IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

26 MARCH 2024

DATE **SIGNATURE**

Case No: 79041/2018

In the matter between:

SOLIDARITY APPLICANT

And

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN

POLICE SERVICE N.O.	FIRST RESPONDENT
MINISTER OF POLICE N.O.	SECOND RESPONDENT
SOUTH AFRICAN POLICE SERVICE	THIRD RESPONDENT
PHETSO ANNA SEBILWANE AND OTHERS	FOURTH TO SEVENTY SIXTH RESPONDENTS

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 26 MARCH 2024.

JUDGMENT

COLLIS J

1.The question at the heart of this review application, is firstly whether the Non-Statutory Force project (NSF project) implemented by the first, second and third respondents is a lawful project and secondly whether the decisions taken to implement the NSF project stand to be reviewed and set aside.

2.The application is opposed. As per its amended notice of motion the applicant seeks the following relief:

"1. Condoning the late filing of this application in terms of section 9 of the Promotion of Administrative Justice Act ("PAJA").

2. An order in terms of section 8(1)(c)(ii)(aa) of PAJA setting aside the Respondents' decision to implement the NSF project; alternatively an order setting aside the Respondents' decision to implement the NSF project. The ground of review being the principle of legality as outline in the rule of law as contained in section 1(c) of the Constitution;

3. Should prayer 3 supra not be granted by this Honourable Court, an order in terms of section 8(1)(d) of PAJA, alternatively on the principle of legality as outlined in the rule of law as contained in section 1(c) of the Constitution, declaring that the Applicant's members, who are employed by the SAPS, to be endowed with the same rights to apply for and be recognised for positions within the SAPS as those specifically earmarked for so-called NSF members.

4. If an order is not made in terms of paragraphs, 3 or 4 supra; an order is sought setting aside the Respondents decision to implement the NSF

project as purportedly outline in: (a) interim constitution of the Republic of South Africa 20 of 1993-section 214-224 b) promotion of national unity and reconciliation act 34 of 1995- section 1; c) cabinet resolution/minute: integration period; d) government employees pension law amendments act 35 of 2003 e) special pensions act 69 of 1996 f) SAPS act 68 of 1995 as amended g) public service bargaining Council resolution seven of 2001 and h) termination of integration intake act 44 of 2001) in terms of section 8(1)(c)(i) of PAJA, alternatively on the principle of legality as outlined in the rule of law ac contained in section 1(c) of the Constitution; then an order is sought compelling or directing the Respondents to afford the Applicant's members equal opportunity to be promoted and/or to be recognised with the same benefits currently reserved for alleged NSF members;

5. Ordering any of the Respondents that oppose this application, jointly and severally along with any other Respondent who opposed the relief sought by the Applicant, the one paying the other to be absolved, to pay the costs of this application, including the costs of two (2) Counsel;

6. Granting the Applicant further and/or alternative relief."

BACKGROUND

3. The change to a constitutional democracy brought with it the need to restructure the Government. Linked to this was the need to restructure elements of the State, including the police service, the army, the navy and intelligence services amongst others.

4. NSF members, are in fact persons who made selfless sacrifices to assist the nation in its quest for democracy. They are referred to as "non-statutory force" members because the security and armed forces to which they belonged pre-democracy were not legislated for or recognised in formal structures of the previous regime. Once democracy was attained, it became imperative to recognise the service of NSF members. Their long service outside South Africa was recognised as being material to fashioning the new Republic.[1]

5. The Non-Statutory Forces Project ('the NSF') can be defined as the prioritised and preferential treatment of former Non-Statutory Forces (pre-1994) into the ranks of the SAPS. These individuals are mostly from what is colloquially known as "liberation movements", and then more specifically MK and APLA.[2] "The NSF process was initiated to elevate the majority of NSF members to commanding positions."[3]

[1] AA, para 21, p 14-7.
[2] Record, Founding Affidavit, paragraph 31 & Annexure FA8 (Contents of a speech by Deputy- Minister of Police, Maggie Sotyu, on 21 July 2014, during the SAPS budget vote in Parliament), Caselines 02-11.

[3] Record, Founding Affidavit, paragraph 82 & annexure FA34, Caselines 02-36.

6. The NSF members historically did not have the opportunity to contribute to a pensions fund, or having an employer contribute to a pension fund, or who had long tenures of service as guerrilla fighters, but not as statutory forces. Attaining equality in respect of the NSF members entailed, as identified in the multi-disciplinary task team in June 2013 already,[4] an adjustment to their pension benefits, ranking levels, recognition of service ad importantly, skills development.[5]

7. Initially, in 2014, and whilst the details of the NSF project were still opaque, the alleged purpose of the NSF project was to ensure five (5) deliverables under a "project plan" namely, (1) Full-service recognition; (2) Equitable Pension; (3) Allocation of Leave Days; (4) Re-Ranking; and (5) Skills Development.[6]

8. Later and during February 2018, the SAPS delivered to the SSSBC an information document where the initial five deliverables morphed into eight (8) deliverables. These deliverables were set out to be: (1) Pension Benefits (2) Recognition of Service (3) Leave benefits – note the reference to 'capped

[4] AA, para 30, p 14-10.
[5] AA,para 34, p 14-10.
[6] See footnote 1 supra, Caselines 02-13 and paragraph 33.1, Caselines 02-14.

leave' (4) Long Service Awards (5) Skills Development (6) Medical Aid Benefits (7) Re-Ranking and (8) Re- enlistment.[7]

PARTIES

9. The Applicant is SOLIDARITY, a trade union registered in terms of the provisions of the Labour Relations Act, No 66 of 1995. The applicant's membership currently consists of approximately 140 000 members in all occupational fields, which has a substantial number of members that are in the employ of the Third Respondent. It approaches this Court, firstly in the interest of its members who are being discriminated against on the ground that they are classified as non-NSF members.

10. The First Respondent is the National Police Commissioner, cited in his official capacity.

11. The Second Respondent is the Minister of Police, cited in his official capacity and as the political head of the SAPS, appointed in terms of section 206(1) of the Constitution.

[7] Record, Founding Affidavit, paragraph 41 & Annexure FA12, caselines 02-17 to 02-18.

12. The Third Respondent is the South African Police Service, established in terms of the relevant provisions of the South African Police Service, Act No 68 of 1995 and as contemplated in Section 205(1) of the Constitution. The SAPS is the employer headed by the Minister of Police.

13. The Fourth to the Six Hundred and Twenty-Nine respondents applied to join the main application, and in the end Koovertjie AJ, granted the joinder only in respect of the first, second and 51(fifty-one) other intervening parties.[8]

14. The respondents oppose the application raising amongst others certain preliminary points, i.e condonation, lack of jurisdiction of the court, non-joinder of certain parties and whether the applicant has standing to bring the application. They also oppose the merits of the application and in this regard this court was called upon to determine whether the applicant has made out a case for review on the grounds of:

(i) Unreasonableness;

(ii) Erroneous interpretation of the law;

(iii) Rationality;

(iv) Procedural Fairness;

(v) Discrimination and

(vi) Unfairness.

[8] Supplementary affidavit para 8 See 09-6.

15. In respect of the main application the court was also called upon to make an analysis of the decisions taken to implement the NSF project and whether this decision constitutes administrative action. Secondly, the court had to determine whether the decision to implement the NSF project is authorised by any legislation. In addition, this Court was called upon to assess as to whether the attempted implementation of the NSF project was an exercise of power in the public interest or for the personal advantage/ulterior purpose of the officials who wielded the power.

16. In determining the outcome of this application a convenient point of departure would be considering the condonation which the applicant has applied for and thereafter this court would deal with the preliminary points raised by the respondents. The merits of the application will thereafter be addressed.

17. The review is primarily a review under the Promotion of Administration Justice Act[9] ("PAJA"). In the alternative, the review is brought as a legality review under section 1 (c) of the Constitution.[10] Be it an administrative justice review or legality review, the application should have been brought in time.

[9] Act 3 of 200.
[10] Nom, prayers 2,3 and 4, at pp 01-1 and 01-2, read with FA para 89, at p -02-40.

CONDONATION

18. As per the Notice of Motion the applicant seeks condonation from this Court in terms of section 9 of PAJA regarding the delay in bringing this application.

19. The applicant alleges as per the Founding Affidavit,[11] that the basis for condonation can be attributed to the fact that the relief sought constitutes a review and setting aside of administrative decisions orbiting the NSF project. In light of the review not being brought within 180 days of the date on which the applicant first became aware of the administrative action, it seeks condonation in terms of section 9, alternatively that this review proceeds on the ground of legality alone in the event of condonation not being granted.

20. In its founding affidavit the applicant alleges further that it first became aware of the respondents' intention to implement the so-called NSF-project during the latter part of 2017. In about November 2017, the applicant's PAIA-request was refused and if it is accepted that this is the day that the applicant obtained knowledge of the decisions made to implement the NSF-project then the present application is made approximately 5 (five) months outside the

[11] Founding Affidavit para 110-119

statutory 180-day period. On this basis the deponent asserts that the delay to bring this application, given the history of the matter should be condoned by this Court.

21. Also, the applicant had around 2017, launched two urgent applications under PAIA seeking to uncover the documents relating to the legality, formation and implementation of the NSF project which proceedings further resulted in the delay in launching the present review application. It is on this basis that it was submitted that the applicant should be granted condonation for the delay in launching this review application.

22. The first to third respondents oppose the applicant's request for condonation.[12] In the Answering Affidavit[13] the respondents set out that the applicant had been made aware of the NSF project for many years and indeed had one of its members also apply as set out in Annexure "FA3" annexed to the Founding Affidavit.

23. Furthermore, it is contended that the applicant had failed to explain the delay in bringing this application notwithstanding its knowledge of the rumours, news articles and speeches concerning the NSF project.

[1212] AA First to Third Respondents para 136 to 139 p10-43.
[13] AA First to Third Respondents

24. In addition, the applicant at all times knew of the invite-only meetings, the agenda at such meetings and notwithstanding all of this it failed to approach the court to challenge the NSF project timeously.

25. Therefore, so the contention goes, in the absence of the applicant identifying the exact decision it seeks to review and where the applicant has failed to specify the 'legislation' that renders the NSF project unlawful and irregular, condonation should not be granted.[14]

26. The remainder of the respondents further assert that the applicant having been made aware of speeches and news articles during 2002, pointing arrows at the NSF project suggest at the very least as of this date the applicant was made aware of the project and its intention to implement same.[15] Despite this however, the applicant nevertheless sat back and failed to launch the review proceedings timeously.

27. The NSF-project itself was registered as far back as 26 June 2013 and the task team established during the same year. The project was also announced in Parliament on 21 July 2014. On this basis it was submitted by the

[14] First to Third Respondent's AA para 138 p10-44
[15] Fourth to Fifty-Six Respondents AA par 17-24 p12-10

respondents that the applicant could not have obtained knowledge of the project only in 2017 and that this court should find this assertion to be untenable.

28. The applicant failed to place any rebuttal evidence before this court to refute these dates as alluded to by these respondents. Accordingly, in its absence, this court must accept that the NSF-project was registered as far back as 2013.

29. Even if one accepts the version of the applicant that it only became aware of the NSF project during 2017, it failed to account for the entire period from when it first obtained knowledge to the date that the application was launched. It's failure to adequately explain the delay is simply unreasonable.

30. In its replying affidavit the applicant conceded that albeit that it gained knowledge of the intention of the NSF-project to favour the NSF members only, it could not approach this court earlier that it did without having any detailed knowledge of the degree of such intended preferential treatment. The further structuring of the NSF, as a secret project, coupled with the deliberate withholding by the respondents of the exact content of the project prevented the applicant from fully understanding the project itself.

31. The applicant asserts further in its reply that such a deliberately constructed veil prevented it from approaching this Court with substantiated evidence of the exact decisions to be reviewed. Furthermore, the applicant did not rest on its proverbial laurels, but actively sought information from the respondents which was only — partially — provided on the strength of two (2) Court orders. As such it was contended that the respondents actively contributed to the delay in finally approaching this Honourable Court.

32. Again in reply,[16] the applicant further asserts that its application is about the statutory force members in SAPS who are denied the same benefits as non-statutory force members. However, its ambit extends much further, i.e. including the irrational and discriminatory actions of the respondents towards the +/- 150 000 other SAPS members as well. This information was only progressively disclosed, i.e. annexure 'FA33' a letter dated 3 October 2018 received from the State Attorney which revealed that 600 vacant and funded promotion posts are reserved for the NSF members to the exclusion of 150 000 ordinary 'other' operational members. This practice of 'progressive' disclosure only under legal compulsion was maintained until 14 August 2020, when the Commissioner of Oaths signed the deponent's Answering Affidavit.

[16] Replying Affidavit para 380 p 11-111.

33. In addition the very fact that the respondents kept Annexures KJS1 to KJS14 secret and only disclosed same on 14 August 2020 is testimony to the fact that the applicant was deliberately deprived of the true extent and facts relating to the NSF project, and that this brought about the delay in approaching this court earlier than it did.

34.It was further submitted that the applicant only became fully aware of critical elements of the NSF project on 3 October 2018 (if the letter from the State Attorney is accepted) or then on 14 August 2020 (when the respondents disclosed another set of documents previously withheld). On this basis it can then be argued that 'full awareness' arose only on 14 August 2020.

35. Section 39(2) of the Constitution requires Courts, when interpreting any legislation, "to promote the spirit, purport and objects of the Bill of Rights." It is on the aforementioned basis that the applicant contended that the respondents' progressive disclosure of documentation only under legal compulsion should be considered when interpreting time periods and 'full awareness' in the present matter.

36. As indicated above, the applicant seeks condonation for the late filing of the review brought under PAJA, effectively asking for an order extending the

180-day period for lodging a review application in terms of section 9 of PAJA,[17]. The SAPS Respondents contend that condonation should be refused.[18]

37. On its version the applicant obtained knowledge of the decision to implement the NSF project in 2017 and took approximately five months before it launched its review proceedings. Having regard to the evidence set out by the applicant in its founding affidavit before Court, it has failed to adequately explain the entire period of five months before the review proceedings were launched.

38. A more detailed exposition of what brought about the delay, is contained in its replying affidavit filed in response to the answering affidavit of the first to third respondents. The applicant failed to provide its explanation in its founding affidavit where this Court had to assess its reasons for the delay. The said reasons, in addition, should have explained adequately the entire period as from the date of first obtaining knowledge to the date when the review application was ultimately launched. This the applicant has failed to do.

[17] FA, para 110, p 02-47.
[18] AA, para 136.1, p 14-43.

39. In absence of an adequate explanation a Court can however still also consider condoning a delay if the interest of justice so requires. If, however, it is found that the applicant has failed to demonstrate that the interest of justice requires the extension of time, the delay is per se unreasonable and should then not be condoned by a Court.

40. Section 7(1) of PAJA prescribes the time frames within which the judicial review of administrative action may be instituted.[19] It reads as follows:

"Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection 2(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonable have been expected to have become aware of the actions and the reasons."

41. On the other hand, section 9 provides:

(1) The period of-

(a)

[19] Promotion of Administration Act, 3 of 2000.

…

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interest of justice so require."

42. In the present application, the applicant failed to seek extension from the respondents as provided for in terms of the provisions of Section 9(1)(b).[20] The aforesaid provision provides that the 180 days referred to in sections 5 and 7 of PAJA may be extended for a fixed period, either by agreement between the parties or failing such agreement, by a court or tribunal on application by the person or administrator concerned.

43. In this application, the applicant, has not sought an agreement with the respondents and has not made any application before this court or any other court or tribunal for variation of time in accordance with section 9.

[20] Promotion of Administrative Justice Act, 3 of 2000.

44. In Aurecon South Africa (Pty)Ltd v City of Cape Town,[21] the court stated that:

"whether it is in the interest of justice to condone a delay depends entirely on the facts and circumstances of each case. The respondent failed to adequately explain the reasons for its delay. The delay was inexcusable and the *court a quo* should not have granted the application for review."

45. In the Aurecon case, the appeal court did not agree with the interpretation by the court a quo that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. The matter therefore turned on whether the respondents had made out a case for extension of the 180-day time period.

46. Before this Court, the applicant has not made out a case for the extension of the delay since there is no reasonable explanation proffered for the lengthy delay in bringing the review. It is the respondents' contention that the non-statutory project was registered at Cape Town, on or about 26 June 2013, more than five (5) years before the review application was brought,[22] which allegation remains uncontested in the absence of a replying affidavit having been filed to the remaining respondents answering affidavit.

[21] [2016] 1 ALL SA 313 (SCA).
[22] 4th to 56 respondents' answering affidavit at paragraph 168 at paginated page 12-39.

47. Herein, the applicant has conceded in the heads of arguments that it knew about the NSF projects for many years.[23] However the applicant states that: "the applicant, at best knows about the intention of the NSF project to favour the NSF members without detailed knowledge of the degree for such intended preferential treatment."

48. A similar reasoning as the above was however rejected in the Aurecon decision when the court found that City Council has far exceeded the time that is stipulated in section 7(1). Herein, the City Council was criticised because they always had knowledge of the process though they alleged that they only recently came to know about the irregularities. The fact that they always knew about the process, that Court found rendered the delay unreasonable. In *casu* a similar scenario is at play.

49. On the evidence relied upon with reference to condonation, the applicant further failed to disclose that it has exhausted all internal remedies provided for in any other law, prior to approaching this court for relief.

[23] Paragraph 4.3 of the heads.

50. Section 7(2) of PAJA sets out that subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.[24]

51. Section 9(2) of PAJA further provides:

> "9. Variation of time
>
> […]
>
> [2] The court or tribunal may grant an application in terms if subsection (1) where the interest of justice so requires"

52. It has been held that the phrase "unless the interest of justice requires otherwise" means equitable evaluation of circumstances of each case"[25]

53. The interest of justice are determined through a weighing up and striking a balance of rights of the parties embroiled in litigation. On a weighing up of rights, the applicant it is contended, has no rights in respect of the implementations of the NSF project which can be weighed up against the SAPS Respondents' rights to run the SAPS as mandated by legislation and the Constitution.

---

[24] Ibid.
[25] Sanderson v Attorney-General, Eastern Cape [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38 CC.

54. Here too, the weighing of rights up does not support granting the applicant condonation, and to do so would not be in the interest of justice.

55. The SCA has pronounced in respect of the provisions of section 7 of PAJA that it creates a presumption that a delay of longer than 180-days is "per se unreasonable."[26] In the Opposition to Urban Tolling Alliance (OUTA) decision it held as follows:

"At common law application of the undue delay rule required a two-stage enquiry. First, whether there was unreasonable delay and, second, if so, whether the delay should in all circumstances be condoned… Up to a point, I think, section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first inquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the legislature it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all."

[26] Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd [2013] ZASCA 148; [2013] 4 ALL SA 639 (SCA) at para [26],

56. In the Buffolo City Municipality decision, the Constitutional Court confirmed the SCA's interpretation that the presumption of a delay in excess of 180 days is unreasonable exists.[27]

57. In the same decision, it was held that the standard to be applied in assessing the delay in both a PAJA review and a legality review is the same, namely whether the delay was unreasonable.[28]

58. As the present application is brought outside the 180 days' period, the presumption on the unreasonableness of the delay applies.

59. The respondents before court, submitted that the applicant has not sufficiently addressed this court as to what factors should be considered for the court to exercise its discretion under section 9(2) of PAJA and to hold that the interest of justice warrants the granting of the extension of time. This I agree with.

60. It is however established law that condonation does not have to be explicitly applied for in a legality review.[29] A two-stage approach is followed,

[27] Buffalo City Metropolitan Municipality v Asia Construction (Pty) Limited 2019 (4) SA 331 (CC)) ('Buffalo City") at para [49].
[28] Buffalo City at para [49].
[29] Khumalo v Member of the Executive Council for Education, KwaZulu Natal2014 (5) SA 579 9CC) at paras [44]. Although the case dealt with the Labour Relations Act, the Constitutional Court held that as there were no expresses legislated time period

which was expressed as follows by the Constitutional Court in Buffalo City, namely:

"Firstly, it must be determined whether the delay is unreasonable or undue". This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter; Secondly, if the delay is unreasonable the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.[30]

61. In the present application both the PAJA review and the legality review are delayed.

62. In relation to assessing the delay in bringing the PAJA review, as mentioned the SAPS Respondents contend that the Applicant has not placed material facts before the Court to adequately assess whether the delay is unreasonable.

within which the MEC had to bring the review, there is no requirement for a formal condonation application to be brought. The Constitutional Court subsequently applied this finding to a legality review in Buffalo City, at para [51].

[30] Buffalo City at para [48].

63. The Applicant has been aware of the NSF project for many years,[31] confirming that it gained knowledge of the implementation project back in 2016.[32]

64. Having obtained knowledge of the NSF-project as far back as 2016, it however contends that it could not launch the review earlier as it lodged a PAJA application and also lodged other court applications.[33] The failure by the respondents to furnish the documents as set out in the two court orders contributed to this delay.

65.The above explanation, however, I find is without justification as it was always open to the applicant to launch its review and to seek leave to amend its papers upon the record ultimately having been furnished in terms of Rule 53.

66. The applicant as mentioned, has not only failed to provide an explanation for the full period of the delay but it has not acted expeditiously to launch this review.

[31] AA, para 136.1, p 14-43.
[32] FA, para 21, p 02-8.
[33] RA, paras 56.1-56.2, p 15-23.

67. The SAPS respondents contend that the delay is unreasonable. I share these sentiments. Therefore, on the factual enquiry upon which a value judgment is to be made, I conclude that the delay has been unreasonable.

68. In relation to the second stage, the SAPS respondents contend that the applicant has not established material factors to show that the Court should exercise its discretion and overlook the delay. Here too this Court agrees with the SAPS respondents for reasons already set out above.

69. Consequently, the Applicant is refused condonation for the late launching of its review application.

LACK OF LOCUS STANDI

70. As per its founding affidavit, the applicant alleges that it has standing on three bases namely: on its own behalf, in the interest of its members who are SAPS members;[34] and in the public interest.[35] It is the SAPS respondents' contention that none of these bases are available to the Applicant.[36]

71. In support for its locus standi, the applicant annexed to its founding affidavit, a resolution dated 29 October 2018, together with its constitution as

[34] FA, para 8, p 02-3.
[35] FA, para 10, p 02-4.
[36] AA, paras 9-13, pp 14-5 to 14-6.

the enabling instruments. The resolution at best authorises the applicant together with the deponent to the founding affidavit, to initiate these review proceedings on behalf of the applicant. The constitution so annexed however, does not expressly authorise the applicant to bring this application.[37] This averment has also not been answered by the applicant in its replying affidavit.

72. In addition the applicant further pleads that it acts in the public interest with reference to the constitutional provisions of the rule of law, transparency and accountability in the public administration.[38] In this regard the constitutional provisions of sections 195(1)(d) and 195(1)(e) are relied upon as grounds for locus standi and acting in the public interest.[39]

73. The applicant's founding affidavit makes it pertinently clear that the application is pursued in terms of both the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as 'PAJA') and the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the "Constitution").[40]

[37] AA para 71 to 71.2, p 14-17.
[38] FA para 10, p 02-5.
[39] FA para 10, p 02-5.
[40] Inter alia, Paragraph 9 of the Applicants Founding Affidavit, Caselines 01-9.

74. Section 33 in Chapter 2 of the Bill of Rights in the Constitution states emphatically that "everyone" is entitled to "just administrative action." The applicant's application makes it clear that not only is the application brought on behalf of its members but the public at large (thus in the public interest.) Thus, the categories of persons identified in the applicant's application fall withing the ambit of "everyone" as defined in Section 33 of the Constitution. Furthermore, PAJA gives expression to the constitutional right to just administrative action enshrined in s 33 of the Bill of Rights, makes clear that administrative action may be reviewed if it is (ultra vires s 6(2)(a)(i) and 6(2)(f)), if it is irrational (s 6(2)(f)(ii) or unreasonable (s 6(2)(h)) or if it is unlawful and unconstitutional (s 6(2)(i)).[41]

75. Section 38 of the Constitution is framed extremely wide in that Section 38 permits "anyone" acting in their own interest, "anyone" acting on behalf of another person who cannot act in their own name, "anyone" acting as a member of, or in the interest of, a group or class of persons; "anyone" acting in the public interest; or and an association acting in the interest of its members to approach a competent court to allege that a right in the Bill of Rights has been infringed or threatened.

[41] The co-existence of the common law grounds for review and the regime under PAJA is dealt with in Metcash Trading Limited v Commissioner for the South African Revenue Service 2001 (1) BCLR 1 (CC) at paras 40 – 41.

76. As per the founding affidavit and with specific reference to paragraph 10, the applicant states that:

"The Applicant also approaches this Court in the public interest. All South Africans have an interest in the rule of law, the requirements of a proper functioning constitutional democracy and, in particular, the urgent steps necessary to root out unfair discrimination and unlawfulness in our hard-earned democracy.

77. Section 195(1)(d) of the Constitution entails that services provided by public administration (and particular instance the South African Police Service) must be impartial, fair, equitable and without bias. In terms of Section 195(1)(e) the people's need must be responded to, and the public must be encouraged to participate in policy making. It is thus clear that the public has a vested interest in the setting of values and principles in public administration, which include the South African Police service. Section 195(1)(f) entails specifically that public administration must be accountable and in Section 195(1)(g) it is clearly stated that transparency must be fostered by providing the public with timely, accessible and accurate information. This stands in direct contradiction of the secrecy in which the NSF project has been dealt with to date."

78. The respondents have expressly replied to the above allegation in the answering affidavit.[42]

79. Now, the duty to allege and prove *locus standi* rests on the party instituting proceedings.[43]

80. The general requirement to establish *locus standi* is sufficient interest in the subject matter, the interest must not be too removed, the interest must be actual, not abstract or academic, the interest must be current and not hypothetical.[44]

81. Whether a litigant has direct interest in the proceedings must be determined in light of the facts and circumstances of the case. A key factor in this enquiry is the terms of the relief sought.

82. "Ordinarily a person whose rights are directly affected by an invalid law in a manner adverse to such person has standing to challenge the validity of that law in our courts."[45]

---

[42] AA para 74 p.10-18
[43] Mars Incorporated v Candy World (Pty)Ltd 1991 (1) 567 (A) at 575H-I.
[44] Four Wheel Drive Accessory Distributors CC V Rataan No 2019 (3) SA 451 (SCA) at para 7.
[45] Ferreira v Levin and Vryanhoek [199] ZACC 13, 1996 (1) SA 984 (CC); 1996 (1) BCLR (CC) at [162[.

83. Having regard to the authorities relied upon in support of the allegation in respect of locus standi, in view of its own constitution not expressly permitting the applicant authority to launch these proceedings, I am not persuaded that the applicant is clothed with the necessary locus standi to act in either its own name or on behalf of its members.

84. Furthermore, the Applicant further has not established that it has a direct interest in the outcome of the application. It has not identified how the implementation of the NSF project is invalid in a manner that is prejudicial to it, as a registered trade union, or its members which will enable it to bring the application on behalf of its members or in the public interest. In this regard the SAPS respondents requested the applicant to specify the names and details of the members on whose behalf it brings this application.[46] This request, the applicant has failed to adhere to. As such the members are not identified and they themselves have not provided any powers of attorney or similar authorisations to the applicant to prosecute this application. Also, no confirmatory affidavits have been annexed to the founding affidavit to substantiate the ground for locus standi.

[46] AA, para 12, pp 14-5 to 14-6.

85. As a result of the applicant's failure to take up the opportunity to present the details of its members to the respondents, this Court is unable to ascertain as to whether it also has established its locus standi to act on behalf of its members or then the public interest.

86. In addition, to find standing in the public interest one has to look at the provisions in section 38 of the Constitution[47] dealing with violation of rights in chapter 2 of our Constitution. Albeit that the applicant has not expressly pleaded reliance on section 38 of the Constitution, by way of inference it placed reliance on these provisions where it alleges in paragraph 8 to the founding affidavit that it approaches this court in the interest of its members.

87. In the present application the rights alleged to have been violated however, are not any rights as set out in chapter 2 of our Constitution. For this reason, therefore, placing reliance on the provision of section 38 is further misplaced.

[47] Section 38 provides: 'Anyone listed I this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot in their own name;
(c) anyone acting as a members of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest;
(e) an association acting in the interest of its members."

88. As regards the relief sought in the application, i.e. the setting aside of the implementation of the NSF project so as to protect the right to apply for promotion and "the right to promotion" of the applicant's members who are members of the SAPS, the argument advanced by the SAPS respondents, is that the right to apply for promotion and the right to be promoted are both personal rights which vest in the applicant's members personally. The right to apply for promotion and the right to be promoted, do not arise by virtue of membership in the applicant. Given that this part of the relief sought in the notice of motion affects 'members' personally and in the absence of the members of the applicant having been identified, it also validly attacks the applicants' locus standi to act on behalf of its members.

89. The Applicant further places reliance on sections 195(1)(d) and 195(1)(e) of the Constitution. The reliance on these two sections is misplaced as these sections reflect constitutional values and are not self-standing rights.

90. Support for the above view is to be found in the Chirwa-decision where the Constitutional Court held that:

"Therefore although s 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action."[48]

91. On this further basis, I conclude, that the applicant cannot successfully rely on the provisions of section 195(1)(d) and 195(1)(e) of the Constitution to allege locus stindi. The applicant lacks the necessary locus standi to bring this application.

92. Albeit, that I conclude that the applicants' lack of locus standi is dispositive of the application, I still deem it prudent to deal with the additional preliminary points raised and the merits of the application.

93. Before I do so, a convenient point of departure would be to determine whether the decision taken being complained of fall within the definition of administrative action under PAJA. It is the SAPS respondents' argument that the implementation of the NSF project is not administrative action,[49] and they have expressly denied that the implementation of the NSF project constitutes administrative action.[50]

[48] Chirwa, above n38 at para [76]. Ncgobo J in his separate concurrence, at para [195] held that "I agree with Skweyiya J that's s 195 of the Constitution does not give rise to directly enforceable rights."
[49] RA, para 18, p 15-8 read with FA, para 18, p 02-7.
[50] AA, para 6 to 8, p14-4 to 14-5; paras 99.4 and 99.5, p 14-29.

94. Section 1 of PAJA defines the relevant parts of "administrative action" as "any decision taken, or any failure to take a decision, by-

(a) an organ of state, when

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(iii)…

95. The starting point in determining whether an action is "administrative action" is to consider whether the task itself is administrative or not, by analysing the nature of the power being exercised.[51] Due regard must be had to the source of the power exercised, the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters (which are not administrative) and on the other hand to the implementation of legislation (which is administrative).[52]

[51] Transnet Ltd v Grootman Brothers (Pty)Ltd 2001 (1) SA 853 (SCA) ("Trans
[52] Transnet para 34. See also President of the Republic of South Africa v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at para 143.

96. In this regard counsel for the respondents had argued that the re-ranking of police officials and pension fund benefits attributed to them as a means of implementing the NSF project, while exercised by a public functionary is not administrative action. I tend to agree with this.

97. Support for this view is further found in Chirwa,[53] where the Constitutional Court had to consider whether the termination of employment amounted to administrative action under section 36 of the Constitution. The employer in this case was Transnet an organ of state. The Constitutional Court had regard to the SARFU[54]case. The court held that the source of power, although an important factor is not decisive. The crucial question is whether the task performed is administrative action or not.[55]

98. It is no different from a public functionary changing the working hours of police officers.[56]In this review it is not the decision of the NSF project which is being challenged on review by the applicant, but the implementation of the decision itself. The respondents had argued that the implementation of the NSF project remains a labour issue.

[53] Chirwa v Transnet and Others 2008(4) SA 367 (CC).
[54] President of the Republic of South Africa and Others v South African Rugby Football Unions and Others 2000 (1) SA 1 (CC).
[55] Chirwa at para (140) as per Ngcobo J. Skweyiya j at para [74] occurs with Ngcobo J on the reasoning ad decision on this issue.
[56] SA Police Union and Another v National Commissioner of the SA Police Service and Another (2005) 26 ILJ 2403 (LC);(J1584/05) [2005] ZALC 91; [2006] BLLR 42(LC) [5 October 2005) at para 51.

99. In applying the SARFU test, to the facts in Chirwa the Constitutional Court reasoned as follows:

"The subject matter if the power involved here is the termination of a contract of employment for poor work performance. The source of power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of State. It follows therefore that the conduct of Transnet did not constitute administrative action under s 33.

100.Support of the view that the termination of the employment of a public sector employee does not fall under administrative action under section 33 can also be found in the structure of our Constitution.

101. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognises that employment and labour relations and administrative action are two different areas of law.

102. The decision Gcaba v Minister of Safety and Security[57] is instructive in the present dispute. At the heart of the matter in Gcaba was the interplay between administrative and labour law principles within the context of public sector employment.[58] In finding that the failure to promote and appoint Mr Gcaba was quintessentially a labour related issue, based on the right to fair labour practices,[59]and therefore the failure to promote and appoint him was not administrative action. Herein the Constitution Court held:

"Generally employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair

[57] Gcaba v Minister of Safety and Security and Others 2010 (1) SA 238 (CC).
[58] Gcaba, at para [17].
[59] Gcaba, at para [66].

administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.[60]

103. In the present matter, the Applicant's case is rooted in setting aside of the "en-masse promotions of a selected group". Although the source of power exercised by the SAPS respondents amount to public power, the subject matter of this application is rooted in the issue of alleged mass promotion.

104. It is on this basis that the SAPS respondents contend that there is no administrative action that is cognisable before this court. I support this view.

NON-JOINDER

105. In turning then to the preliminary point of non-joinder the respondents allege that the NSF project throughout has been implemented with the participation of both the National Treasury and or the Minister of Finance. As the National Treasury has budgeted funds, and in the event of the applicant being successful, the allocated funds in all likelihood will be extinguished and

[60] Gcaba, at para [64].

it is for this reason that it is allege that the National Treasury has an interest in the application.[61]

106. In addition the respondents assert that the Government Pensions Administration Agency together with the Department of Public Works should have been joined as these institutions similarly have an interest in this application.[62]

107. In its replying affidavit, the applicant had denied that these functionaries or institutions have an interest in the outcome of these proceedings, and if they were to have, they will only become involved once the re-ranking/promotions have been finalised.

108. In respect of the alleged issue of non-joinder the first to third respondents rely on quotations from two judgments in relation to the preliminary point of non-joinder: Firstly,

"The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined… "

[61] AA para 13-15 p 10-6.
[62] AA para 16-17 p 10-6.

109. Secondly, the respondent relies on a further decision:

"It has not become settled law that the joinder is only required as a matter of necessity – as opposed to a matter of convenience if the party has a direct and substantial interest."

110. On the evidence placed before this court, I cannot find that there is merit on the point of non-joinder. As I see it, albeit that the functionaries of institutions might have an interest in the matter, it cannot be said that they should be heard at the time when the merits of this application is to be determined.

111. Accordingly the point in limine of non-joinder is dismissed with costs.

GROUNDS FOR REVIEW

112. As a point of departure in considering the grounds of review it is important to note that the applicant carries the onus to identify the decisions it seeks to review and set out the nature of such decisions. In addition, the applicant carries the onus, to identify when the decisions referred to were made and who made the decisions referred to.[63]

[63] AA, para 79, p 14-20.

113. As previously mentioned the applicant primarily rely on four grounds on which it premises its review application.[64]

114. Given the exposition of the facts of this application, the applicant contends that its members (and the remaining 99.06% of the SAPS' employees) have been shut out from the secretive NSF project and have been prohibited from making representations and/or applying for the same benefits which are being awarded to and are in the process of being awarded to NSF (now temporarily interdicted) members in the absence of legislative provisions which cater for such promotions/awards.

115. Furthermore, the applicant asserts that it is clear that the NSF project/agenda was not brought to the attention of the applicant's members, the remaining SAPS workforce or the general public at large.

Unreasonableness

116. On the ground of unreasonableness, it is the applicants' case that the Minister's approval of the NSF project was so unreasonable that no reasonable decision maker could have approved the NSF project. Apart from the respondents' failure to comply with the provisions governing promotions and

[64] FA para 21-109

benefits (an example of which is demonstrated in paragraph 47 of the Founding Affidavit), the respondents were and remain totally blind to the illegality and inherent unconstitutionality of the NSF project as it stands. It is on this basis that the applicant had argued that the respondents' minds were accordingly closed to alternative means of inclusive promotion and reward mechanisms.[65]

117. The respondents deny that the object of the NSF project is unreasonable. In their answering affidavit they set out that the applicant has failed to point out any promotions and benefits that were available to the general body of members to the SAPS and which promotions and benefits were denied to the members of the applicant.[66] They further assert that the NSF project is a fundamental expression of acknowledgment by the State of sacrifices made by NSF members and on this basis had argued that the NSF project was eminently reasonable.

118. In reply, the applicant had asserted that the issuing of a new National Instruction 11 of 2017, had as its aim the effect to catapult NSF-members to the top echelons of the SAPS without any proper process being followed. This

[65] FA para 91 p 01-46.
[66] AA para 125 p10-39.

benefit will exclusively benefit only NSF members to the detriment of duly qualified and long-standing non-NSF members, such as their members.

119. On the conspectus of the evidence placed before this Court, I could not find any evidence presented before this Court by the applicant, where a member(s) of the applicant was overlooked as non-NSF members to the exclusive benefit of NSF-members.

120. It might very well be that the applicant on the face of it can argue that the decision so taken with the introduction of the NSF project could inherently be seen as unreasonable, but in the absence of concrete evidence presented before this Court, the applicant is asking of this Court to venture into the realm of speculation. To this, the object of the NSF-project should also not be discarded, i.e. at its heart the project was established to assist NSF members to address and redress the sacrifices made by their members, when they were prevented from joining the SAPS given our unsavoury history.

121. For the above reasons, I cannot therefore conclude that the applicant has established a ground of review premised on unreasonableness of the decision.

Erroneous interpretation of the law

122. In respect of the erroneous interpretations of the Law, the applicant in the founding affidavit asserts that circumstances not required in the Military Veterans Act, National Instruction 4/2010 and the Police Service Employment Regulations, 2008 to afford promotions, re-rankings and benefits were taken into consideration and those circumstances that were supposed to be considered in terms of the aforementioned were not taken into consideration. As such, the decision to implement the NSF project was unlawfully made.[67]

123. Section 1 of the Military Veterans Act i.e. the definitions section of the aforementioned Act defines a Military Veteran as any South African Citizen who:

123.1 Rendered military service to any of the military organisations statutory and non-statutory, which were involved on all sides of South Africa's Liberation War from 1960 to 1994;

123.2 Served in the Union Defence Force before 1961; or

123.3 Became a member of the new South African National Defence Force after 1994.

[67] FA para 92 p 01-46.

124. Section 3 of the Act clearly states that aid to and benefits for Military Veterans is to be provided by and is the obligation of State Departments (Organs of State). No differentiation is made between benefits which are to be afforded to Statutory Forces and Non-Statutory Forces ("NSF"). According to the Act, both are to be treated equally.

125. The applicant does not dispute that NSF members could be entitled to the workplace-related benefits listed in the MVA's Section 5, i.e. skills development, facilitation of employment placement, pensions and health care (as set out in par 42, of the Founding Affidavit). The Applicant, however, disputes that the NSF members are entitled to the benefits for which no statutory provision is made, for instance promotions and/or re-ranking. The statutory benefits mentioned in Section 5 can't be afforded to the NSF military veterans only and to the exclusion of Military Veterans in the broader sense (statutory forces and employees of the SAPS) who are members of the applicant, especially in light of the fact that the respondents refuse to make available to the applicant and its members information concerning the NSF project which is only benefiting NSF members. NSF members are as of law (Section 5 of the Military Veterans Act) only entitled to the benefit of facilitation of employment placement and there is no right to permanent placement or employment, neither any right to preferential promotion or re-ranking.

126. All promotions/re-ranking and pension benefits received by NSF members without non-NSF members having the opportunity to apply or make representations is accordingly unlawful, unconstitutional, irrational, unreasonable and invalid.

127. It is on this basis that the applicant contends that the aforementioned constitutes a blatant disregard for the constitutional right to equality and not to be discriminated against at the hands of state officials who seek to overlook the applicant's members and other career-progressing employees of the SAPS.

128. The respondents in reply denied that the NSF project was premised on its misinterpretation of the law, but that in fact it is based on a broad suite of instruments and policy enactments.[68] Furthermore, the policy was presented before Parliament by the Minister of Police and accepted and that Parliament had voted for funding for the NSF project. The respondents further denied that the NSF project beneficiaries are 'military veterans' within the meaning of the Military Veterans Act.

[68] AA para 126 p 10-39.

129. On behalf of the applicants it was argued that the respondents' reasons proffered for the NSF project are inadequate and as such, the respondents' decision was materially based on erroneous interpretations and/or application of the law. As such counsel had argued that their decision(s) to implement the NSF project is subject to review for being unfairly, unlawfully and unreasonably taken or made.

130. In addition it was submitted that public functionaries are required to act within the powers granted to them by law (i.e. intra vires). They must also not misconstrue their powers and the implementation of the NSF project as it falls outside of the ambit of any empowering provision. On this basis it was argued that their decisions are accordingly reviewable in terms of Section 6(2)(a)(i) of PAJA.[69] It is manifestly apparent that the respondents have misconstrued their powers in the roll-out and implementation of the NSF project.

131. In respect of this ground of review, the argument advanced by the respondents is to the effect that Parliament has appropriated funds for the

[69] That section provides:
"A court or tribunal has the power to judicially review an administrative action if-
(a) the administrator who took it-
(i) was not authorised to do so by the empowering provision"

NSF project within the SAPS and that such an allocation cannot take place absent a lawful basis.[70]

132. In addition counsel had argued that the applicant does not have the legal competence to decide how public funds, lawfully appropriated by Parliament, for the specific purpose of funding the NSF project within the SAPS is spent.[71] The applicant simply cannot seek to set aside an executive/policy decision taken by Parliament.

133. On the allegation made in the Answering Affidavit, that the funding for the NSF project was approved by Parliament, the applicant has placed no rebuttal evidence before this Court, that no such approval during a Parliamentary sitting had taken place. At best what the applicant had placed reliance upon, were letters from the National Commissioner of the South African Police to the Director-General and a further letter written by the State Attorneys to support its contention that no prior funding had been approved for the NSF-project.[72]

134. In the absence of any such evidence in rebuttal, I must accept that Parliament (representing the broader public representatives) has appropriated

[70] AA, para 128.2-, p 14-40.
[71] AA, para 128.3, p 14-40.
[72] RA para 353 p 11-105.

funds for the NSF project within the SAPS and that such an allocation cannot take place without a lawful basis. Consequently, this ground of review cannot be sustained.

Rationality

135. In respect of this ground the argument advanced by the applicant was that when dealing with a review on legality the exercise of all public power must be rational, i.e. rationally related to the purpose for which the power was given (otherwise it is arbitrary)[73]. It is the applicants' case that the decision to exercise power in relation to the NSF project was arbitrary.

136. In respect of rationality the Courts have developed the concept requiring the executive and public functionaries to exercise their power for the specific purpose for which it was granted, so that they cannot act arbitrarily, for no other purpose or an ulterior motive. It is the applicants' argument that the

[73] In Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC) Yacoob A.D.C.J.
held: "rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."

NSF project is tarnished with more than one ulterior motive i.e. political and for financial gain.

137. In response to this argument advance in relation to rationality, the respondents have denied that this ground has been pleaded with specificity. It was contended by the respondents that the applicant has failed to identify the particular power so exercised which they aver was arbitrarily exercised. [74]

138. In respect of this ground of review, the applicant had failed to plead before this court that the decision to implement the NSF project indeed falls within the definition of administrative action. Absent such allegation, thus the Court cannot conclude that there could be merit on this ground of review.

Grounds of Discrimination and Procedural Unfairness

139. In respect of these grounds counsel for the applicant had argued that it is common cause that the principle of legality has been expanded by treating procedural fairness as a requirement of rationality. It is the applicants' contention that the NSF project has been completely devoid of any procedural fairness. In 2010 the Constitutional Court in Albut v Centre for the Study of

[74] AA para 132 p 10-

Violence and Reconciliation[75] further expanded the principle of legality by treating procedural fairness as a requirement of rationality. In this case it was held that: "rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred.

140. In respect of discrimination, it is the applicants' contention that it is clear that the respondents' failure to support an equal playing field for all employees of the third Respondent results in the respondents having discriminated against the applicant's members and all other career SAPS- employees (not designated as NSF-members). The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (-the Equality Act") opposes such conduct.

141. In addition, the third respondent's policy(s) and decisions to withhold benefits, opportunities and advantages based on prohibited grounds as

[75] Albutt v Centre fbr the Study of Violence and Reconciliation 2010 (3) SA 293 (CC),

envisaged in the Equality Act amounts to "discrimination" as envisaged in section 1 of the Act.

142. Support for this ground is found in section 13(2)(b)(i) of the Act, which provides that discrimination is unfair if such discrimination took place on the grounds in paragraph (b) of the definitions of "prohibited grounds" and if one or more of the conditions set out paragraph (b) of the definition of "prohibited grounds" are established.

143. It was argued by counsel for the applicant that the respondents' discrimination falls under paragraph (b) of the definitions of "prohibited grounds" in section 1 of the Equality Act. The discrimination is unfair as it caused and perpetuates systematic disadvantages to non-NSF members.

144. Moreover, it was contended that if the respondents' NSF project continues to be implemented, the applicant's members and other career employees of the third respondent will be adversely affected by the NSF project and accordingly causes perpetual disadvantages and is therefore unfair as envisaged in section 13(2)(b) of the Equality Act. 106. Section 34(1)(a) of the Equality Act provides that:

"In view of the overwhelming evidence of the importance, impact on society and link to systematic disadvantage and discrimination on the grounds of

HIV/AIDS status, socio-economic status, nationality, family responsibility and family status- special consideration must be given to the inclusion of these grounds in paragraph (a) of the definitions of 'prohibited grounds' by the Minister."

145. The above provision attests to the severity of discrimination on the mentioned grounds as well as the systematic nature of discrimination on those grounds, thus emphasising the unfairness thereof.

146. The above constitutes a forthright disregard for the constitutional right to equality and not to be discriminated against at the hands of state officials who seek to overlook the applicant's members and other career SAPS members. The applicant's members remain, to a substantial degree, in the dark and to date the applicant's members are denied the opportunity of making any informed representations to the SAPS and other respondents as to the NSF-project, the reason for its existence, the lawfulness of the project, the process followed thus far and the members' qualification to be part of the project (should it be conducted in a regular and lawful fashion), coupled with the discriminatory fashion in which the project and the subsequent re-grading is conducted, etc.

147. On behalf of the respondents it was argued with reference to the ground on discrimination and unfairness that upon a careful analysis of the applicant's case on discrimination and unfairness, as grounds for review, it shows that the applicant relies solely on the Equality Act.[76]

148. Any potential claim which the applicant might bring in terms of the Equality Act, is a claim not justiciable under the guise of a PAJA review alternatively a legality review, more so in circumstances where the applicant has failed to identify which of its members had been discriminated against and what the nature of the discrimination has been. This stance adopted by the respondent I am in agreement with. The applicant or any of its members are not without recourse if they believe that they have been discriminated again in terms of the Equality Act.

149. It is on this basis that I conclude that this alleged ground of review cannot be sustained and must also be dismissed.

150. In respect of the review premised on the principle of legality, I also cannot conclude that the applicant can succeed as the applicant's case does not fall within the exercise of a public power. It is on this basis that a legality review in terms of section 1(c) of the Constitution must also fail.

[76] FA, para 103, p 02-45.

COSTS

151. This court in the exercise of its discretion deems it prudent to award costs against the unsuccessful party, such costs to include the costs of two counsel where so employed.

ORDER

152. In the result the following order is made:

152.1 The application is dismissed with costs, such costs to include costs consequent upon the employment of two counsel.

C COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARANCES

Counsel for the Applicant:	Adv. W P BEKKER SC
	Adv. C J JOOSTER
Instructed by:	Serfontein Viljoen & Swart Attorneys
Counsel for the 1st to 3rd Respondents:	Adv. O MOOKI SC
	Adv. A LOUW
Instructed by:	State Attorney, Pretoria
Counsel for the 4th to 56th Respondents	Adv. L MAUNATLALA
	Adv. J CHANZA
Instructed by	Sekati Monyane Inc
Date of Hearing:	02 March 2023
Date of Judgment:	26 March 2024