



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 304/20

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF COOPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS, KWAZULU-NATAL**

Applicant

and

NKANDLA LOCAL MUNICIPALITY

First Respondent

**COUNCIL OF THE NKANDLA
MUNICIPALITY**

Second Respondent

LANGELIHLE SIPHIWOKUHLE JILI

Third Respondent

MTHONJANENI LOCAL MUNICIPALITY

Fourth Respondent

**COUNCIL OF THE MTHONJANENI
MUNICIPALITY**

Fifth Respondent

PHILANI PHILEMON SIBIYA

Sixth Respondent

Neutral citation: *Member of the Executive Council for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality and Others* [2021] ZACC 46

Coram: Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Tshiqi J (majority): [1] to [34]

Theron J (concurring): [35] to [72]

Heard on: 11 May 2021

Decided on: 8 December 2021

Summary: Local Government Municipal Systems Act 32 of 2000 — interpretation of section 54A — operation of constitutional invalidity after expiration of period of suspension — interests of justice — mootness

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg):

1. Leave to appeal is refused.

JUDGMENT

TSHIQI J (Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ concurring):

Introduction

[1] This application arises from two disputes. The first dispute concerns the appointment of the third respondent, Mr Langelihle Siphwokuhle Jili, as a Municipal Manager of the first respondent, the Nkandla Local Municipality. The second concerns the appointment of the sixth respondent, Mr Philani Philemon Sibiya, as a Municipal Manager of the fourth respondent, the Mthonjaneni Local Municipality.

Both appointments were challenged by the applicant, the Member of the Executive Council for the Department of Cooperative Governance and Traditional Affairs, KwaZulu-Natal (MEC) on the basis that they were made in contravention of section 54A(2) of the Local Government Municipal Systems Act¹ (Systems Act) and were thus null and void as envisaged in section 54A(3) of the Systems Act.²

Factual background

Nkandla Local Municipality

[2] On 24 January 2017, pursuant to a valid interview process, the Nkandla Municipal Council resolved to appoint Mr Jili as its Municipal Manager. On 26 January 2017, the Municipality notified the MEC about the decision to appoint Mr Jili as prescribed by section 54A(7) of the Systems Act.³ In February 2017, Mr Jili assumed his position as Municipal Manager. On 13 February 2017, the MEC wrote to the Mayor of the Nkandla Local Municipality requesting certain information and documentation pertaining to Mr Jili's level of experience. On 7 March 2017, the MEC wrote to the Mayor and advised that, according to her assessment, Mr Jili's appointment was not in compliance with the legislative requirements, as he appeared not to have a

¹ 32 of 2000. Section 54A(2) provides as follows:

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

² Section 54A(3) provides as follows:

“A decision to appoint a person as a 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
- (b) the appointment was otherwise made in contravention of this Act.”

³ Section 54A(7) provides as follows:

- “(a) The municipal council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.
- (c) 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.”

minimum of five years' experience at senior management level.⁴ The MEC called upon the Municipality to take remedial action to address the issue.

[3] On 23 May 2017, the Municipality wrote to the Minister of Cooperative Governance and Traditional Affairs, as contemplated in section 54A(10) of the Systems Act,⁵ requesting him to waive the relevant experience requirement related to the post of Municipal Manager. On 14 September 2017, the Minister responded and informed the Municipality that its request for waiver had been declined. On 10 November 2017, an official from the MEC's office wrote to the Municipality demanding that it should take remedial action concerning Mr Jili's appointment. On 21 November 2017, the Mayor responded and said that the Municipality was awaiting a legal opinion. On 4 January 2018, the official from the MEC's office again addressed a letter to the Municipality requesting an update on what remedial action had been taken to resolve the matter. No response was received from the Municipality. There was no further significant communication from the parties regarding this issue.

Mthonjaneni Local Municipality

[4] On 19 December 2016, the Municipal Council of the Mthonjaneni Local Municipality resolved to appoint Mr Sibiya as its Municipal Manager. A day later, the Municipality informed the MEC of the decision to appoint Mr Sibiya as prescribed by section 54A(7) of the Systems Act. On 20 January 2017, the MEC informed the Mayor and the Minister that she was of the view that Mr Sibiya did not have the required experience and requested that the Municipality take remedial action to remedy the alleged irregularity. However, Mr Sibiya assumed the position of Municipal Manager in the same month (January 2017). On 9 July 2017, the Mayor informed the MEC that

⁴ The prescribed qualifications for the post of a Municipal Manager are contained in Item 2 of Annexure B to the regulations. See Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, GN 21 GG 37245, 17 January 2014.

⁵ Section 54A(10) states that:

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

the Municipal Council had sought a legal opinion on the validity of Mr Sibiya's appointment. Further, the legal opinion would be tabled at the next Municipal Council meeting scheduled for 29 August 2017, whereafter he would revert. The Mayor did not respond as promised. On 20 November 2017, an official from the MEC's office sent a circular to the Municipality. This circular contained guidance on how an application could be made to the Minister for the waiver of the irregular appointment as contemplated in section 54A(10) of the Systems Act. This was followed by another letter dated 24 January 2018 advising the Municipality that it was required to take steps to regularise the matter. On 26 January 2018, officials from the MEC's office met with officials from the Municipality, and the latter was advised to apply to the Minister for the waiver of the irregular appointment to rectify the situation. There was no further meaningful engagement between the parties concerning this issue.

Litigation history

[5] Due to the impasse between the MEC and the two Municipalities, the former launched two separate review applications in the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg. In both applications the MEC sought orders reviewing, setting aside, and declaring null and void the appointments of Messrs Jili and Sibiya. In challenging both appointments, reliance was placed on section 54A(2) and (3) of the Systems Act. The complaint regarding Mr Jili's appointment was that his experience at management level was less than the stipulated minimum period of five years. Regarding Mr Sibiya, the MEC alleged that his qualifications were irrelevant for the position and that he did not have the required experience at management level. The applications were heard simultaneously because the issues raised and the relief sought were identical. The High Court dealt with both matters in one judgment.⁶

⁶ *MEC for the Department of Co-operative Governance and Traditional Affairs v Nkandla Local Municipality; MEC for the Department of Co-operative Governance and Traditional Affairs v Mthonjaneni Municipality* (2019) 40 ILJ 996 (KZP) (High Court judgment).

[6] The High Court upheld the applications and declared both the appointments of Mr Jili and Mr Sibiya null and void. However, the Court ordered that the setting aside of the appointments should not operate retrospectively from the date of their respective appointments, but that it should take effect from the date of its order.⁷ The respondents were ordered to pay the costs of the application jointly and severally and such costs were to include the costs of senior counsel.⁸ The High Court subsequently granted leave to appeal to the Supreme Court of Appeal.⁹ In the majority judgment, supported through a separate concurrence, that Court upheld the appeals, whilst the dissenting judgment would have dismissed them.¹⁰

[7] Although the majority considered the question of whether Messrs Jili and Sibiya had the prescribed qualifications and experience as envisaged in section 54A(2), this was not the focus of the main judgment or the separate concurrence. The main focus of both judgments was the delay occasioned by the failure on the part of the MEC to act within the stringent time frames prescribed by the Systems Act, and its delay in bringing the review applications. Both judgments found that the delay in both instances was excessive and unreasonable.¹¹ In considering an appropriate remedy, the majority considered the fact that no complaints had been made about Messrs Jili and Sibiya's performance since their respective appointments.¹² The main judgment also highlighted that the MEC did not identify any prejudice that she may suffer as a result of the preservation of the employment contracts for the remainder of the five-year term.¹³ The majority held that, in those circumstances, a just and equitable remedy was the retention

⁷ Id at para 67.

⁸ Id.

⁹ The Supreme Court of Appeal also heard the appeals simultaneously.

¹⁰ *Nkandla Local Municipality v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality v MEC for the Department of Co-operative Governance and Traditional Affairs* [2020] ZASCA 153 (Supreme Court of Appeal judgment) at paras 54, 102 and 122.

¹¹ Id at paras 42 and 118.

¹² Id at para 51.

¹³ Id at para 52.

of Messrs Jili and Sibiya in their current positions for the remainder of their respective employment contracts.¹⁴

[8] The minority judgment disagreed that the delays were unreasonable.¹⁵ Regarding the failure to adhere to the tight time frames prescribed by the Systems Act, the minority expressed the view that the MEC could not be faulted for engaging the Municipalities before approaching the Court as a last resort. This, according to the minority, was done in the spirit of co-operative governance.¹⁶ It also stated that that Court was not at large to interfere with the discretion of the High Court to grant condonation for the delay in bringing the application for review.¹⁷ It held that it would have endorsed the High Court's order declaring the appointments null and void. However, just like the majority, the minority held that it would also have allowed Messrs Jili and Sibiya to remain in office until the expiry of their current contracts of employment.¹⁸

In this Court

[9] In all applications that seize this Court, two preliminary issues must be disposed of before this Court will decide whether to venture into the merits of the matter. The first is whether this Court has jurisdiction to entertain the application and, if it does, the second question is whether it is in the interests of justice for this Court to grant leave to appeal.¹⁹

¹⁴ Id.

¹⁵ Id at para 88.

¹⁶ Id at para 79.

¹⁷ Id at para 88.

¹⁸ Id at para 100.

¹⁹ Section 167(3)(b) and (c) of the Constitution.

Jurisdiction

[10] This matter concerns the exercise of public power by the MEC, as well as the interpretation of section 54A(3) and (8) of the Systems Act.²⁰ It raises a constitutional issue, and the jurisdiction of this Court is accordingly engaged.²¹

Leave to appeal

[11] In considering whether leave to appeal should be granted, the enquiry into the interests of justice plays a vital role. In this enquiry, prospects of success, although not the only factor, are an important consideration. The applicant must show that there are reasonable prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal.²²

[12] In determining whether this application bears reasonable prospects of success, it is helpful to consider the grounds of appeal, and the grounds advanced by both the applicant and the respondents in opposing this application.

[13] The MEC's main ground of appeal against the decision of the Supreme Court of Appeal is that the majority erred in holding that her failure to adhere to the prescribed timelines and its delay in launching the review application were inordinate. The MEC's further contention is that the Supreme Court of Appeal erred in deciding not to set aside the appointments of Messrs Jili and Sibiya. Based on these

²⁰ Section 54A(8) provides as follows:

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

²¹ *Notyawa v Makana Municipality* [2019] ZACC 43; (2020) 41 ILJ 1069 (CC); 2020 (2) BCLR 136 (CC) at para 31.

²² *Id* at para 32. See also *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 29; *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 29; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 11-2; and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 6.

contentions, the MEC accordingly asks this Court to declare the appointments null and void and to set them aside.

[14] In opposing the application, the respondents align themselves with the majority reasoning of the Supreme Court of Appeal regarding the delay. The respondents also submit that the application is moot and that leave to appeal should therefore be refused.

[15] I will first deal with the respondents' submissions on mootness because if this matter is indeed moot, granting leave to appeal will serve no purpose.

Mootness

[16] The principles applicable to mootness are trite. Courts should not decide matters that are abstract or academic and which do not have any practical effect, either on the parties before the court or the public at large. The question is a positive one, namely whether a judgment or order of the court will have a practical effect and not whether it will be of importance for a hypothetical future case.²³ A matter is also moot and not justiciable if it no longer presents an existing or live controversy.²⁴ However, where the interests of justice so require, a court still has a discretion to determine a matter despite its mootness.²⁵ Several factors are considered in order to determine whether the interests of justice require that the matter should be determined nonetheless. Where there are two conflicting judgments of different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of

²³ *Director-General Department of Home Affairs v Mukhamadiva* [2013] ZACC 47; 2013 JDR 2860 (CC); 2014 (3) BCLR 306 (CC) at para 35. See also *President of the Ordinary Court Martial v The Freedom of Expression Institute* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at paras 13-4 and *Simon N.O. v Air Operations of Europe AB* [1998] ZASCA 79; 1999 (1) SA 217 (SCA) at para 226.

²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18.

²⁵ *POPCRU v SACOSWU* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) at para 44. See further *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 8; *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 32; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29 and *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg*) at para 9.

granting leave to appeal and thereby entertaining a moot matter.²⁶ Another factor is the nature and extent of the practical effect that any possible order might have.²⁷

[17] In contending that the matter is moot, the respondents rely on *SAMWU*,²⁸ in which this Court declared section 54A of the Systems Act invalid and unconstitutional in terms of section 172 of the Constitution.²⁹ In that matter, this Court specifically limited the retrospective effect of its declaration of invalidity and held that the invalidity will operate prospectively. It then suspended the order of invalidity for a period of 24 months to afford Parliament an opportunity to cure the defect that led to the order of invalidity.

[18] A declaration of invalidity means that a provision or statute is unenforceable as a result of the declaration of invalidity. An order suspending the order of invalidity keeps the provision or the law alive until the suspension period has lapsed or until Parliament has either rectified the source of its invalidity or amended it. Interested parties may also approach this Court for an order extending the period of suspension. This must be done before the period of suspension has expired. In *SAMWU*, Parliament did not take advantage of the suspension period to rectify the source of the declaration

²⁶ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) (*AAA Investments*) at para 27.

²⁷ These factors and others are listed in *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32, which cites the cases of *AAA Investments* id at para 27 and *Langeberg* above n 25 at para 11.

²⁸ *South African Municipal Workers' Union v Minister of Co-operative Governance & Traditional Affairs* [2017] ZACC 7; 2017 JDR 0459 (CC); 2017 (5) BCLR 641 (CC) (*SAMWU*) at para 91.

²⁹ Section 172 of the Constitution, in relevant part, provides:

- “(1) When deciding a constitutional matter within its power, a court—
- ...
- (b) may make any order that is just and equitable, including—
- (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

of invalidity after the decision of this Court. The Minister also did not approach this Court for an order extending the suspension period before its expiry.

[19] The period of suspension ended on 8 March 2019. Until 8 March 2019, there could be reliance on section 54A because the suspension had the effect of keeping it enforceable despite the order of invalidity. Once the suspension period had expired, the order of invalidity kicked in. After this there could no longer be any reliance by the MEC on the section to seek an order to declare the appointments null and void because it was invalid and therefore unenforceable.

[20] The High Court declared the appointments null and void, but it ordered that their setting aside should not operate retrospectively from the date of the respective appointments but should rather come into effect from the date of its order. The effect of this is that the appointments were set aside with effect from 21 February 2019. The suspension of the declaration of invalidity expired on 8 March 2019, approximately 15 days after the High Court order. Although there was a window period between the date of the High Court order and the date on which the suspension period lapsed, the MEC conceded during argument in this Court that it did not seek an order setting aside the appointments just for the period between these two dates. This is understandable because this window period was approximately 15 days.

[21] As section 54A was declared to be of no force and effect after 8 March 2019, some 15 days after the High Court had delivered its judgment, this means that the declaration of invalidity of the relevant appointments based on that section can only relate to the period before 9 March 2019. However, at the hearing of the matter in this Court, counsel for the MEC made it plain that his client sought a declaration of invalidity operating only from the date on which this Court delivers its judgment.

[22] The order sought is not competent because the provision on which the MEC relied to challenge the appointments ceased to exist on 8 March 2019. A declaration of unlawfulness of the appointments, which is based on the non-existent section and

operates from the date of delivery of this order would effectively suggest that the invalid provision continued to operate even after the suspension period had expired. The purpose of a prospectively operating order is to preserve the operation of the invalid law until the date of the court's order. And here that order may not be granted. Since the MEC does not seek an order with retrospective effect, but rather wishes the invalidity to take effect from the date of this Court's order, on what basis would the appointments be declared unlawful? The respondents referred us to a draft Bill that is meant to substitute section 54A, but there can be no reliance on a Bill that has not yet been promulgated into law.

[23] This is, however, not the end of the enquiry. The next question to consider is whether it is in the interests of justice to determine this application despite its mootness. It is to this that I now turn my focus.

[24] One of the troubling factors in this application is that a period of more than four years has passed since the invalid appointments were made. This means that persons whose qualifications and experience were questioned by the MEC on the basis that they fell short of those prescribed by section 54A(2) of the Systems Act, have been allowed to occupy the critical position of a Municipal Manager for the bulk of the period of their five-year contract.

[25] An analysis of the time periods between the dates of their respective appointments and the date on which the review application was brought in the High Court shows that the delays were largely caused by the failure on the part of the MEC to comply with the tight timelines prescribed by the Systems Act and later on by the delay in initiating the review applications. Section 54A(7) requires the Municipality to inform the MEC of the outcome of the recruitment process within 14 days of such period being completed. The Municipality complied with this period. Section 54A(8) requires the MEC, within 14 days of being informed of the appointment, to take steps to enforce compliance with the section by the Municipal Council. This may include an application to a court for a declaratory order on the validity of the appointment, or any

other legal action against the Municipal Council. However, the MEC failed to act within the 14-day period.

[26] Regarding the Nkandla Local Municipality, the MEC was notified of the decision to appoint Mr Jili on 24 January 2017, but requested further information on 13 February, some 20 days later. Regarding the Mthonjaneni Local Municipality, the MEC was notified of the decision to appoint Mr Sibiya on 20 December 2016 but responded on 20 January 2017, some 30 days later. The MEC further delayed in launching the review proceedings. The proceedings were launched 15 and 18 months, respectively, after the decisions to appoint Mr Jili and Mr Sibiya. The consequence of the delays is that, for the period of inaction and during the lengthy litigation process in the various Courts, Messrs Jili and Sibiya remained in office as Municipal Managers of the respective Municipalities for over four years of their five-year terms.

[27] There was an urgent need for the MEC to take steps quickly as prescribed by the Systems Act, but this did not happen. In *Notyawa* this Court cautioned against this kind of delay and stressed the importance of the tight timelines as prescribed by the Systems Act, as follows:

“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.”³⁰

[28] Section 237 of the Constitution also provides that all constitutional obligations must be performed diligently and without delay. In *Khumalo*³¹ this Court said:

³⁰ *Notyawa* above n 21 at para 11.

³¹ *Khumalo v MEC for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC).

“Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.

This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision, and the undoing of the decision threatens a myriad of consequent actions.”³²

[29] The delays, which can be attributed to the MEC, cannot be ignored by this Court in deciding whether it is in the interests of justice to determine the application despite its mootness. The undesirability of having Municipal Managers, whose credentials were questioned by the MEC, has to be weighed against the prejudice they will suffer if the application is entertained after they have occupied these positions for such a long period of time. Another relevant consideration is the possible impact of the termination of their contracts on service delivery in the affected Municipalities. The reality is that the respective contracts will come to an end on 18 December 2021 for Mthonjaneni Local Municipality and 25 January 2022 for Nkandla Local Municipality. This means that by the time this Court hands down judgment they will likely be left with only a month or so before the natural expiry of their employment contracts.

[30] In *Khumalo*, this Court highlighted the discretionary powers a court has in determining what it considers to be a just and equitable remedy, despite the unlawful conduct of a state functionary. It said:

“Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court’s remedial powers to grant a ‘just and equitable’ order in terms of section 172(1)(b) of the Constitution. A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside.”³³

³² Id at paras 46-7.

³³ Id at para 53.

[31] As the Supreme Court of Appeal observed, Municipal Managers play a crucial role in municipalities. In *Notyawa*, one of the factors this Court considered in determining whether it was in the interests of justice to grant leave to appeal was the fact that the Municipality had had no permanent Municipal Manager for a long period. This, according to the Court, had impacted negatively on service delivery.³⁴ This consideration is equally important here. Should this Court set aside the appointments for the remainder of the period of the two respective contracts, it is not clear how this will impact service delivery in the respective Municipalities.

[32] Furthermore, there have been no complaints raised by the MEC about the Municipal Managers' competence and performance during the period of over four years. The MEC did not identify any prejudice she may suffer as a result of the preservation of their employment for the remainder of the fixed five-year term. An order that Messrs Jili and Sibiya should retain their employment for the rest of the five-year period will ensure that service delivery in the Municipalities is not compromised and that a handover to their successors occurs seamlessly. Consequently, the interests of justice do not favour granting leave to appeal and the application must accordingly be refused.

Costs

[33] The dispute in this matter is primarily between the MEC and the Municipalities, both being organs of state. I see no reason to deviate from the reasoning of the Supreme Court of Appeal that a costs order in relation to the state parties in this matter would not serve the interests of justice.³⁵ The parties sought to raise constitutional issues of considerable importance and they utilised public funds to finance this litigation. Any order as to costs will effectively be paid by taxpayers. An appropriate costs order is that each party be ordered to pay its own costs.

³⁴ *Notyawa* above n 21 at para 53.

³⁵ Supreme Court of Appeal judgment above n 10 at para 54.

Order

[34] In the result, the following order is made:

1. Leave to appeal is refused.

THERON J (Tlaletsi AJ concurring):

[35] I have had the benefit of reading the eloquent judgment penned by my Sister Tshiqi J (first judgment). I agree that the application should be dismissed, but for different reasons. In my view, the present invalidity of section 54A of the Systems Act by virtue of this Court's decision in *SAMWU* does not render either application moot, nor does it denude this Court of its power to declare the appointments of Messrs Jili and Sibiya to be unlawful. However, although this Court's jurisdiction is engaged, I agree that it would not be in the interests of justice to grant leave to appeal.

Mootness

[36] The applicant seeks orders invalidating the appointments of Messrs Jili and Sibiya with prospective effect from the date of this Court's order. The first judgment nevertheless says that the matter is moot because section 54A is no longer in force by virtue of the order of invalidity in *SAMWU* coming into effect on 9 March 2019. It says that this Court cannot grant the orders sought by the applicant because this Court can only make a declaration of invalidity in respect of the appointments which relates to the period before 9 March 2019.³⁶

[37] I disagree. In the first place, there is a difference between mootness and prospects of success on the merits. Respectfully, I believe the first judgment conflates

³⁶ See the first judgment at [21] and [22].

the two. A matter is moot when the order would have no practical effect.³⁷ A matter lacks prospects of success where there is no prospect of this Court granting the order sought by the applicant. The first judgment concludes, as a matter of law, that the order sought by the applicant is not competent because this Court only has the power to declare the appointments invalid up until 9 March 2019. In other words, there are no prospects of the applicant persuading this Court that it can and ought to grant the order it seeks. Notably, the first judgment does not conclude that if this order were granted, it would lack practical effect. It follows that the first judgment's finding that the matter is moot is, in actuality, a finding that in its view the application lacks prospects of success, which is a consideration that is relevant to whether leave to appeal should be granted.

[38] In my view, the present application has not lost its practical effect because section 54A is no longer in force and the respondents' reliance on this Court's decision in *JT Publishing*³⁸ in contending otherwise is misplaced. The applicant in that matter sought a declaratory order regarding the constitutional validity of certain legislative provisions that were appealed in the intervening period between the hearing of the matter and the date on which this Court handed down its judgment.³⁹ This Court described the position as follows:

“For Parliament has now achieved the purpose that the suspension was meant to serve by passing in the meantime the Films and Publications Act 65 of 1996, which repeals entirely both the Publications Act and the Indecent or Obscene Photographic Matter Act, replacing the pair with a substantially different scheme. The new statute was enacted very recently and it has not yet been brought into operation. But that will no

³⁷ This Court's jurisprudence regarding mootness is well settled. In *POPCRU* above n 25 at para 43, this Court said:

“As a starting point, this Court will not adjudicate an appeal if it no longer presents an existing or live controversy. This is because this Court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result. Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away entertaining abstract propositions of law.”

³⁸ *JT Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) (*JT Publishing*).

³⁹ *Id* at paras 15-7.

doubt happen soon, in all probability sooner than the time when the suggested suspension would have expired. The old statutes, which are already obsolete, will both then terminate. Neither of the applicants, nor for that matter anyone else, stands to gain the slightest advantage today from an order dealing with their moribund and futureless provisions. No wrong which we can still right was done to either applicant on the strength of them. Nor is anything that should be stopped likely to occur under their rapidly waning authority.

In all those circumstances there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historical one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that.”⁴⁰

[39] The declaratory order sought by the applicant in *JT Publishing* would have been of no practical consequence because it sought to invalidate legislation that had already been repealed. Crucially, and contrary to what the respondents suggest, that matter was not moot merely because the legislative provisions implicated had been repealed. It was moot because *a declaratory order stating that the provisions were unconstitutional* would have been pointless in view of the repeal.

[40] In this matter, the applicant does not seek an order declaring section 54A of the Systems Act invalid. Instead, she seeks an order declaring that the appointments of Messrs Jili and Sibiya are unlawful. This order would have an obvious practical effect: namely, that it would result in Messrs Jili and Sibiya being removed from their respective positions as municipal managers. Irrespective of this Court’s findings on the merits, its order will determine whether the appointment of two municipal managers contravened section 54A of the Systems Act, which was in force when those appointments were made. While it is so that the time remaining in their terms of office is short, the removal of either Mr Jili or Mr Sibiya for that period would have practical consequences for them personally, the municipalities they serve and the residents within these municipalities.

⁴⁰ Id at paras 16-7.

Leave to appeal

[41] As indicated, the first judgment takes the view that the effect of this Court's judgment in *SAMWU* and the present invalidity of section 54A is that this Court cannot grant an order invalidating the appointments beyond 9 March 2019. While I disagree that this is a concern relating to mootness, I accept that it is relevant to whether the applicant has prospects in obtaining the orders she seeks. Because I am concerned about the jurisprudential implications of the first judgment's conclusion that the invalidity of section 54A stunts this Court's power to grant the orders sought by the applicant, it is necessary for me to address this point in some detail.

The effect of the invalidity of section 54A on the present dispute

[42] The first judgment holds that an order setting aside the appointments with prospective effect from the date of this Court's order is not competent because the order of invalidity made by this Court in *SAMWU* has now come into effect. It reasons that section 54A itself would provide the legal basis for an order declaring the appointments of Messrs Jili and Sibiya unlawful and then invalidating them, and that if this Court were to make such an order, it would have the consequence that the now invalid section 54A would continue "to operate even after the suspension period ha[s] expired".⁴¹ Therefore, at most, this Court has the power to make an order invalidating the appointments up until 9 March 2019.

[43] In my view, this approach conflicts with the doctrine of objective constitutional invalidity and mischaracterises the nature and source of this Court's power to declare conduct to be unlawful and then set it aside. To begin with, a decision which is *ultra vires* its empowering legislation is invalid under the Constitution according to the principle of legality⁴² and this Court's power to declare it unlawful is sourced directly from section 172(1)(a) of the Constitution and not from the empowering provision

⁴¹ See the first judgment at [22].

⁴² *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) at para 50.

itself. According to the doctrine of objective constitutional invalidity, law or conduct that is inconsistent with the Constitution is unlawful from the moment at which the inconsistency arises⁴³ and, as such, a court order declaring that law or conduct is inconsistent with the Constitution “does not invalidate [it]; it merely declares it to be invalid”.⁴⁴ An order declaring the appointments to be unlawful would thus be “descriptive of a pre-existing state of affairs” (this being the unlawfulness of the appointments from inception).⁴⁵ In other words, it would describe the lawfulness or unlawfulness of the appointments at the moment they were made, when section 54A was in force. There is no question of this Court’s declaration of invalidity applying or enforcing section 54A to alter the legal consequences of appointments made after the section became invalid.

[44] The first judgment also seems to suggest that this Court’s power to invalidate and set aside the appointments is somehow contingent upon the validity of section 54A. Not so. Upon declaring that the appointments are invalid in terms of section 172(1)(a) of the Constitution, this Court would then have the power, in terms of section 172(1)(b), to make any order that is just and equitable, including “an order limiting the retrospective effect of the declaration of invalidity”. This remedial power is triggered by a declaration of invalidity in terms of section 172(1)(a) and does not depend on the validity or invalidity of section 54A at the time it is exercised.

[45] This Court’s powers to declare that an exercise of public power is *ultra vires* its empowering provision, and to set it aside with prospective effect, thus emanate not from section 54A, *but from the Constitution*.⁴⁶ It is therefore incorrect to say that this Court

⁴³ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 20.

⁴⁴ *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 27.

⁴⁵ *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at fn 200.

⁴⁶ *Id* at para 51.

is denuded of its power to make an order setting aside the appointments after 9 March 2019 because section 54A is no longer in force.

[46] It also cannot be that section 172(1) of the Constitution empowers this Court to declare the appointments to be unlawful and set them aside, but only up until 9 March 2019. Not only is the section not qualified in this way (that is, it does not say that conduct can be declared unlawful *only for so long as the relevant law it breaches is in force*),⁴⁷ limiting this Court's power in this way raises the question: if the appointments made in terms of section 54A are declared unlawful and invalid up until 9 March 2019, what happens after that date? In the absence of an empowering provision giving the appointments legal force, they can hardly become lawful again. On the first judgment's approach, the appointments would thus be suspended in a zombie-like state, neither lawful nor unlawful.

[47] A further difficulty facing the first judgment's approach is that it effectively qualifies the prospective effect of this Court's order in *SAMWU* and is incompatible with this Court's judgment in *Notyawa*. In *SAMWU*, this Court declared section 54A unconstitutional on the basis that the Local Government: Municipal Systems Amendment Act⁴⁸ that purported to insert section 54A into the Systems Act in 2011 was incorrectly tagged as an ordinary bill not affecting the provinces, whereas it ought to have been tagged as a section 76 bill (affecting the provinces). The consequences that ordinarily flow from a declaration of constitutional invalidity include that the law will be invalid from the moment it was promulgated.⁴⁹ That is, the order will have immediate retrospective effect. In *SAMWU*, this Court expressly stated that the order of invalidity would operate prospectively. The declaration of invalidity was also suspended for 24 months to allow the Legislature time to cure the procedural defect.

⁴⁷ Section 172(1) of the Constitution provides:

“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.”

⁴⁸ 7 of 2011.

⁴⁹ *Cross-Border Road Transport Agency* above n 43 at para 20.

[48] In this matter, the High Court made its order before the expiry of the two year suspension, which eventually expired on 9 March 2019 without the Legislature having taken any steps to amend section 54A. The applicant's appeal to the Supreme Court of Appeal was heard on 2 September 2020, nearly one year and six months after the order of invalidity took effect, at a point in time when section 54A was no longer in force. It is worth noting that the Court made short shrift of the respondents' contention that the falling away of the suspension order in *SAMWU* stood in the way of hearing the applications. Molemela JA, writing for the majority, had this to say:

“I am alive to the fact that the 24 months' suspension period expired on 9 March 2019 without the legislature having taken any steps to amend section 54A. This, however, is not an impediment in relation to the hearing of this appeal.”⁵⁰

[49] Notably, this Court itself took the same view in *Notyawa*, a matter which concerned the review of a refusal to appoint a municipal manager in terms of section 54A of the Systems Act. Tellingly, despite the fact that this Court heard the matter after 9 March 2019, no mention was made of the *SAMWU* order or the expiry of the two year suspension of invalidity. This Court implicitly accepted that even though section 54A was at that stage a dead letter, the challenge before it gave rise to a live dispute that was not rendered moot by the *SAMWU* order coming into effect.

[50] To hold otherwise would be to give the *SAMWU* order retrospective effect – something this Court expressly sought to avoid. It has been said, time and again, that the presumption against retrospectivity in our law flows from an unwillingness to inhibit or impair existing rights and obligations.⁵¹ The prospective order of invalidity in

⁵⁰ Supreme Court of Appeal judgment above n 10 at para 13.

⁵¹ *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (*Mhlungu*) at para 65; *Kaknis v Absa Bank Limited* [2016] ZASCA 206; 2017 (4) SA 17 (SCA) at paras 11-2; *Minister of Public Works v Hafféjee N.O.* [1996] ZASCA 17; 1996 (3) SA 745 (A) at 752A-B; and *Curtis v Johannesburg Municipality* 1906 TS 208 at 311, where the Court explained:

“The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation.”

SAMWU aimed to avoid this consequence. Indeed, the reason the order was made prospective was that a retrospective order would unsettle the legal consequences of appointments made in terms of section 54A of the Systems Act while it remained in force.⁵² Notably, the majority accepted the Premier’s contention that a retrospective order would, for example, result in “potential challenges by candidates who unsuccessfully applied for a position as a municipal manager over the last five years for want of compliance with requirements brought about by the Amendment Act” and “further similar challenges by any person whose appointment as a municipal manager was declared null and void for want of compliance with section 54A of the Amendment Act”.⁵³

[51] The legal consequences of *SAMWU* must be determined with reference to the language and manifest purpose of the order.⁵⁴ The majority explained why the declaration of invalidity had to operate prospectively, and the purpose of specifying that the order be prospective was to preserve the legal consequences of decisions and acts taken under the Amendment Act, including section 54A. This necessarily entails the preservation of causes of action based on decisions and actions taken under section 54A. It would thus be contrary to this Court’s judgment in *SAMWU* if the coming into operation of its order of invalidity were to impair review proceedings concerning those appointments by rendering them moot, but also to make it impossible for a court, in the context of those proceedings, to determine their lawfulness after 9 March 2019. Yet that is precisely the effect of the first judgment.

[52] The effect of the *SAMWU* order on the present matter is also dictated by the well-established rule of construction that even if a new statute is intended to be retrospective in so far as it affects vested rights and obligations, it is nonetheless

⁵² *SAMWU* above n 28 at paras 85-6, read with para 35.

⁵³ *Id* at para 35.

⁵⁴ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29, relying on *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) at para 13.

presumed not to affect matters that are the subject of pending legal proceedings.⁵⁵ I see no reason why the same principle does not apply in the case of a repeal or order of invalidity. It follows that, even if the invalidity were retrospective (again, this Court expressly said that it would not be),⁵⁶ it is presumed that it does not affect the present application, which was initiated well before the period of suspension ended on 9 March 2019. If, as the first judgment suggests, the order of invalidity has effectively rendered the relief sought by the applicant in this matter both incompetent and moot, it plainly will have affected these proceedings and caused patent unfairness to the applicant.

[53] In sum, the *SAMWU* order does not stand in the way of this Court declaring the appointments of Messrs Jili and Sibiya to be unlawful and granting orders setting them aside. Despite this, however, I would nevertheless refuse leave to appeal because the application lacks prospects of success and it would not be in the interests of justice to grant leave to appeal.

Delay

[54] The respondents say that the applicant unduly delayed both in taking steps to ensure the Municipalities' compliance with section 54A (as required by section 54A(8)) and in instituting the review proceedings. The respondents say that both delays should not be condoned and, consequently, that the merits of the reviews should not be entertained.

[55] The applicant says that this Court's assessment of these delays should be made according to the principle of legality and not the Promotion of Administrative Justice Act⁵⁷ (PAJA). The respondents says that under either PAJA or legality, the conclusion is the same: the applicant has unduly delayed in bringing the application and this delay

⁵⁵ *Mhlungu* above n 51 at para 67, citing *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1148F-H.

⁵⁶ *SAMWU* above n 28 at para 86.

⁵⁷ 3 of 2000.

should not be condoned. The answer to the question of whether PAJA or the principle of legality governs the assessment of these delays depends on whether the decision to appoint a municipal manager in terms of section 54A amounts to administrative action. In *Notyawa*, this Court was faced with the same question but concluded that a determination of the proper characterisation of the impugned decisions was unnecessary because that determination would have no bearing on the outcome of the matter.⁵⁸ This Court then proceeded to determine the review's prospects of success on the premise that it was a legality review.

[56] I am likewise satisfied that in this matter it is unnecessary to decide the point. Undoubtedly, if this were a PAJA review, the applicant's prospects would be even dimmer than if it were a legality review. This is because the applicant did not make a self-standing application for condonation and, if PAJA applied, would face a presumption that the delay in bringing the review applications, which exceeded the 180-day limit, was unreasonable.⁵⁹ Even if we were to approach the matter as a legality review and apply the two-stage *Khumalo* test (discussed below), there appears to be no basis for overturning the Supreme Court of Appeal's findings and condonation of the delay. There is thus no need to determine whether the more onerous prescripts of PAJA should apply.

[57] A further reason not to decide this issue is that it would be inappropriate to make such a determination in a judgment which ultimately refuses leave to appeal. My discussion of the merits in this matter is merely in the service of establishing that the applicant's prospects of success are dim. That discussion is not a finding on the merits or whether the principle of legality and PAJA applies.

⁵⁸ *Notyawa* above n 21 at para 35.

⁵⁹ Section 7 of PAJA. See *Khumalo* above n 31 at para 44 and *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* [2013] ZASCA 148 at para 26, which were endorsed by this Court in *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 para 49.

[58] In *Khumalo*, this Court set out a two-stage approach to assessing undue delay.⁶⁰ First, the court must determine whether the delay was reasonable. Second, if the delay is found to be unreasonable, the court must consider whether the delay should be condoned. The determination of reasonableness at the first stage is an enquiry which depends on the facts and circumstances of the case.⁶¹ Although the enquiry requires a court to make a value judgement, it does not involve the exercise of a discretion⁶² and therefore the stricter test for appellate interference with exercises of discretion does not apply. At the second stage, which concerns whether an unreasonable delay should be overlooked and condoned, a court exercises a true discretion and the strict test for interference on appeal applies.⁶³

[59] The High Court concluded, at the first stage, that the delays were not unreasonable and, having found that the delays were reasonable, the question of whether it should exercise its discretion to condone the delays did not arise. The Supreme Court of Appeal was split on the issue of delay. The minority approached the matter on the basis that the issue before it was whether it should interfere in the exercise of the High Court's discretion to grant condonation and concluded that there was no basis for such interference. In doing so, it appears that the minority conflated the first and second legs of the *Khumalo* test where delay in a review is considered (as set out above). Likewise, the majority, despite accepting that the High Court had found that the delays were reasonable, appears to have assumed that it was being asked to interfere with the

⁶⁰ *Khumalo* id at paras 49-52.

⁶¹ *Asla Construction* above n 59 at para 48.

⁶² In *Associated Institutions Pension Fund v Van Zyl* [2004] ZASCA 78; 2005 (2) SA 302 (SCA) at para 48, the Supreme Court of Appeal said the following:

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

⁶³ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at para 88.

High Court's exercise of its discretion to condone the delays. Both the minority and majority erred in this respect.

[60] In the end, the majority of the Supreme Court of Appeal concluded that the applicant's delays were unreasonable and ought not to be condoned. Thus, in deciding the merits of this application, this Court would have to determine, first, whether the Supreme Court Appeal was correct that the delays were unreasonable and then, secondly, whether there is a basis for interfering with the exercise of its discretion to refuse to condone the delays.

[61] In reaching the conclusion that the applicant's delays in both the *Nkandla* and *Mthonjaneni* matters were not unreasonable, the High Court found that—

“[t]he correspondence and time frames . . . suggest that the applicant in a spirit of co-operation allowed considerable latitude to the respondents to address the lack of the third respondent's relevant experience, and when they eventually failed to do so despite reminders, the applicant ultimately had to resort to court applications as a last resort.”⁶⁴

[62] The most damning flaw in the High Court's judgment identified by Makgoka JA in his partial concurrence was that the High Court “ignored the important consideration that there was not a single attempt by the MEC to explain her inaction”, which meant that the High Court engaged in pure speculation that “her inaction could be attributed to her considerations of co-operative governance”.⁶⁵ The entirety of the High Court's analysis of the reasonableness of the applicant's delays is a single paragraph. Although the High Court set out the time frames for each matter separately, in the end its analysis did not draw any distinction between the explanations proffered by the applicant in respect of the delay in the two matters.⁶⁶ Notably, the High Court also did not refer to explanations actually offered by the applicant. Instead, it engaged in a somewhat

⁶⁴ High Court judgment above n 6 at para 59.

⁶⁵ Supreme Court of Appeal judgment above n 10 at para 119.

⁶⁶ High Court judgment above n 6 at para 59.

speculative *ex post facto* rationalisation of the applicant's delays, which the Court reasoned were occasioned by the applicant's heeding of "the injunction to promote a spirit of co-operative governance".⁶⁷

[63] It is a well-established principle in our law that the reasonableness of the delay must be assessed on, among others, the explanation offered for the delay.⁶⁸ This is irrespective of whether the review is under PAJA or the principle of legality.⁶⁹ In this matter, the High Court reached the conclusion that the delays were reasonable on the basis of speculation and in the absence of a proper explanation for the delays in each matter.

[64] In *Nkandla*, the applicant's papers before the High Court provided no explanation whatsoever for her delay in bringing the review. Had the High Court heeded clear dicta from this Court in *Asla Construction* and *Khumalo*, it would have been constrained to conclude that the delays were necessarily unreasonable. Instead, the High Court appeared to assume that the delays were reasonable because the applicant's conduct and reluctance to escalate the matter was informed by principles of co-operative governance. But this was not an explanation advanced by the applicant in her papers. In the absence of any explanation for the 15-month delay, the ineluctable conclusion is that the delay was unreasonable.

[65] *Mthonjaneni* stands on a somewhat different footing because it appears that at least in her replying affidavit in the High Court the applicant purported to address the question of delay. In reality, the only submissions made regarding delay were a number of qualifications to the chronology set out in Mr Sibiya's answering affidavit and the bald allegation that "it was the action of the Mayor and the Municipality which put off for so long the bringing of this application". In her replying affidavit, the applicant provides an explanation for delays during an undefined period during which the

⁶⁷ Id.

⁶⁸ *Asla Construction* above n 59 at para 52.

⁶⁹ Id at fn 40.

applicant waited for the Municipality to make a waiver application to the Minister. The applicant also says there was a period (again, of unspecified duration) during which she waited for the Municipality to obtain a legal opinion. The applicant further says that on 9 July 2017, her offices requested that the Municipality remedy the situation, failing which it would institute legal action against it for non-compliance with the Systems Act. The Municipality reverted on 19 July 2018 with an undertaking to obtain a legal opinion regarding the query. It appears that it was only four months later, on 21 November 2017, that the applicant sent a reminder to the Municipality. The applicant does not provide an explanation for this delay. The applicant also does not explain what transpired between 26 January 2018 and 11 May 2018, when the review application was finally launched.

[66] The applicant's overall delay in bringing the review application in *Mthonjaneni* was 17 months. The vague explanations for mostly undefined periods of time that were proffered by the applicant do not fully account for this excessive delay or demonstrate why it was reasonable in the circumstances. There are therefore reasonable prospects of this Court upholding the Supreme Court of Appeal's determination that the delays were unreasonable.

[67] Having concluded that the delays were unreasonable, the majority of the Supreme Court of Appeal refused to grant condonation for the late filing of the review applications. This involved the exercise of a discretion and for this Court to interfere with that discretion, a more stringent test must be satisfied. As this Court recently explained in *Notyawa*:

“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. The intervention of the appeal court may be justified only on narrow specified grounds.

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. 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.”⁷⁰

[68] When the Supreme Court of Appeal refused to condone the applicant’s delays, it exercised a discretion in the “true” sense and this Court is entitled to interfere with that discretion only if it is satisfied that it was not exercised judicially.

[69] In accordance with the approach endorsed by this Court in *Notyawa*, the majority of the Supreme Court of Appeal took into account that the matter does not involve a serious breach of the Constitution, and that the illegality of the impugned decisions was not clearly established on the facts.⁷¹ Following this Court’s lead in *Notyawa*, the majority also took into account the impact that the removal of Messrs Jili and Sibiya would have on service delivery to residents in their respective municipalities and observed that there had never been complaints about their competence and performance.⁷² Moreover, given the crucial role played by municipal managers in terms of section 55 of the Systems Act, setting aside Mr Jili and Mr Sibiya’s appointments and rendering them void from the outset or from the date of the order “would undoubtedly have adverse consequences for the public and the municipalities in whose interests the municipal managers purported to act”.⁷³ The Court reasoned that even if it were accepted that Messrs Jili and Sibiya did not meet the applicable minimum experience requirements “the circumstances of [the] case still do not call for the invocation of a remedy setting aside their appointment”.⁷⁴ Finally, the majority’s decision not to condone the unreasonable delays appears to have been informed in part by its finding that they were unexplained. This accords with what this Court held in *Gijima*:

⁷⁰ *Notyawa* above n 21 at paras 40-1.

⁷¹ Supreme Court of Appeal judgment above n 10 at para 52 and *Notyawa* id at para 52.

⁷² Supreme Court of Appeal judgment id at para 51 and *Notyawa* id at para 53.

⁷³ Supreme Court of Appeal judgment id.

⁷⁴ Id.

“[N]o discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here.”⁷⁵

[70] The majority applied the correct legal principles governing the condonation of undue delay in review proceedings and made no misdirection on the facts. There would therefore be no basis for this Court to interfere with the exercise of the Supreme Court of Appeal’s discretion to refuse condonation. With that finding intact, this Court could not proceed to the merits of the application.

[71] In addition to the application’s dim prospects of success, concerns for the public interest, the fact that both terms of appointment will shortly expire, and the fact that section 54A has been repealed and any interpretation of it will not have any wider import for other litigants, all point to a conclusion that the interests of justice do not favour granting leave to appeal.

[72] For these reasons, I concur in the order made by the first judgment.

⁷⁵ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) (*Gijima*) at para 49.

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