Observations

[34] The parties devoted a large part of their argument in addressing whether the impugned decisions of the Municipality and the MEC may be classified as administrative action or executive action. It was contended that if we hold that they were administrative action PAJA was applicable to the assessment of the delay. If, however, those decisions were executive a different standard applied.

[35] Although there is an overlap in standards for evaluating delay under PAJA and the legality review, those tests differ in some material respects. The distinguishing features of the two tests were adequately defined by this Court in *Asla Construction*[16] and as a result there is no need to traverse them here. But that distinction has no bearing to the outcome of the present inquiry which depends on whether interference with the exercise of discretion is justified. Here both pathways lead to the same destination.

[36] Therefore, in the view I take of the matter, it is not necessary to determine whether the challenged decisions were administrative or executive actions. This is

[16] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) (*Asla Construction*) at paras 49-53.

because the High Court explicitly stated that it could have reached the same conclusion regardless of whether what was before it was a legality review or a PAJA review. The nature of the review would have made no difference to the outcome. In addition, Mr Notyawa, rightly or wrongly, eschewed reliance on PAJA and asserted that "my application is brought as a common law review".

[37] In light of the decision of this Court in *Pharmaceutical Manufacturers*,[17] the description that the application was a common law review was plainly mistaken. The review of the exercise of public power is now controlled by the Constitution and statutes like PAJA. Common law principles are subsumed under the Constitution and form part of a single system of law which derives its force from the Constitution.[18] Accordingly, there are no common law reviews.

[38] As was noted in *Affordable Medicines Trust*, what was the *ultra vires* ground of review under the common law is now a breach of the legality principle under the Constitution.[19] The Constitution demands that all government decisions must comply with it, including the principle of legality which forms part of the rule of law, and which is one of our constitutional founding values. Consequently, the essence of Mr Notyawa's assertion was that his was a legality review. However, this by no means suggests that the application of PAJA to a particular review depends on the applicant's characterisation or a reference to it in the papers, as Mr Notyawa has asserted. PAJA's application depends on the nature of the impugned decision. If it is administrative, PAJA applies. But if it is executive action PAJA does not apply. In those circumstances the matter becomes a legality review.

[39] As the parties diverge on the characterisation of the impugned decisions here, ordinarily the determination of this issue would have been necessary. However in the

[17] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*).

[18] Id at para 33.

[19] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 50.

present circumstances that determination has no bearing on the outcome. This is because the High Court expressly recorded that it would have reached the same conclusion even if the application was a legality review. As a result the matter would be approached on the footing that Mr Notyawa instituted a legality review. What needs to be determined is whether it is in the interests of justice to grant leave and this question depends on whether the High Court had exercised the discretion improperly.

Interference with discretion on appeal

[40] Our law vests in the court of first instance the discretion to condone a delay by an applicant in instituting review proceedings. The exercise of this discretion may not be interfered with on appeal on the basis that the decision was incorrect. Whether the appeal court would have exercised that discretion differently is irrelevant.[20] The intervention of the appeal court may be justified only on narrow specified grounds.

[41] The test is whether the court whose decision is challenged on appeal has exercised its discretion judicially. The exercise of the discretion will not be judicial if it is based on incorrect facts or wrong principles of law.[21] If none of these two grounds is established, it cannot be said that the exercise of discretion was not judicial. In those circumstances the claim for interference on appeal must fail.

Approach by the High Court

[42] The High Court rightly considered and evaluated the facts pertaining to condonation as set out in Mr Notyawa's affidavit. First, the Court pointed out that the explanation proffered did not cover the entire period of the delay and that there were substantial periods for which no explanation at all was tendered. A perusal of Mr Notyawa's affidavit confirms that this finding was based on correct facts.

[20] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 41.

[21] *Giddey N.O. v Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at paras 21-2.

[43] In its assessment of the explanation given, the High Court took into consideration that the application was first launched in July 2015 and that the respondents filed their opposing papers in September 2015. Nothing happened until February 2016 when the matter was set down for hearing by the respondents. Even then Mr Notyawa sought a postponement because he had not filed a replying affidavit. The single reason he advanced for his inaction was that he needed a transcript of the Council meeting of 8 May 2015.

[44] The High Court rejected that reason as implausible and this conclusion cannot be faulted. There is no explanation for why Mr Notyawa failed to compel production of the transcript after 15 days from the date on which the application was launched, as he was entitled to do so under rule 53 of the Uniform Rules of Court. Moreover, when the postponement was refused, Mr Notyawa chose to withdraw the application as he preferred to institute an action. But again he did nothing for about six months. He only sprang into action when the Municipality re-advertised the vacancy. All these facts were correctly taken into account in determining whether the delay was unreasonable.

[45] Having concluded that the delay was unreasonable, the High Court proceeded to consider if it could be condoned. In this regard the Court paid attention not only to the unsatisfactory explanation but also to the fact that the order sought would have no practical effect and that there were poor prospects of success in the main review application. Accordingly the High Court refused condonation.

[46] Evidently the High Court followed a two-stage approach in conducting the inquiry. First, it determined whether the delay was unreasonable. Second, once it found that the delay was unreasonable, the Court considered whether the delay could be condoned. That this is the correct approach was affirmed by this Court in cases like *Khumalo*[22] and *Asla Construction*.

[22] *Khumalo v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at paras 49-52 and 56.

[47] Consequently the High Court applied the right principles to the correct facts.

Reliance on Gijima[23]

[48] While not taking issue with the approach followed by the High Court, relying on *Gijima* Mr Notyawa contended that despite the unreasonable delay, the High Court should have entertained the review application. It is apparent from the judgment in *Gijima* that a court has discretion to overlook a delay.[24] And that the discretion must be exercised with reference to facts of a particular case which warrant the overlook.[25]

[49] The nature and extent of the illegality raised in respect of the impugned decision constitutes a weighty factor in favour of overlooking a delay.[26] Where, as in *Gijima* and *Tasima I*,[27] the illegality stems from a serious breach of the Constitution, a court may decide to overlook the delay in order to uphold the Constitution, provided the breach is clearly established on the facts before it.[28] This flows from the obligation imposed by section 172(1)(a) of the Constitution which requires every competent court to declare invalid law or conduct that is inconsistent with the Constitution.[29]

[50] As was noted in *Khumalo*, prejudice that may flow from the nullification of an administrative decision long after it was taken may be ameliorated by the exercise of the wide remedial power to grant a just and equitable remedy in terms of

[23] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) (*Gijima*).

[24] Id at para 47. See also *Khumalo* above n 22 at para 45.

[25] Id at paras 48-9.

[26] *Asla Construction* above n 16 at para 58.

[27] *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima I*).

[28] *Asla Construction* above n 16 at para 63.

[29] In peremptory terms section 172(1)(a) of the Constitution provides:

> "(1) 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."

section 172(1)(b) of the Constitution.[30] At common law, courts avoided prejudice to respondents by declining to entertain a review application. Our law has since moved on and PAJA affords courts the wide remedial power which may be exercised to protect rights of innocent parties. That power mirrors in exact terms the power contained in section 172(1)(b) of the Constitution.

[51] It must be emphasised that when a court exercises the discretion, it must always keep in mind the development brought about by the Constitution and PAJA. The key point being that the issue of prejudice may adequately be regulated by the grant of a just and equitable order. And where the unlawfulness of the impugned decision is clearly established, the risk of reviewing that decision on the basis of unreliable facts does not arise. In an appropriate case the presence of these factors would tilt the decision in favour of overlooking an unreasonable delay. What is important is to note that the exercise of discretion is no longer regulated exclusively by the common law principles which did not permit the flexibility of reversing the unlawful decision while avoiding prejudice to those who had arranged their affairs in terms of the unlawful decision.

[52] However, the present matter is distinguishable from *Gijima.* It does not involve a serious breach of the Constitution. Nor is the illegality of the impugned decisions clearly established on the facts. On the contrary, it appears that these decisions were taken in compliance with section 54A of the Systems Act. Another distinguishing factor here is that, unlike in *Gijima*, the matter was initiated by an individual and not the state in pursuit of having its own decision corrected. And it is not necessary in these proceedings to determine whether the application of the *Gijima* principle is limited to cases where the state is the applicant.

[53] Moreover, in the context of section 54A, the Municipality must have had no less than four acting municipal managers to date. This is because each acting appointment may not exceed six months. The Municipality has been without a permanent manager

[30] *Khumalo* above n 22 at para 53.

from 2015 and this must have impacted negatively on service delivery to its residents. In addition, Mr Notyawa can no longer obtain the relief he sought. By law he cannot be appointed a municipal manager of the Municipality. Faced with this difficulty he contended that he seeks a declarator that the impugned decisions were invalid so as to pave way for a damages claim. However, his counsel conceded rightly that the declaration in question may still be sought in the action he contemplates bringing.

[54] In the circumstances, granting leave to appeal here would serve no purpose. It is therefore not in the interests of justice to do so. Consequently, the application should be dismissed.

Costs

[55] Since the matter raises constitutional issues, it falls within the ambit of *Biowatch*.[31] Despite losing, Mr Notyawa should not be ordered to pay the respondents' costs. Both of them are organs of state.

Order

[56] In the result the following order is made:

The application for leave to appeal is dismissed.

FRONEMAN J:

[57] I agree that the application for leave to appeal must be dismissed, but for perhaps more direct and robust reasons than merely those relating to the propriety of the discretion exercised by Roberson J in the High Court in respect of the applicant's delay in bringing the review. She was right in that regard, as my brother Jafta J explains in

[31] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

the first judgment, but she was also right in regard to all other aspects that she made findings on. Those findings precede the delay issue and accordingly offer the most immediate and unassailable grounds for disposing of the application for leave to appeal.

[58] The first is mootness.[32] The High Court found that by the time the application for review was eventually heard the purpose of the review – to order consequential relief that the Municipality must conclude a written employment contract with the applicant – had become moot. This was because section 57(6) of the Systems Act provides that a municipal manager who is already in office when municipal elections take place may hold office for not more than 12 months from the date of those elections. Municipal elections had been held and the twelve months was to expire within days of the hearing.[33]

[59] Before us this finding was not challenged, but the applicant changed tack. The consequential relief was no longer sought, but he submitted that a live controversy between the parties remained. This related to what further consequential remedy, in the form of a claim for damages, might be available to the applicant. This would be pursued in different proceedings.

[60] This change in strategy cannot avail the applicant, not least because the point is being raised for the first time in this Court. There was nothing to prevent the applicant from seeking an amendment to the relief he sought in the High Court. Yet there is no explanation why he did not do so, nor why this Court should do so as a court of first instance. That this should not readily be countenanced was recently re-affirmed by this Court in *Tiekiedraai*.[34] There is no reason to do so here.

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[32] Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 identifies mootness as a sufficient ground for the dismissal of an appeal:

> "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

[33] High Court judgment above n 11 at para 59. This is noted in the first judgment at [27].

[34] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC) at paras 19-24.

[61] A prerequisite for the exercise of the discretion to grant leave to appeal in spite of mootness is that any order which this Court may make will have some practical effect either on the parties or on others.[35] It is doubtful whether this separation of an application for a review and consequential relief flowing from it in separate proceedings presently constitutes a live issue between the parties. No separate proceedings have been instituted by the applicant and this is not a case where the applicant seeks a remittal to the High Court to determine an outstanding live issue between the parties. Nothing prevents the applicant from pursuing a damages claim, except perhaps the fear that the claim might have prescribed.

[62] Neither would a determination on the merits of the review have a practical effect on others that might tilt the interests of justice in favour of granting leave to appeal.[36] The merits depend on whether the determination made by the second respondent that the applicant did not meet the requirements of section 54 of the Systems Act, in that he had no experience and expertise in the administrative functioning of a municipality, was correct. The High Court found that it was. But even if it were wrong, the finding involves no constitutional or legal issue that would have an effect on others. It is essentially a factual finding contingent on the particular circumstances relating to the applicant. In the absence of any compelling considerations bearing on the broader public interest, there is no basis for this Court to exercise its discretion in favour of adjudicating a dispute which is moot.

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[35] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11.

[36] In *Director-General Department of Home Affairs v Mukhamadiva* [2013] ZACC 47; 2013 JDR 2860 (CC); 2014 (3) BCLR 306 (CC) at para 40, this Court identified several relevant factors that could be considered when exercising discretion to entertain a moot matter:

> "The fact that a matter may be moot in relation to the parties before the court is not an absolute bar to the court considering it. The court retains discretion, and in exercising that discretion it must act according to what is required by the interests of justice. And what is required for the exercise of this discretion is that any order made by the court has practical effect either on the parties or others. Other relevant factors that could be considered include: the nature and extent of the practical effect the order may have; the importance of the issue; and the fullness of the argument advanced. Another compelling factor could be the public importance of an otherwise moot issue."

[63] So, for mootness alone, it is not in the interests of justice to grant leave.

[64] The High Court considered that the decision sought to be reviewed was administrative action that fell under PAJA and that, in any event, the prospects of success on the merits were not good.[37] I consider both these findings to be unassailable as well, but it is not necessary to go into any further detail on that. Suffice it to say that, in considering the prospects of success as part of her inquiry into the delay issue, she may have been in anticipatory compliance with what was stated about the need to do so in state self-review by this Court in *Asla Construction*.[38]

[65] The contextual similarities and possible dissimilarities in a delay inquiry under PAJA review and legality review (and state self-review as a sub-category of the latter) are, however, not directly relevant or crucial here and need not be pursued.

[37] High Court judgment above n 11 at paras 46 and 60-1.

[38] See discussion in *Asla Construction* above n 16 at paras 55-8.

For the Applicant:	A Beyleveld SC and I Bands instructed by Wheeldon Rushmere and Cole Inc
For the First Respondent:	T J M Paterson SC and N Molony instructed by Whithersides Attorneys
For the Second Respondent:	R G Buchanan SC and G Appels instructed by N N Dullabh and Co.