THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 1652/19

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LTD	**Applicant**

and

CHRISTELLE KEEVY	**First Respondent**
NOMPUMELELO PHASHA	**Second Respondent**
JAMES SHIKWAMBANA	**Third Respondent**
LINDIWE VUYELWA BAYI	**Fourth Respondent**
THOKOZANI ZITHA	**Fifth Respondent**
HAMILTON NGUBO	**Sixth Respondent**
PUMZILE ZONKE	**Seventh Respondent**
NOMBUSO GCABASHE	**Eighth Respondent**
NOMFAZWE NKOBO	**Ninth Respondent**
LINDA HLONGWANE	**Tenth Respondent**
NYIKO MAHLAULE	**Eleventh Respondent**
TENDAI MATORE	**Twelfth Respondent**
RONALD NGWASHENG	**Thirteenth Respondent**
NOMBULELO MHLAKAZA	**Fourteenth Respondent**
TSHIFHIWA NULAUDZI	**Fifteenth Respondent**
THANDEKA NDLOVU	**Sixteenth Respondent**
GUGULETHU RADEBE	**Seventeenth Respondent**
TIMOTHY RODNEY MAGAMPA	**Eighteenth Respondent**
PALESA CHIBISI	**Nineteenth Respondent**
LESLINA NGWAMBANI	**Twentieth Respondent**
THERESA GELDENHUYS	**Twenty-First Respondent**
LESEGO KGWEBANE	**Twenty-Second Respondent**

DIMAKATSO MOTSOENENG	**Twenty-Third Respondent**
YANDE SITHABISO ZIBI	**Twenty-Fourth Respondent**
KEOIKANTSE MAKGALE	**Twenty-Fifth Respondent**
NOTHANDO MASEKO	**Twenty-Sixth Respondent**
AYANDE MKHIZE	**Twenty-Seventh Respondent**

Heard: **11 and 12 December 2019 and 6 and 7 January 2020**

Delivered: **07 February 2020**

Summary: A Review in terms of section 158 (1) (h) of the LRA – is the SABC a "State" within the contemplation of the section. Declaratory relief – requirements not met – SABC has a power to dismiss as a corollary to the power to engage in terms of section 26. Is promotion and transfer of employees an exercise of public power susceptible to review under the legality principle. The Provisions of section 26 and other related sections of the Broadcasting Act considered. Jurisdiction of the Labour Court – questionable. Counter-application – dispute of fact – risk – motion proceedings. Delay in instituting review proceedings – procedural obstacle to the hearing of the review – not destructive of the merits or demerits of the review. Held: (1) the application is dismissed. Held: (2) No order as to costs. Held: (3) The counter-application is dismissed with costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Before me is a review application brought in terms of the provisions of section 158 (1) (h) of the Labour Relations Act[1] (LRA). The application involves a review of one's own decision on the basis that it does not comply with the "law". For a period of time the applicant, through its officials, took decisions that involved appointments; promotions and transfers of employees purportedly taken in terms of its internal policies – old and new. It is an open secret that over a considerable period of time, the applicant was controlled by different Board of Directors and various executive heads. The applicant was riddled with all sorts of allegations of corruption and maladministration. This judgment is not intended to deal with all those allegations. Its fulcrum is whether the appointments, promotions and transfers were done in accordance with the law. If this Court finds that no law was contravened, then that shall be the end of the matter for the applicant.

[2] Given the number of respondents involved herein, the application was heard over a period of four full Court days. Initially, and in line with the Practice Manual, the Judge President preferentially enrolled the application for two days. Argument could not be completed on those two days, load shedding being a factor as well. A further two days were arranged with this Court during the Court's recess period. Although the matter involves 27 respondents, the basis of impugnment remains largely the same. It is, largely, that the appointments, promotions and transfers failed to meet the requirements of own internal policies. The applicant seeks to take cue from what was done in *Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal*[2].

Pertinent Background Facts

[3] The applicant is a corporation established by an Act of Parliament. The main business of the applicant is public broadcasting. As an entity, it is empowered by the legislation that establishes it to engage employees in

[1] No. 66 of 1995, as amended.
[2] 2014 (3) BCLR 333 (CC).

order to achieve its objects as listed in the establishing legislation. For a period of considerable time, the applicant was plagued with various allegations of maladministration and non-compliance with processes. Such culminated in the invocation of powers of some of the chapter nine institutions. Reports were generated which suggested certain remedial actions. The parliamentary committee responsible for communications also put a hand in the quagmire. It too, generated a report requiring certain steps to be taken. For the purposes of this judgment, it is unnecessary to deal in any measure of detail with the conundrums and quandaries that beset the applicant for a period of time. Such is matter of public record.

[4] The focal point in this matter is the engagements, promotions and transfers of about 27 former and current employees of the applicant. These employees, the respondents before me, were either engaged through a process known as headhunting[3], promoted and/or transferred. Central to the complaints of the applicant lies the alleged abuse of unfettered powers of one Hlaudi Motsoeneng. Allegedly, whilst holding the executive position of the Chief Operating Officer (COO), he was law unto himself, as it were, and flouted most, if not all, the internal procedures of the applicant.

[5] In the main, two internal policies are implicated in this matter. To that extent, these two policies would be the focal point of this judgment. Other documents that featured centrally, particularly in the defences raised by the respondents, were the Delegation of Authority Guidelines (DAG) and the Transfer Policy (TP). Less would be said about those policies in this judgment, simply because the alleged illegality is allegedly not germane from them.

[3] Also known as Executive Search – it is the process of recruiting to fill senior positions in organisations. Generally, it is undertaken by the board of directors or the delegated Human Resources Executive.

[6] The first policy is the **SABC RECRUITMENT POLICY** (Old Policy), it is dated 21 July 1999 and is unsigned. The deponent to the applicant's case alleges that this policy was approved on 26 October 1998 and made effective November 1998. I pause to mention that no evidence was presented as to how it was approved and by who. For the purposes of this judgment, I am going to assume that this policy was drafted by an official at the executive level and approved by the Executive Committee. This assumption is fortified by the following statement that occurs in the policy itself:

> 'The SABC Management and its relevant stakeholders will be empowered from time to time to develop or review its Recruitment Policy to ensure compliance with labour legislation and/or in consideration of issues impacting on recruitment practices.
>
> **Executive Committee**
>
> The affairs of the SABC are administered by an executive committee consisting of the Group Executive Officer, Chief Operating Officer and no more than 11 other members.'

[7] Another assumption to make is that it was developed in consultation with the trade unions as stakeholders. This policy regulate issues like Job advertisement; interviews; selections; relocation costs; post-appointment procedures for successful candidates and exit interviews.

[8] Thereafter, the **RECRUITMENT & SELECTION POLICY** (New Policy) was prepared by one Eleanor Mathole-Khiba, who was the General Manager: Group Organisational Development. This Policy was approved by the Board of the applicant, on 19 August 2016. It is recorded in this policy that: *"The intention with this policy is to establish norms, measures and guidelines for recruitment to ensure effective and efficient recruitment programme and process."*

[9] One of the objectives of this policy is to ensure that the SABC complies with all relevant employment legislative prescripts as well as governance

protocols[4]. This policy makes no reference to the old policy. It sought to regulate all job applicants both internal and external. It regulated shortlisting; assessment; appointment; relocation costs; corporate induction; appointment of non-RSA citizens; deviations; policy reviews and the relevant annexures. This policy was last reviewed on 26 November 2014. The contemplation is to review it on a two-year basis with full participation of organised labour.

[10] In its founding papers, the applicant alleges that these policies were put in place pursuant to the SABC's Constitutional mandate and statutory obligations and the prescripts in the policies are to give effect to the Constitutional mandate and statutory obligations. The statutes that the applicant detailed in the founding affidavit are the Constitution of the Republic of South Africa[5] (the Constitution), in particular section 195 thereof; the Public Finance Management Act[6] (PFMA), in particular schedule 2 and some definitions and the Broadcasting Act[7] (BA). It is unnecessary to detail the respective cases made in respect of each of the respondents. Suffice to mention that the applicant alleged that the appointments, promotions or transfers were irregularly made as they do not conform to the prescripts alluded to in either the old or the new policy. The respective respondents, dispute the allegations. The cases against the 11th and 12th respondents were withdrawn during the hearing of the application with no tender to pay the wasted costs. Their counsel attempted to argue the issue of wasted cost but relented after the Court referred him to Rule 13 of the Rules of the Labour Court. Some of the respondents did not file opposing papers but were in attendance when the matter was argued in Court. Other than that all other respondents opposed the application. This Court declined an invitation to rule on the alleged unconstitutional conduct of the Judge President of this Court when he enrolled this matter on the preferential basis.

[4] Clause 2.4 thereof
[5] Act no. 108 of 1996.
[6] No. 1 of 1999.
[7] No. 4 of 1999.

Evaluation

Preliminary issues

[11] Prior to hearing the merits of this application, the Court had to quickly dispose of an interlocutory application. The gist of the interlocutory was to seek a directive from this Court. The application was astutely tucked under Rule 11 of the Rules of this Court. After hearing Mr Makhura, appearing for the respondent launching the interlocutory application, this Court dismissed the application without providing reasons for the order. Briefly, the reasons thereof are that this Court does not give directives on how the parties should litigate. The Practice Manual makes provision for instances where the Judge President of this Court may issue directives to the parties. The directive sought – to compel provision of further particulars to enable the respondent to answer, such a procedure is unavailable in motion proceedings. In a review application, when an opposing party takes a view that the Court has been furnished with an incomplete record, such a party may seek the dismissal of the review application on that basis alone[8].

[12] An opposing party does not and cannot compel an applicant to discover some documents, which the opposing party takes a view that they should form part of the record. However an available procedure is to compel provision of record of the proceedings sought to be reviewed, in an instance where an applicant for review is not the custodian of the records of the proceedings sought to be reviewed and set aside. The duty to request and present a record of proceedings sought to be reviewed lies with an applicant for review. In reviews of own decision, it is still the duty of the applicant to place before the Court the record of the impugned decision in order to demonstrate that their own decision was unlawful. If a party fails to do so, a respondent must meet such a defective case and point out the defect in order for a Court of review to refuse the review. The interlocutory application was ill-conceived and ought not to have

[8] *Francis Baard District Municipality v Rex N. O* [2016] 10 BLLR 1009 (LAC).

been brought. Rule 11 is there for a purpose and its purpose[9] must not be abused in order to bring these kind of applications.

[13] The affected respondent could have raised a preliminary point in an answering affidavit. The risk the respondent took by not answering to the factual allegations, is one that the applicant must live with, together with its attendant consequences. After the ruling, the affected respondent subsequently filed an answering affidavit.

[14] Further, the Court was compelled to hand down an *ex tempore* judgment on an application brought by the twenty-seventh respondent to have part of her case struck off the roll due to non-service. This Court briefly supplements the reasons given *ex tempore* by stating that in this Court technicalities have no place, given the statutory imperative to resolve labour disputes speedily[10]. Striking off only part of a case of a respondent in a case brought as a unitary case against a number of respondents is nothing but a technicality and unhelpful to the respondent concerned. Where a matter is heard in the absence of a party, the LRA makes provision[11] that if an order is obtained, the affected party may seek a rescission of the order. Thus, it would have been destructive to this important matter to give space to technical arguments. Counsel who represented this particular respondent also carried a brief and mandate to represent other respondents and he had a full set of the papers allegedly not served on the respondent concerned. A suggestion made by counsel for substituted service was one that is without merit. The rules of this Court has a provision of how service could be effected. One of the approved methods is by hand[12].

[15] This Court was advised by the applicant's counsel that the respondent concerned was present in Court and the application was handed to the

[9] It is there to assist the Court and not the party to adopt any procedure that it deems appropriate in instances where a situation not catered for in the Rules arise.
[10] Section 1 of the LRA
[11] Section 165 of the LRA
[12] Rule 4 (1) (a) (i) by handing a copy to the person.

said respondent. This was not seriously disputed. Nonetheless, it was sufficient, for the purposes of this matter that counsel on brief for the other respondents was in possession of the founding papers of the applicant. For these reasons too, the application was ill-founded and was doomed to fail.

[16] Mr Mokhari SC, appearing for the nineteenth respondent, passionately pursued an argument that there is no decision by the Board of the applicant to launch the present application. In other words, the institution of this application was not authorized. Allied to that was an argument by Mr Gerber, appearing for a number of respondents, that the application ought to have been launched by the Board of the applicant and not the applicant.

[17] In *Ganes v Telecom Namibia*[13], it was held that what is relevant is that the institution and prosecution of an action was authorized. While in motion proceedings the best evidence would be an affidavit by an officer of the company annexing a copy of the relevant resolution of the Board, such evidence is not necessary in every case and the Court must decide whether enough has been placed before it to warrant a conclusion that it is the company which is litigating and not some unauthorized person on its behalf.[14] In *ANC Umvoti Council Caucus v Umvoti Municipality*[15], the following was said:

> '[28] I am therefore of the view that the position has changed since Watermeyer J set out the approach in *Merino*…case. The position now is that absent specific challenge by way of Rule 7 (1), the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant is sufficient.'

[13] 2004 (3) SA 615 (SCA).
[14] *Mall (Cape) (Pty) Ltd v Merino Kooperasie BPK* 1957 (2) SA 437 (C).
[15] 2010 (3) SA 31 (KZP).

[18] Thus, I take a view that enough has been placed before me to warrant a conclusion that the SABC as a legal entity is before me. Later in the proceedings*, ex abudandi cautela*, in my view, the applicant handed up an affidavit annexing an extract of a Board resolution. There was an objection from two counsel, and yet again, the Court was compelled to issue an *ex tempore* judgment on the objection. I may add that occasionally, this Court accepts this type of evidence belatedly where the authority to litigate is unrelentingly pursued.

[19] Unfortunately, at the time when the evidence proving authority was presented, Mr Mokhari SC was not present as he had already asked to be excused. However, this Court had highlighted the risks attendant to counsel asking to be excused before the completion of the matter.[16] Accordingly, I am unable to uphold Mr Mokhari's submission, who was supported on this one by Advocate Kufa, that the application should be dismissed on this basis alone. The SABC as a legal entity has a right to sue or be sued in its name. The submission by Mr Gerber that only the Board of the applicant has *locus standi* to launch this application is thus rejected. The functionary that took the impugned decision is the applicant. The fact that the Board is the accounting authority within the contemplation of the PFMA is of no moment in this regard. Section 19 (1) of the Companies Act[17] specifically provides that a company is a juristic person and has all the legal powers and capacity of an individual.

[20] There were a barrage of legal points raised by various respondents, some are indirectly addressed in the merits discussion in this judgement and others not. Given the view this Court takes at the end, it shall be academic to entertain them and only serve to elongate this already long judgment.

[16] In my view counsel on brief must remain in attendance until the entire case is completed. This is simply in the interest of the client. This, despite the fact that counsel would have completed his or her submissions in a matter involving a number of respondents, like this matter. If Mr Mokhari SC was in attendance, he may have, for the benefit of his client made valuable submissions to assist the Court to arrive at a conclusion with the benefit of his client included.
[17] No. 71 of 2008.

The merits of the application

[21] The central question in this matter is whether a public institution exercises public power when appointing, promoting or transferring employees? Mr Redding SC, correctly conceded that if this Court reaches a conclusion that the old and new policies do not have a force of law, then the principle of legality finds no application. Such would render it unnecessary for the Court to enquire into whether the policies were complied with or not in relation to each of the respondents. Of course, the contention of the applicant is that the policies are law since they are policies put in place in line with a constitutional mandate of the applicant as an organ of state. Further, Mr Redding SC, correctly conceded that this Court must amongst others consider whether a rule of law as provided for in the Constitution has been implicated. Differently put, do the policies form part of the rule of law as it has become to be known?

[22] The applicant seeks a declarator to the effect that the appointments, promotions and transfers of certain of its employees (the respondents before me) are unlawful and or irrational. Further, the applicant seeks a review of those appointments, promotions and transfers in terms of the provisions of section 158 (1) (h) of the LRA.

The ambit of section 158 (1) (h)

[23] It has long been held that a review contemplated in section 158 (1) (h) is a legality review[18]. As to what a legality review means, the Constitutional Court has in a number of judgments pronounced on what that is. Recently, the Constitutional Court clarified the principle of legality thus:

> '[40] What we glean from this is that the exercise of public power which is at variance with principle of legality is inconsistent with the Constitution itself. In short, it is invalid… Relating all this to the matter before us, the award of the DoD agreement was

[18] See *Ramonetha v Department of Transport Limpopo and others [2018] 1 BLLR 16 (LAC)*

> exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.[19]'

[24] In *Minister of Defence and Military Veterans v Motau*[20] it was said:

> '[69] The principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard it must be rationally related to the purpose for which the power was given…'

[25] In *DA v President of the RSA*[21], Yacoob ADCJ, as he then was, stated the following about rationality:

> '[27] The Minister and Mr Simelane accept that the 'executive' is constrained by the principle that [it] may exercise no power and perform no function that conferred… by law and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise the exercise of the power could be arbitrary and at odds with the Constitution. I agree.'

[26] It has been confirmed that rationality and reasonableness are conceptually different. In *Albutt v Center for the Study of Violence and Reconciliation and others*[22], the following was said:

> 'The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because

[19] *State Information Technology Agency SOC ltd v Gijima Holding (Pty) Ltd 2018 (2) BCLR 240 (CC).*
[20] 2014 (8) BCLR 930 (CC)
[21] 2013 (1) SA 248 (CC)
[22] 2010 (3) SA 293 (CC)

there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'

[27] On the strength of the above decision, the submission by Mr Redding SC that rationality in this matter entails ignoring of policies put in place by the applicant is thus rejected. The policies themselves allows an exercise of discretion and are mere guidelines[23]. One policy uses phrases like 'could be' as opposed to must be. Nonetheless, I fully agree with Mr Mokhari SC as supported by Mr Mkhatswa and Mr Makhura that an internal policy is not the law. I shall revert to this issue later in this judgment.

[28] The net effect of *Motau* and other related judgments is that every decision must be one that falls within the confines of the law. It has now been authoritatively held that there is no longer a common law review. It is either a constitutional review - popularly known as legality/rationality review or a review under the Promotion of Administrative Justice Act[24] (PAJA) – for administrative decisions. Since this is a review of own decision, it has been held that the only applicable review is that of legality/rationality. It seems trite that where public power is exercised, courts are sceptered to evaluate the legality and/or rationality of that power. Later in this judgment, this Court would consider the question whether promoting and or transferring an employee amounts to an exercise of public power.

Issue of Jurisdiction

[23] See *Leonard Dingler (Pty) Ltd v Ngwenya* [1999] 20 ILJ 1171 (LAC) and *SAMWU obo Abrahams and others v City of Cape Town* [2008] 29 ILJ 1978 (LC)
[24] No. 3 of 2000.

[29] An issue that implicates the jurisdiction of this Court, particularly under the enabling section of legality review, is whose decisions are to be reviewed by this Court under the section? There are some judgments, to which this Court agrees with, which states that if the LRA has provided another remedy and or process, section 158 (1) (h) should not be invoked.[25] The section is concerned with the "State" in its capacity as an employer. This Court is not aware of any decision of the Labour Court or the Labour Appeal Court that gives meaning to the word "State" as employed in the section. The LRA itself does not specifically afford the word a definition. In my view, it is about time that such a definition must be attempted[26]. I intend to do so in this judgment. This point was not squarely raised by any of the respondents before me, but it being a legal point that implicates the jurisdiction of this Court, the Court is entitled to entertain it. A jurisdictional point was raised[27] and abandoned by the 19th respondent. Although it was abandoned, some of the respondents, particularly Mr Serage, obliquely dealt with issues that implicates the jurisdiction of this Court. Thus, it remains a live issue before me.

[30] When interpreting any statute, the first port of call is to afford words employed by the legislature their ordinary grammatical meaning[28]. In plain English the word "State" means a body of people that is politically organized, especially one that occupies a clearly defined territory and is sovereign. Unfortunately, our supreme law – the Constitution of the Republic of South Africa - also does not define the word. Section 40 (1)

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[25] See: *PSA obo De Bruyn v Minister of Safety and Security and another* [2012] 33 ILJ 1822 (LAC) para [2] … Section 18 (1) (h) was intended to preserve the common law judicial review remedy of public servants. In *Ngutshane v Ariviakom (Pty) Ltd* [2009] 30 ILJ 213 (LC), the Court said: [24] Accordingly, the Labour Court has no jurisdiction to review the decision of the respondent to dismiss Ngutshane. The provisions of s 158 (1) (h) may apply in circumstances where the LRA offers no remedy…Recently, similar sentiments were echoed by my brother Tlhotlhalemaje J in *Denosa v MEC Health Gauteng [*2019] 40 ILJ 2533 (LC).

[26] In my view, this is an important task that may lessen the load of this Court. Largely, this Court experiences a number of parastatals seeking to challenge decisions of disciplinary committees using section 158 (1) (h) of the LRA.

[27] Paragraph 5.5 pages 1820-1821 bundle 5.

[28] This approach received endorsement in the recent judgment *of Independent Institute of Education (Pty) Ltd v Kwa-Zulu Natal Law Society and others* [2019] ZACC 47

of the Constitution only provides that in the Republic, government is constituted as national, provincial and local spheres of government. Section 1 of the Constitution provides that the Republic of South Africa is one sovereign state. In *Women's Legal Centre Trust v President of South Africa and others*[29], the Constitutional Court had regard to section 40(1) and the definition of "*an organ of state*" and concluded thus: -

> '[19] These provisions (section 40 (1) and section 239) suggest that "the state" includes all those actors who derive their authority from the Constitution, including Parliament, government at national, provincial and local levels, state institutions supporting constitutional democracy created by Chapter 9 of the Constitution, state departments and administrations as well as bodies created by statute.'

[31] By this definition, the Constitutional Court was attempting to give meaning to the word "the state" as employed in section 7 (2)[30] of the Constitution. It is thus understandable for the Constitutional Court to have given the word a wide meaning, which in its judgment it termed "*this broad assemblage*". The question is, should the word State always be given this broad and wide definition, or, where necessary, it should be given a restricted definition. As pointed out above the LRA does not specifically define the word.

[32] However, the word "*Republic"* was afforded a special meaning. It is, when used to refer to the state as a constitutional entity, the Republic of South Africa as defined in section 1 of the Constitution. In my view, with reference to the special meaning of the *Republic* above, it must be accepted that when the legislature used the term State in the LRA, it is referring to a "constitutional entity". Further, the LRA defines "*public service*" to mean national, provincial departments and administration,

[29] Case CCT 13/09 [2009] ZACC 20.
[30] The **state** must respect, protect, promote and fulfil the rights in the Bill of Rights.

including components contemplated in section 7 (2)[31] of the Public Service Act[32] (PSA). Institutions like the applicant before me are not mentioned in the section.

[33] Perhaps the answer to all of these may lie in the historical position which obtained with regard to state employees. From a regulation point of view, the employment of state – government employees in South Africa was regulated mainly by the administrative law[33]. Over time, after the ushering in of the Interim Constitution, the PSA was ushered. It was to provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service and matters connected therewith. At some point the Public Service Labour Relations Act (PSLRA) was introduced. In 1995, the new LRA was ushered in. The current LRA repealed the whole of the PSLRA.

[34] This, then ushered state employees into the LRA. However, the PSA remains in the statute books. It continues to regulate issues like appointments, promotions and transfers. In order to protect the state employees in that regard – where the state exercises powers emanating from the PSA (appointments, promotions and transfers), it was incumbent on the legislature to introduce section 158 (1) (h). The obvious reason for that is that there is one LRA governing both the public and the private sector. There is now one specialized court, being the Labour and Labour Appeals Court. With the above historical background, the contextual meaning of the word “state” must be referring to the state as a constitutional entity comprising of national, provincial and local governments to the exclusion of state-owned entities.

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[31] For the purposes of the administration of public service there shall be national departments and provincial departments mention in the first column of Schedule 1, provincial departments mentioned in the first column of Schedule 2 and the organisational components mention in the first column of Schedule 3. The components mentioned is the Independent Complaints Directorate(ICD); Sports and Recreation South Africa (S&RSA) and Statistics South Africa (Statsa)

[32] No. 103 of 1994.

[33] See *Administrator Transvaal, and others v Zenzile and others* 1991 (1) SA 21 (A).

[35] It does appear that this question received judicial attention in *The Greater Johannesburg Transitional Metropolitan Council v Eskom*[34]*.* This was before the *Women's Legal Centre supra* judgment. In this judgment, the Supreme Court of Appeals in dealing with section 24[35] of the Eskom Act[36], Melunsky AJA, writing for the majority had the following to say: -

> [14] I turn to consider what is meant by the expression "the State". In *the State and Other Basic Terms in Public Law (*1982) 99 SALJ 225-226, LG Baxter suggests that, as a rough description, 'the State' appears to be used as a collective noun for:
>
> "(a) the collective wealth ('estate') and liabilities of the sovereign territory known as the Republic of South Africa' which are not owned or owned by private individuals or corporations; and
>
> (b) the conglomeration of organs, instruments and institutions which have as their common purpose the 'management' of the public affairs, in the public interest, of the residents of the Republic of South Africa as well as those of her citizens abroad in their relations with the South African 'Government'."
>
> In the Shorter Oxford English Dictionary Vol II 2112, *State* is defined to mean *inter alia*
>
> "IV 1. …
>
> 2. A particular form of government;
>
> 3. The state: the body politic as organised for supreme civil rule and government; political organisation which is the basis of civil government; hence the supreme civil power and government vested in a country or nation"
>
> [15] …In its ordinary meaning for the purposes of domestic law the word is frequently used to include all institutions which are collectively concerned with the management of public affairs unless the contrary intention appears.

[34] Case 536/97 dated 30 November 1999.
[35] Eskom is hereby exempted from the payment of any income tax, stamp duty, levies or fees which would otherwise have been payable by Eskom to the **State** in terms of any law…
[36] No. 40 of 1987

[36] After having had regard to various authorities, including the English decisions, Melunsky AJA concluded as follows: -

> "On proper construction of the Eskom Act the expression "the State" in s 24 is not limited to central and provincial government: it includes the State in all its manifestations.

[37] In *Holeni v The Land and Agricultural Development Bank of SA*[37], the Court dealing with section 11 (b)[38] of the Prescription Act[39], a question was flashed out by Navsa JA, writing for the majority: "*can the Land Bank be considered to be 'the State' as referred to in s 11 (b) of the Prescription Act?*" Navsa JA sought refuge from the Constitution and observed that there is no definition of the expression in it. Ultimately, he arrived at the following conclusion:

> [17] It should be borne in mind that, when the Act was promulgated, the definition of 'organ of state' in s 239 of the Constitution was more than two decades into the future. It can hardly be contended that the legislature, at that time, had in mind a broader meaning of 'the State' to coincide with what is presently contained in that definition. In any event, the Constitution itself differentiates between the state and organs of the state. The Constitution can therefore not be used as authority for the proposition that 'the State' in the Act should be interpreted so as to include organ of the state.

[38] Navsa JA went on to say:

> '[20] The state is referred to in two other places in the Act. In s 19, the following appears: "*This Act shall bind the State*". This provision was necessary because of the rule, at the time, that state is not bound by its own laws. The reference here must be to the state as a governing entity with legal personality.

[37] (266/08) [2009] ZASCA 9 (17 March 2009)
[38] 11 (b) fifteen years in respect of any debt owed to *the State* … by the *State* to the debtor …
[39] Act 68 of 1969.

> [22] Thus, in terms of the rule of interpretation that the same words must be similarly interpreted in different parts of an Act, the reference to 'the State' in s 11 must also be to the state as government and as a juristic person in its own right,[40] unless there are indications to the contrary.'

[39] After extensive consideration of certain parts of the Land and Agricultural Bank Act[41], Navsa JA arrived at a conclusion which says:

> [38] To sum up LADA makes it clear that the bank is a separate juristic person acting in its own name and right, distinct from, although not entirely independent of government.

[40] Turning to the LRA, section 209 states that *"This Act (the LRA) binds the State*". Thus, if one employs the reasoning of Navsa JA, it must mean that where the expression is used, it must be referring to the state as government and as a juristic person. In order to arrive at a similar conclusion as Navsa JA did, I must travel the same path with regard to the BA. Section 7 of the BA deals with the establishment of the applicant before me. It states:

> **'Incorporation**
>
> 7 (1) On the transfer date[42] the Minister must apply for the establishment **by incorporation** of the Corporation to a limited liability company with a share capital as contemplated in the Companies Act.
>
> 7 (3) The application for incorporation must be accompanied by the memorandum and articles of association as contemplated in the Companies Act signed by the Minister on behalf of the state.'

[40] See *Sinovich v Hercules Council* 1946 AD 783 at 804.
[41] No 15 of 2002.
[42] Means a date announced by the Minister by proclamation in the *Gazette.*

[41] It is crystal clear to me that the applicant is established as a company by incorporation within the contemplation of the Companies Act and is not a *state*. How can a *state* official – the Minister - apply to establish, through incorporation, a *state*? And, how can a *state,* through its own official act on behalf of the *state*? Just to digress a bit and move to the Companies Act[43]. Section 8 thereof suggests that there are two types of companies, a profit and a non-profit company. The section contemplates a state-owned company. Section 19 (1) (a) of the Companies Act provides that from the date of incorporation, the company becomes a juristic person. Back to the BA, in terms of section 7 (8), the *State* upon incorporation holds 100% of the shares of the corporation. Section 13 of the BA deals with the members of the Board. In terms of subsection 13 (11), the Board controls the affairs of the corporation. In terms of section 14, the Executive Committee administers the affairs of the corporation as appointed and accountable to the Board. On the other hand, section 83 (1) of the Constitution tells us that the President is the Head of State. As Head of State, the President's function is amongst others to make appointments within the contemplation of section 84 (1) (e) of the Constitution.

[42] The Companies Act defines the board to be board of directors of a company. In terms of section 19 (1) of the BA shareholding in the applicant is subject to the provisions of section 32[44] of the Companies Act.

[43] In light of the above provisions, I take a view that the applicant is a separate and distinct legal entity from the state. That being the case, section 158 (1) (h) does not have the likes of the applicant in mind when it empowers the Labour Court to review decisions or acts performed by the *state* in its capacity as an employer. In this regard, the applicant is in the same position as any other employer registered as a company in terms of the Companies Act. Private companies do not have a right to

[43] Act 71 of 2008.
[44] A section that deals with use of a company name and registration number

approach this Court to review their own decisions to appoint, promote and or transfer employees.

[44] It has been authoritatively held that even public service employees do not have as an added string to their bow to challenge their dismissal under this section. Why should it be open for a state-owned company to challenge appointments, promotions and transfers under this section? I conclude that the legality review under section 158(1) (h) is not available to the applicant. A point was made in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others*[45] that a private company becomes an organ of the state only when it performs a public function[46]. Since I later hold a view that in failing to comply with the policies implicated in this matter, the applicant was not performing a public function, it is therefore before me as a private company.

[45] The jurisdiction of the Labour Court is controlled by section 157 of the LRA. In terms thereof, the Labour Court can only exercise jurisdiction on matters that are to be determined by it in terms of the LRA. In other words, if the LRA does not grant the Labour Court power, as it is the case in this matter, the Labour Court must decline jurisdiction. Section 157 (2) grants the Labour Court concurrent jurisdiction with the High Court only on violation of fundamental rights in relation to conduct by the *state* in its capacity as an employer. Given my views as articulated above, much as the matter may be arising from employment and labour relations, I do not believe that the Labour Court may exercise jurisdiction in the circumstances where it lacks power under section 158 of the LRA.

<u>Can the applicant obtain a declaratory relief nonetheless?</u>

[46] Mr Redding SC, conceded, correctly so in my view, that this prayer of declaration is effectively infused in the legality review. Its fate is largely dependent on the success of the legality review. However, I have the

[45] [2015] 36 ILJ 1423 (CC)
[46] Para 23 of the judgment.

following to say with regard to the separate declaratory[47] relief because Mokhari SC took a divergent view. The Labour Court has powers to issue a declaratory order in terms of section 158 (1) (a) (iv) of the LRA and resultantly has jurisdiction in terms of section 157 (1) of the LRA. I must emphasize, the declaration contemplated in section 158 is not similar to the declaration contemplated in section 172 (1) (a) of the Constitution. The one in section 158 of the LRA is one in which rights between parties are declared. The one in the Constitution is one where invalidity of a conduct or law is declared. Corbett CJ in *Shoba v OC Temporary Police Camp, Wagendrift Dam*[48]*,* laid the following principle with regard to declaratory reliefs: -

> "An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case … But because it is not the function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding …"

[47] As it shall be demonstrated later in this judgment, the declaratory order, if made would have no binding effect on any of the respondents. In *Proxi Smart Services (Pty) Ltd v The Law Society of SA and others*[49], the High Court, correctly, in my view, held that the Court will not grant a declaratory order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute. I take a view that the issue of irregular appointments, promotions or transfers is clearly dealt with by the LRA. For that reason, this Court exercises its discretion by refusing to make a declaratory order, in terms of section 158 – which this Court is empowered to make - in the circumstances of this case.

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[47] Paragraph 1 of the unamended notice of motion page 2 bundle 1. Later a draft order was handed up which by implication amends the original notice of motion.
[48] 1995 (4) SA 1 (A) at 14F-I
[49] Case 74313/16 dated 16 May 2018.

The legal position

[48] If I am wrong that this Court should refuse to exercise jurisdiction under section 158(1) (h) of the LRA, I proceed to say that where there is a remedy or process available under the LRA or any other law, then section 158(1) (h) review powers cannot be invoked. The applicant takes a position that because the appointments, promotions and transfers are made by invoking the powers in section 26 of the BA, a legality review is appropriate. Subsection 26 (1) reads thus: -

> "The Corporation may engage such officers and other employees as it may be necessary for the attainment of its object and may determine their duties and salaries, wages and allowances or other remuneration and their other conditions of service in general.

From the subsection arises two public powers/functions - (a) to engage employees and (b) once engaged – being employees – determine their conditions of employment in general. Other than specifying the power to engage, the subsection does not spell out as to how the engagement may be undertaken by the applicant. One must accept that the issue of how, is a matter left for the administration to determine. Section 40 of the BA however provides that the Minister of Communications is empowered to make regulations regarding any administrative and procedural matter which it is necessary to prescribe to give effect to the provisions of the Act. Since section 26 does not prescribe the engagement procedures, using section 40, the Minister may have prescribed the procedure so as to give effect to the engagement part of the section.

[49] Any other administrative and procedural matter not prescribed by the Minister does not have legal force and effect, on application of the *ultra vires* principle, now an incident of the principle of legality. The Constitutional Court in *Masetlha v President of the Republic of South*

Africa and Another[50] held that the power to dismiss is an essential corollary of the power to appoint and the power to dismiss was read into section 209 (2) of the Constitution. The reason it was read in was that section 209 (2) does not expressly provide for dismissal. Similarly, in this matter, I must conclude that the applicant possesses the power to dismiss in terms of section 26 of the BA. Since the applicant holds a view that the respondents were not appointed, promoted or transferred properly, the applicant may dismiss them and or reverse the promotions or transfers and does not require an advice from this Court nor is the Court empowered to do so on its behalf. Mr Moraka made this point and I agree with him.

[50] This is so because, in my view, unprocedural appointment, does not equate an unlawful conduct, within the contemplation of section 172 (1) (a) of the Constitution, in the circumstances of this case. I shall return to this aspect later. Suffice to mention that section 167 (7) of the Constitution provides that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. Added to this is that the jurisdiction of the High Court to decide a constitutional matter is regulated by section 169 (1) (a) of the Constitution. Section 151 (2) provides that the Labour Court is equivalent to the High Court when it comes to matters under its jurisdiction. Section 157 (2) of the LRA grants the Labour Court concurrent jurisdiction with the High Court on matters relating to alleged or threatened violation of any of the fundamental rights in Chapter 2 of the Constitution. To the extent that the applicant's papers are seeking an enforcement, interpretation and protection of section 1(c) of the Constitution, then section 172 (2) powers may be invoked. It seems apparent that the applicant approached this Court to exercise its review powers under section 158 (1) (h). That being the case, I do not agree with Mr Mokhari SC that this Court is not to decide a constitutional matter within the contemplation of section 172 of the Constitution. Thus, under section 158

[50] 2008 (1) SA 566 (CC).

(1) (h), if I discount my reservations highlighted above, this Court has review powers for unlawful decisions or those that offends the rule of law.

[51] An employee does not have as a right, the right not to be dismissed or demoted. An employee only has a right not to be unfairly dismissed or subjected to an unfair labour practice. Section 185 (1) (a) and (b) of the LRA makes that point. I take a view that section 23 (1) of the Constitution properly construed affords any employer the right to exercise fair labour practices[51]. Such fair labour practices includes the right to dismiss fairly and to practice fair labour practices – demotion or transfers. In my view, as corollary to the right not to be unfairly dismissed and being subjected to unfair labour practice lies the right to dismiss fairly and to practice fair labour practices.

[52] The LRA was promulgated to give effect to the fundamental rights conferred by section 23 of the Constitution. Implicit in section 188 is a right to dismiss for reasons of misconduct, incapacity and operational requirements. Section 187 (2) (b)[52] of the LRA goes to the extent of stating that a dismissal is fair if the reason for it is that an employee has reached the agreed or normal retirement age. A further point to be made is this. The applicant laments non-compliance with the policies. Typically, this is akin to a dispute contemplated in section 24 of the LRA. Section 213 of the LRA defines a collective agreement to mean a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade

[51] In *Nehawu v University of Cape Town and others 2993 (2) BCLR 154 (CC)* it was said: [40] In my view the focus of section 23(1) is broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to the right, it is important to bear in mind the tension between the interests of the worker and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, those interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed. This was reaffirmed by the Constitutional Court recently in *AMCU and others v Royal Bafokeng Platinum Ltd and others* CCT181/18 [2020] ZACC 1 (23 January 2020).

[52] On a matter involving a respondent who was appointed contrary the retirement rules, Mr Redding conceded, rightly so, that since the respondent has left the services of the applicant a review would be moot. This Court is sceptered to refuse an application on the basis of mootness. I do so without deciding whether the appointment was unlawful or not.

unions on the one hand and on the other hand one or more employers. The policies involved herein may well be collective agreements, in which case, the provisions of section 24 of the LRA is an available procedure to deal with the interpretation and application of the collective agreements. The policies themselves do mention that they were developed or reviewed in consultation with organised labour or relevant stakeholders – a trade union may be one. With all these statutory mechanisms in place, it is inappropriate, in my view, to invoke section 158 (1) (h) reviewing powers. All that is required is for the applicant to exercise its labour relations rights – dismiss and/or reverse the promotions or refer a dispute about interpretation or application of those policies.

[53] In general, bodies like the CCMA, the Bargaining Council and the Labour Court exist to resolve disputes and not to create disputes. They are specialized bodies created solely for the resolution of labour disputes. Whatever the applicant complains about with regard to the respondents can be resolved by invoking the rights codified in the LRA. If the appointment of respondent X does not assist the applicant in attaining any of its objects, section 189 of the LRA may be invoked. Mr Serage suggested that the applicant had initiated the section 189 process, this is based on his reading of an allegation that section 189 process was publicized.

[54] There is no evidence that the applicant initiated that process. However, there is nothing preventing it from initiating same. Further there is nothing preventing the applicant to initiate negotiations to change the terms and conditions of employment. Where an employee refuse to accept the change, it has been held by the LAC[53] that an employer may lawfully commence a section 189 process. If the appointment and or promotion is inappropriate because the incumbent is not appropriately qualified, incapacity procedures contemplated in section 188 read with the Code of Good Practice may be invoked. If the appointment and or promotion

[53] See *Numsa and others v Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd* [2019] 40 ILJ 2024 (LAC) at para 31

arose as a result of dishonesty and or misrepresentation, the misconduct procedures may be invoked. If there is non-compliance with a policy which may be a collective agreement on the evidence before me, section 24 may be invoked. Last but not least, if a person appointed had reached[54] an agreed or normal retirement age, he or she may be fairly dismissed. Mr Redding SC correctly conceded that there is nothing that prevented the applicant to simply exercise its dismissal powers. Upon realizing that the shoe was pinching, the applicant presented a draft order, which effectively watered down the relief of termination of the appointments. This, in my view, does not help the applicant.

[55] In a legality review, what matters is the question whether the decision is lawful or not? Given the view, I take at the end, the draft order in its ameliorated form cannot be adopted. The question remains, why then trouble the Labour Court by using its reviewing powers, which is reserved for instances not provided for in the LRA.

[56] The upshot of what the applicant is seeking to do is for the Labour Court to dismiss on its behalf for misconduct, incapacity and or operational requirements. The Labour Court does not possess those powers. I am acutely aware that since it was done in *Khumalo*, it appears to be the norm, despite the existence of circumstances that may allow the invocation of the LRA, to approach this Court under section 158 (1) (h). This norm must, in my view, be 'nipped in the bud' as it were. This norm would create a culture of undermining labour rights and is inconsistent with the scheme and purpose of the LRA.

[57] The underpinning consideration in the LRA is fairness. How is fairness to be factored in in a legality review? In my view it cannot be. In the Constitution, the issue of just and equitable only features once a conduct has been declared unlawful. The fairness I am referring to is one that should be factored *en route* declaration. The only manner in which it can be fostered is for the Labour Court to take a 'hands off approach'. It is not

[54] The twenty first respondent Ms Geldenhuys.

unusual for the Labour Court to take a hands off approach. It is frequently done in a power play situation because the LRA does allow power play.

[58] As an added factor, this Court shares concurrent jurisdiction with the High Court on matters arising from a contract of employment.[55] In contract law, a contract may be set aside on the grounds of mistake[56] and or misrepresentation[57]. With all those available legal remedies why seek a declarator and/or invoke section 158 (1) (h)? In my view, this Court should refuse to be dragged into being a legal advisory Court. It is a Court of law and equity.

Exercise of public power.

[59] The next question to be considered is whether by promoting, appointing and transferring the respondents, the applicant was exercising public power or not. The High Court in *DA v SABC*[58] took a view that in appointing employees using section 26, the SABC exercises public power. At paragraph 160 of the judgment the following was said:

> [160] If the dismissal of an employee by a public body such as the SABC is the exercise of public power[59], *a fortiori* must this be the case in relation to appointments. Once an appointment has been made, there is scope for an argument that the relationship between the parties is governed by their contract and the remedies in the Labour Relations Act. The same scope does not exist in relation to the exercise of the power to appoint.

[60] I seem to understand this paragraph to mean that the public power and the exercise thereof ends at the appointment/engagement stage because

[55] Section 77 (3) of the BCEA.
[56] *Khan v Naidoo* 1989 3 SA 724 (N)
[57] *Trollip v Jordaan* 1961 1 SA 238 (A)
[58] Case 3104/2016 dated 12 December 2016.
[59] In *Gcaba*, which came after *Chirwa*, it was concluded that failure to promote and appoint was not an administrative action. At para 64 the Court in *Gcaba* said generally, employment and labour relations issues do not amount to administrative action within the meaning of PAJA.

once the appointment/engagement is made the relationship going forward is governed by a contract of employment and the provisions of the LRA. If my understanding is correct, I am inclined to agree. In fact, Mr Redding SC correctly associated himself with this understanding. Once an appointment is made, an employer and an employee relationship is born.

[61] Unlike in *Khumalo*, section 26 of the BA does not set out how the public power must be exercised. In all the three judgments written by Skweyiya J (majority), Ngcobo J (minority) and Langa CJ (minority) in *Chirwa v Transnet Limited and Others*[60], only the judgment of Langa CJ addressed the pertinent question of the exercise of a public power[61]. In relation to this matter, I must decide whether in appointing, promoting and transferring was the applicant exercising public power or not. The then learned Chief Justice had the following to say: -

> [186] Determining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.

[62] Of importance for me in this exercise is the source of the power. It is apparent that when the respondents were promoted and or transferred the power was purportedly to be sourced from the old and the new

[60] [2008] 2 BLLR 97 (CC).
[61] Although Ngcobo J in the minority judgment disagreed with a view that Transnet in dismissing was not exercising public power. His conclusion was that the functionary was public and actions of a public official is public power. The majority by Skweyiya J was to the effect that the functionary is irrelevant, what is relevant is the nature of the power.

policy. These policies are in my view an offspring of a contract of employment. A breach of them simply entails a breach of a contractual obligation. As pointed out above employment policies do not have a force of law unless they are collective agreements, which are given legal power by section 23 of the LRA. Perhaps it helps to peep into the provisions of the PAJA for the purpose of buttressing this point. In the PAJA, an administrative action is defined and it involves exercise of public power. Similarly, a legality review requires exercise of public power. In the PAJA, the empowering provision is defined to mean a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken. It is worth emphasizing that any such agreement, instrument or document must be concerned with the performance of public function.

[63] Mercifully, the matter before me was not brought under the provisions of PAJA. It thus becomes unnecessary to decide whether the policies are the empowering provisions as defined in PAJA. I must state that I do not agree with an assertion that the policies owe their existence from a constitutional mandate. A constitutional mandate is one that derives from the provisions of the Constitution. The applicant owes its existence from the BA. If regard is had to the preamble of the BA what the legislature sought to do was to align the broadcasting system with the democratic values and to enhance and protect the fundamental rights of citizens. The fundamental rights referred to in here are those which relates to those set out in chapter 2 as reserved for citizens.

[64] Chapter II of the BA emphasizes that the broadcasting system is owned and controlled by South Africans. Only the Minister has the constitutional mandate of broadcasting policy development. Section 3 (1) of the BA spells out the broadcasting system which is owned and controlled by South Africans. Subsection 3 (2) emphasizes that the Minister is ultimately responsible to develop the broadcasting policy that is required from time to time. Both policies in their text, suggests that they exist to

ensure compliance with Labour legislation. Thus, in my view, the Board or the management when developing those policies were not carrying out any constitutional mandate. The person who carries a delegated constitutional mandate in terms of the BA is not before me, nor was the court told that such a mandate was further delegated – of course it being contrary to the principle of *delegatus delegare non potest* - to the Board and or management.

[65] Even if I were to draw an analogy from the provisions of PAJA, I take a view that the application or non-application of the recruitment process of the applicant does not involve performance of a public function. *Gcaba v Minister for Safety and Security and Others*[62] told us already that generally employment matters are not administrative actions. The upshot of that being that in employment matters no exercise of public functions or powers is involved. The driving force, in my view, when it comes to legality review is the implication of the rule of law. As to what a rule of law means, I can do no better than to refer to *Lon Fuller*, when he said for law to be law rather than pure force, eight demands of legality must be respected: law must be a system of rules and these rules must be general, public, prospective, comprehensive, consistent, possible to obey, relatively stable, and there must be congruence between these rules and their administration.[63]

[66] Canadian *case law* had something to say about the concept of *exercise of public power* that may attract judicial review. The Supreme Court of Canada in *Highwood Congregation of Jehovah's witnesses (Judicial Committee) v Wall*[64], had the following to say:

> [14] Not all decisions are amenable to judicial review under a superior court's jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies

[62] 2010 (1) SA 238 (CC).
[63] Lon L Fuller, *The Morality of Law* rev ed (New Haven: Yale University Press, 1964) at 39, 44.
[64] 2018. SCC 26

> make some decisions that are private in nature – such as renting of premises and hiring of staff – and such decisions are not subject to judicial review… In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament" but rather exercising private power… Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

> [22] Second, while it remains true that "almost all powers exercised by public authorities today have a statutory basis", it is important to recognize that public authorities can function based on powers that do not owe their existence to enactments. The Crown has powers of a natural person, and can conduct some of its affairs without relying on statutory powers. Indeed, even some fairly sophisticated administrative regimes have operated without any comprehensive statutory framework.

> [24] Where a public authority is operating under powers that do not arise from an enactment, remedies under s 2(2) (b) of the Judicial Review Procedures Act will not be available, though remedies under s 2(2) (a) will remain available if the public authority's activities have sufficient public character.

[67] In *Paine v University of Toronto et al*[65], it was said:

> [I]t is not enough that the impugned decision be made in the exercise of a power conferred by or under statute; it must be made in the exercise of a "statutory power of decision", and I think that must be a specific power or right to make the very decision in issue.

[68] In *Hamsphire County Council v Supportways Community Services*[66], the following was said:

[65] [1982] 34 O.O (2d) 770
[66] [2006] EWCA Civ 1035 (CA)

> 59 … [I] agree with Neuberger LJ that this was not a public case. The action of the Council in conducting the support services review was not amenable to judicial review, because there was no sufficient *nexus* between the conduct of the review and the public law powers of the Council to make this a judicial review case. The required public law element of unlawful use of power was missing from the support services review. The substance of the dispute between the Council and the Company was about the expiration of the Agreement after the Council had conducted the support services review under clause 11…The source of the power of the Council's support services review was in the Agreement, not legislation or in the non-statutory 2003 Guidelines and published rules… Termination of the Agreement turned on the operation of the contract according to agreed terms, not exercise of a statutory or common law public law power of the Council which was amenable to judicial review.

[69] The above approach was cited with approval in *Calibre Clinical Consultants (Pty) Ltd and another v NBCRFI and another*[67]. In a dissenting judgment, Rogers AJA, in the matter of *Sanparks v MTO Forestry (Pty) Ltd and another*[68], had the following to say:

> [63] I agree with Dambuza JA that the conclusion of the lease was an exercise of public power. However, once the contract came into existence, a commercial contract in which DWAF did not negotiate from a position of superiority, the exercise of its contractual right was in my view a private matter…[69]

> [77] … To attract the court's supervisory jurisdiction there must be not merely a public but a governmental interest in the decision-making power in question.[70]

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[67] 2010 (5) SA 457 (SCA). Nugent JA amongst others said: [36] … I have considerable doubt whether a body can be said to exercise 'public powers 'or 'perform public function' only because the public has an interest in the manner in which the powers are exercised or its functions are performed, and I find no support for that approach in other cases in this country or abroad.

[68] [2018] ZASCA 59 (17 May 2018)

[69] I fully agree with this view and find persuasion in it.

[70] *R v Chief Rabbi of the United Congregations of Great Britain and the Common Wealth, Ex Parte Wachmann* [1992] 1 WLR 1036 (QB) at 1041C-E

[70] I find myself in agreement with the Canadian *case law* in as far as the legality review in a South African context is concerned. Where the applicant relies on powers not emanating specifically from section 26 of the BA, there is no exercise of public power involved, thus legality review is unavailable. On its own version, when the transfers; appointments and promotions were made, the applicant alleges that they were not made in the exercise of the "law" emanating from the policies. That must mean that there was no exercise of public power, which would allow the exercise of judicial review under the legality review. The implicated officials adopted their own unapproved procedures – head hunting and deviations – so to speak. The decisions in issue were made sourcing powers from some employment policies or practices and not an enactment. Exercising powers emanating from an employment policies/practice does not amount to exercise of a statutory power of decision.

[71] In appropriate circumstances, internal employment policies may become a term and condition of employment under the rubric of an employment contract[71]. These policies involved in this matter could not have been sourced from the provisions of section 26 of the BA. Engage does not equate promote. An employer engages[72] a person who then becomes an employee once so engaged. On the contrary, an employer can only promote or transfer an appointed employee. Promotion in an employment context means to be moved to a higher position or rank. Transfer in an employment context means to move an employee from one workplace to another. There is no debate in this matter that all the respondents were or are employees within the meaning of an employee as defined in the LRA. One thing for certain, they had been engaged by the applicant in order to meet its objects. That is consistent with the text in section 26 of the BA. As the Constitutional Court in *State Information*

[71] See *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83.
[72] The dictionary meaning of engage is to arrange to employ or hire someone.

Technology Agency SOC ltd v Gijima Holding (Pty) Ltd[73] puts it, once there is compliance with the prescripts that is the end of the matter in a legality review. In my view, a missed opportunity arose for the applicant[74]. Section 40 of the BA empowers the Minister to make regulations that would have spelled out how recruitment to engage within the contemplation of section 26 must happen. Those regulations would have attracted a force of law, which if breached, would ignite the principle of legality. In *Constitutionality of the Mpumalanga Petitions Bill*[75], Langa DP (as he then was) stated the following:

> "Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purposes of implementing valid legislation. Such functionaries are usually members of the executive branch of government… A legislature has the power to delegate the powers to make regulations to functionaries when such regulations are necessary to supplement the primary legislation…"

[72] These documents (the old and the new policy), as I have pointed out above, have no force of law. If all domestic employment policies would be given a force of law, then the content and meaning of the rule of law would be diluted and be meaningless. I say so because one domestic policy for company X may design a particular procedure which is inconsistent and in direct contradiction of the procedure designed for company B. In those circumstances how would the Courts enforce and uphold the rule of law? In my view, such an approach of affording domestic internal policies a force of law is nothing but a recipe for disaster. Even in instances where an administrative policy is issued in terms of legislation, Courts have expressed doubt on the binding nature

[73] 2018 (2) BCLR 240 (CC).
[74] In my view it is not a lost opportunity though.
[75] 2001 11 BCLR 1126 (CC)

of such policies. The SCA in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*[76], Harms JA had the following to say:

> [7] The word "policy" is inherently vague and may bear different meanings… Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation)

[73] The above conclusion, which I associate myself with, simply implies that policy determinations lack force of law and has no public binding effect[77]. In terms of section 43 of the Constitution, the legislative authority vests in Parliament; Provincial legislatures and Municipal Council. It is apparent that these Policies were drawn up by the Executive Committee and approved by the Board as guidelines in recognition of Labour legislations. In drawing them up, the Executive Committee was not creating legislation and or subordinate legislation which could attract a force of law, neither was their drawing up involving the exercise of public function. Recently, the SCA in *Mostert NO v The Registrar of Pension Funds*[78] had the following to say:

> [8] A word of caution may not be out of place. *New Clicks* is no authority for the proposition that the making of regulations by a minister, in general, is administrative action for purposes of PAJA. It seems, with respect, that the statements in some of the other judgments in that case, to the effect that this is what

[76] Case 252/99 [2001] ZASCA 59 (17 May 2001)

[77] See ON Fuo in *Constitutional basis for the enforcement of "Executive" Policies that give effect to Socio-Economic rights in South Africa* PELJ 2013 (16) 4. Also Jan J Hattingh: *Government Relations, A South African Perspective Manualia Didactica* 36 1998. Hattingh at page 55 emphasises that administrative policies as being unenforceable.

[78] 2018 (2) SA 53 (SCA)

> Chaskalson CJ held, were based on a misinterpretation of what he said…
>
> [10] …The final word on regulation-making and the applicability of PAJA to it may therefore not have been spoken…

[74] That being so, how can compliance or non-compliance with the internal employment policies amount to exercise of public power? In my view, no exercise of public power is involved in *casu*. The Constitutional Court in *AAA Investments (Pty) Ltd v The Micro Finance Regulatory Council*[79], confirmed that if a Council exercises its functions in terms of national legislation and the functions are in the public interest, it is subject to the principle of legality. In *Gijima* and others, it was confirmed that a contract awarded contrary to section 217 of the Constitution is liable to be set aside only on the principle of legality. I must add, as argued by Mr Redding SC, with reference to *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of SASSA*[80], the supply chain management policy referred to in *Allpay* was an offshoot as it were of the Treasury Regulations drawn up in line with an Act of Parliament. Such is not the situation with regard to these two policies allegedly breached. The two policies specifically states, they are guidelines and allow a fair amount of discretion when it comes to their application. This is at odds with the rule of law as defined by Fuller.

[75] In my view, the situation as it obtained in *Khumalo* does not obtain in this matter. The promotion of Khumalo was done within the purported confines of section 11 of the PSA. The section specifically spelled out the required process in making appointments and filing of the posts in the public service. The Court in *Khumalo* concluded that the promotion of Khumalo offended section 11 (2) of the PSA, since it required persons to be qualified for promotion and Khumalo was not qualified. Section 26 of the BA says nothing about qualifications. Mr Itzkin for the applicant urged this Court to take heed of portions of paragraph 62 in *Khumalo.* In my

[79] 2006 (11) BCLR 1255 (CC).
[80] 2014 (1) SA 604 (CC).

view when the entire paragraph is read a different picture to the one punted for in this matter emerges. The entire paragraph reads thus:

> [62] Section 11 (2) must be read in the context of the state's obligation under section 195 (1) (i) of the Constitution and the right to fair labour practices under section 23 of the Constitution. Section 195 (1) (i) stresses the importance of ensuring that the appointment process in the public sector are based on ability, objectivity and fairness. Fairness in employment practices and labour relations requires the state to be even-handed and transparent not only to those whom it employs, but so too to those who may wish to apply for employment at a state institution. It would not be fair if the state were to employ persons who do not meet the very requirements that the state itself sets. It is neither fair nor in compliance with the dictates of transparency and accountability for the state to mislead applicants and the public about the criteria it intends to use to fill a post. The formulation and application for a particular post is a minimum prerequisite for ensuring objectivity of the appointment process. Persons who do not meet the requirements for the post in the public sector ought not to be appointed.

[76] The above paragraph reveals that the objectivity that requires the state to formulate the minimum requirements derives from the concept of fair labour practices, hence reference to fairness as opposed to legality. Section 11 (2) of the PSA that the Court was seeking to give context to does not apply to the applicant. At paragraph 63, the Constitutional Court buttressed the point. It said:

> [65] …The reading of the corollary into section 11 of the PSA, in the context of section 195 of the Constitution, implies that, it would generally not be fair or in terms of an objective process for public-sector employers to consider applicants who fall outside of the formal criteria.

[77] On the contrary, the applicant's case is not pegged on a statute but policies developed internally. In *Chief Executive Officer of the SASSA N .O v Cash Paymaster Services (Pty) Ltd*[81], the SCA held as follows*:* -

> [20] SASSA has, in terms of reg 16A3.2 a supply chain management policy that requires that procurement and tendering should be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> [21] SASSA is not obliged to comply with its policy in the circumstances set out in reg16A.6.4 and it is accordingly unnecessary to consider the terms of the policy further.
>
> [28] …I think not. As was recently said by this court[82]
>
> "It is important to mention that mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void …"[83]

[78] The principle of legality does not come in when it comes to breach of an employer's internal policies[84]. To the extent that the applicant wishes to rely on section 195 of the Constitution, I am of a view that there can be no direct reliance without due regard to the PSA. The applicant may fit the definition of a public enterprise, but it has not pegged its case on a national legislation that promotes the principles listed in section 195 (1) as required by section 195 (3). On 30 October 2013, the Public Administration Management Bill was published.[85] Once the State President issues a proclamation, the Act to be known as Public

[81] [2011] ZASCA 13 (11 March 2011)
[82] *Nokeng Tsa Taemane Local Municipality v DPOA* (518/09) [2010] ZASCA 128 (30 September 2010) para 14
[83] This specific position was not approved by the Constitutional Court on the basis set out in the footnote below. However, it ought to be observed that the policy was issued in terms of the regulations hence it acquired a force of law.
[84] In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive officer of SASA* 2014 (1) SA 604 (CC) it was confirmed that compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASA may disregard at a whim … Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA.
[85] GG No 36981 of 30 October 2013

Administration Management Act[86] (PAMA), shall come into effect. Practically, it shall be safe to assume that Parliament has passed the legislation contemplated in section 195 (3).

[79] That being the case, the principle of subsidiarity[87] must apply in relation to the principles set out in section 195 (1) of the Constitution. Interestingly, public administration as employed in section 195 is defined to mean the public service, municipalities and their employees. The public service is defined to mean national and provincial departments and its components. In section 4 of PAMA an obligation is created for each institution to promote the principles outlined in section 195 of the Constitution. An institution is defined to mean national, provincial departments and municipality or components of national and provincial governments. All of the above points that the applicant before me is not one of the identified bodies to promote the principles in section 195 (1) of the Constitution. The objects of PAMA is amongst others to give effect to section 195 (1) of the Constitution.[88]

[80] One other angle to look at section 195 arises from the provisions of section 196 of the Constitution. The section establishes a constitutional body known as the Public Service Commission (PSC). This body is clothed with powers and functions. One of the functions is to promote the values and principles in section 195. It is specifically empowered to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195. In February 2016, the PSC issued a fact sheet on irregular appointments in the public service. In the fact sheet it sought to explain irregular appointments and stated thus: -

> "In Human Resource Practice the term "irregular appointments" is utilized to describe a wrongful action that has taken place during the

[86] No. 11 of 2014.
[87] See: *My Vote Counts NPC v Speaker of the National Assembly and others* [2015] ZACC 31 (30 September 2015.
[88] See section 3 (a) of PAMA

> process of R&S (recruitment and selection) which is in contravention with legislation, regulations and other subordinate prescripts. Simply put, irregular appointments entail transgression of applicable legislative and policy framework in the appointment process.

[81] Therefore, it seems plain to me that within the contemplation of section 195, for an irregularity to arise, which may be seen to offend any of the principles and values, there must be a statutory obligation to follow a specified process for the purposes of recruitment and selection. Discretionary internal policies with no force of law is not contemplated in section 195 of the Constitution.

[82] The majority in *Chirwa* concluded that although section 195 provides valuable interpretative assistance it does not found the right to bring an action. According to Ngcobo J, in *Chirwa,* section 195 principles are there to contemplate fair labour practices and must be understood within the context of section 23 (1) of the Constitution.

[83] Regard being had to the above legal position; this Court reaches a conclusion that a course open to the applicant is to proceed as contemplated by the LRA. I also conclude that not complying with the internal employment policies does not of necessity amount to the exercise of public power[89] and it is incapable of attracting a legality review. All there is, is a public enterprise by-passing its own discretionary procedures.

[84] In *DA v SABC*, the High Court took a view that since the SABC is a public body which, when it acts, is generally exercising public power. I do not agree that at all times when the SABC acts it exercises public power.

[89] Currie: *The Promotion of Administrative Justice Act: A commentary* stated the following which met with the approval of the Constitutional Court in *Allpay*: "only procedures in empowering provisions can qualify as fair but different. An empowering provision is defined as 'a law, rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. Some empowering materials – such as internal department circulars – are not generally publicly accessible. At least for the purposes of the fair but different provision, it is submitted that an empowering provision can only qualify as fair if it is itself publicly accessible. A law that is not publicly accessible cannot provide publicly known and thus fair procedures".

Proper reading of the *DA* judgment reveals that the High Court sought refuge from *Chirwa* and *Khumalo* to come to that conclusion. My views on *Chirwa* are given impetus by my reading of *Gcaba*, which necessarily removes at a general level employment matters from the purview of the exercise of public power. Again, I read *Khumalo* to be specific to legislative powers as opposed to non-legislative powers.

[85] The Canadian *case law* as espoused above, at the very least supports this disagreement. Mr Redding SC correctly conceded to this proposition that not at all times is public power being exercised by the SABC. As the Learned Late Chief Justice Langa observed in *Chirwa*, determining whether the exercise is that of public power is notoriously difficult. It is not that easy. One Canadian case[90] suggested factors[91] relevant to the determination whether a matter is coloured with a public character element or character to bring it within the purview of public law.

[86] The SABC appoints employees in order to attain its objectives. The objectives of the SABC are listed in section 8 (a) - (p) of the BA. It ought to be remembered that section 9 of the BA clearly provides that the applicant operates on two separate organizational entities. The public service function is spelled out in section 10 of the BA. I do not read section 26 to mean or say that employees are appointed to carry out the public service functions contemplated in section 10. Subsection 8 (d) to my reading is the only one that expressly spells out that one of the objectives is to provide in its public service radio and television programming that informs, educates and entertains.

[87] The late Chief Justice Langa made it absolutely clear that not one factor is determinative. Nonetheless, I agree that when the SABC appoints

[90] *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 60

[91] Those are (a) the character of the matter for which review is sought; (b) the nature of the decision-maker and its responsibilities; (c) the extent to which a decision is founded in and shaped by law as opposed to private discretion; (d) the body's relationship to other statutory schemes or other parts of government; (e) the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by public entity; (f) the suitability of public law remedies; (g) the existence of compulsory power; and (h) an "exceptional" category of cases where the conduct has attained a serious public dimension.

using powers conferred to it in section 26, it does exercise statutory public power. Therefore, in order to determine the legality of the engagements, the ambit of section 26 only must be considered. As pointed out in *Masethla*, the question is rather about whether public authority has been exercised in a constitutionally valid manner[92]. In *Masethla*, it was found that section 209 implied the power to dismiss and having dismissed Mr Masethla, the President exercised the power in accordance with the law[93] – the law being section 209 of the Constitution.

[88] Legality simply entails compliance with the empowering legislation. Since there are no prescribed requirements, by simply engaging an employee to assist in achieving its objects, the SABC would have exercised public power in terms of the enabling section (section 26 of the BA). As held in *Masethla*, once appointed, a contract of employment arises and in this instance, the LRA shall apply thereafter. It is interesting to note that the Constitutional Court refused to accept that section 12 of the PSA was the source of the power because it provided for the manner and form of the service contract once the appointment or dismissal has occurred. Similarly, in my view, there is no power to be sourced from the policies when it comes to engagement.

[89] The only source of public power is section 26 and nothing more[94]. The PFMA was only flagged to justify approaching this Court.[95] The source of power to do anything more after the appointment is lawfully executed is the LRA or where necessary the employment contract itself, if it is in place.

[90] With regard to a discretionary relief of declaration of rights, in this Court's view, the requirements of the relief are not met. Axiomatically, the relief sought by the applicant must be refused. I must briefly return to the question of the alleged irrationality of the promotions and or transfers.

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[92] Para 63 of the judgment.
[93] Para 87 of the judgment.
[94] This point was made in *DA v SABC* paragraph 157 of the judgment.
[95] See para 18.7 of the Founding Affidavit page 28 Bundle 1.

The rejected argument of Redding SC was that it is irrational for an employer like the applicant before me to ignore its own internal policies. Rationality involves exercising public powers for a different purpose for which the powers has been afforded. In section 26 of the BA, the purpose of the power to engage is to attain its objects. It has not been alleged and or proven in the papers that any of the appointments were done to achieve a different object. Unlike in the *DA case* there was no allegations of adverse findings against any of the respondents when their respective transfers, appointments or promotions were made.

[91] I fully agree with Mr Mokhari SC that no case for irrationality has been made by the applicant. Since the empowering section 26 does not prescribe a procedure, the fact that the applicant may have adopted a different means that seeks to by-pass its discretionary bespoken procedures does not mean the means the applicant adopted is irrational and performed in the exercise of public functions.

<u>The issue of delay</u>

[92] Of necessity, all alleged unlawful actions ought to be attacked within reasonable time. Our Constitution does not countenance an illegality. It is premised on the foundation of the rule of law. The section that the applicant invoked to approach this Court does not set out a time period within which to approach the Court. The majority of the impugned decisions were taken some time ago. PAJA which deals mainly with administrative actions, an offspring of section 33 of the Constitution, prescribes that within a period of 180 days, action must be taken to deal with any unlawful administrative action. Section 145 of the LRA requires an attack on a defective arbitration award to be launched within a period of six weeks.

[93] In respect of the decisions that the applicant seeks to impugn a period ranges from 3 years up to and including 10 years in some cases. The Prescription Act, provides that some claims get extinguished in law after a passage of a prescribed time period. Recently, the Constitutional Court in *Notyawa v Makana Municipality and others*[96] had the following to say: -

> [50] As was noted in *Khumalo*, prejudice that may flow from the nullification of an administrative decision long after it was taken may be ameliorated by the exercise of the wide remedial powers to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution. At common law, our courts avoided prejudice to respondents by declining to entertain a review application. Our law has since moved on and PAJA affords courts the wide remedial power which may be exercised to protect the rights of innocent parties. That power mirrors in exact terms the power contained in section 172(1) (b).
>
> [51] It must be emphasised that when a court exercises the discretion, it must always keep in mind the development brought about by the Constitution and PAJA … What is important is to note that the exercise of discretion is no longer regulated exclusively by the common law principles which did not permit the flexibility of reversing unlawful decisions while avoiding prejudice to those who had arranged their affairs in terms of the unlawful decision.

[94] The message above seems loud, lucid and clear. It is no longer permissible for a Court of law to avoid its constitutional obligation simply because of the passage of time. In line with the constitutional imperatives of a rule of law, it does seem to me that a Court of law is more exalted to ascend to the altar, where an allegation is raised – not proven – that a particular decision is threatening the rule of law. Jafta J added that where the unlawfulness of the impugned decision is clearly established, the risk of reviewing that decision on the basis of unreliable facts does not arise.

[96] [2019] ZACC 43 (21 November 2019)

In my mind a party seeking a review of a decision on the basis of illegality, bears the *onus* to show the alleged illegality. The other party, the respondents in this case, bears very little risk, which may translate to inconvenience, which may be remedied with an appropriate order of costs, if the party heard, after a passage of time, fails to show the alleged unlawfulness. On the other hand, where a Court of law refuses to hear a matter in the face of apparent unlawfulness, in my mind, that Court would be failing the foundational principle of the rule of law.

[95] A rule of law is achievable through a functional judiciary. Section 165 (1) of the Constitution vests judicial authority in the courts. Although the common law rule of undue delay still serves a purpose, in my view when regard is had to section 1 (c) read with sections 165 (1), 34, 39 (2) and 173 of the Constitution, unless a hopeless case is so presented, courts must rise to the occasion and defend, where necessary, the rule of law, to ensure a functional State. Our constitutional democracy is young and fragile and it deserves judicial activism.

[96] The applicant has provided reasons why it approached this court late. In *Gijima*, the Court asked the question: did the award (impugned decision) conform to the legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review. The Constitutional Court went on to reconfirm *DoT v Tasima (Pty) Ltd*[97] with regard with the issue of delay. In *Gijima*, before dealing with the delay the question was posed: What impact, if any, should this delay have? After *Gijima*, the Constitutional Court again in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[98] laid the basis for the delay rule in legality reviews. The majority stated that the approach to overlooking a delay in a legality review is flexible. It set out that it involves taking into account a number of factors. The first of which is (a) potential prejudice to affected parties – this is ameliorable, (b) the nature of the impugned decision – may drive the court to the merits of the

[97] 2017 (2) SA 622 (CC).
[98] [2019] ZACC 15.

review, (c) the conduct of the applicant – state litigants are exalted to act with haste given the available resources, (d) court compelled to declare the conduct unlawful – as duty bound by section 172 (1) (a) of the Constitution.

[97] The two step approach remains. The first is, is the delay unreasonable? In my view, the delay in this matter is unreasonable. The second is, should this delay be overlooked? Having considered the evidence of the applicant and having weighed the factors mentioned above, with flexibility of course, I choose to overlook the delay and entertain the matter. I regard the matter to be important to both parties, an additional factor to be weighed, in my view, when considering whether to overlook or not. It ought to be emphasised, the delay rule only prevents a court of review to entertain the application and does not prevent the court once the delay is overlooked to still dismiss the review on its merits. In *Merafong City Local Municipality v Anglogold Ashanti Ltd*[99], the majority judgment made an order remitting the matter to the High Court to consider the lawfulness of the Minister's decision. In *Heath v President of the Republic of South Africa*[100], it was stated that the Court is obliged to adopt a two stage approach, if it finds that the delay is reasonable that is the end of this enquiry and the review proceeds.[101] The delay is nothing but a procedural obstacle, which a Court of law must be slow to allow it to prevent the Court from looking into a challenge to the lawfulness of the exercise of public power.

Counter-application

[98] The 26th respondent brought a counter-application, in terms of which she seeks damages for an alleged breach of contract. The *onus* remains on the 26th respondent to allege and prove the terms of the agreement and the breach thereof. In addition, she has to prove the damages claimed. In my view, the choice of proceedings – motion proceedings, was a very

[99] [2016] ZACC 35
[100] [2018] 1 All SA 740 (WCC)
[101] Para 22 of the judgment.

bad choice given the disputed facts, which ought to have been foreseen by her[102]. Without any further ado, the 26th respondent, in my view, has failed to discharge her overall *onus* and must fail.

[99] This being civil proceedings, costs must follow the results. The counter-application ought to be dismissed with costs.

Respondents' respective cases

[100] In the light of the above principles, it is unnecessary for this Court to consider whether indeed there was or was no compliance with the Policies. A decision on this aspects would firstly not be appropriate in a judicial review since compliance or non-compliance does not implicate the Constitutional rule of legality and over and above that it would be a futile and academic exercise. Decidedly, this Court chooses not to entertain each of the respondents' defences to the alleged non-compliance. Suffice to say, the statutory prescripts were exercised lawfully and rationally, thus, the matter ends there. The applicant failed to discharge the *onus* to demonstrate that there was an illegality which would have ignited the Court's powers.

The issue of costs

[101] The costs of the counter-application have already been dealt with. With regard to the costs of the main application, this Court adopts the approach in *Biowatch Trust v Registrar, Genetic Resources*[103]*,* for a simple reason that the applicant approached this Court in an attempt to defend the Constitutional principle of legality. True, the respondents were dragged into a matter which ostensibly involve huge litigation costs, however, the legal certainty on this issue is beneficial to them as well.

[102] In *Wightman t/a JW Constructions v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) it was held that: A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. See also *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)*

[103] 2009 (10) BCLR 1014 (CC)

Not forgetting that as the Labour Court, section 162 of the LRA affords me a wide discretion when it comes to costs. The practice of costs following the results is foreign in the Labour Court jurisdiction.[104]

[102] In the premises the following order is made.

Order

1. The main application is dismissed.
2. There is no order as to costs in relation to the main application.
3. The 26th Respondent's counter-application is dismissed.
4. The 26th Respondent is to pay the costs associated with the counter-application.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Redding SC with him R Itzkin and S Manie
Instructed by	:	CDH Inc, Sandton.
For the Respondents		
The 1st, 5th, 10th, 20th and 21st Respondents	:	H Gerber
Instructed by	:	Welman and Bloem

[104] See: *Zungu v Premier of the Province of KZN and others* (2018) 36 ILJ 523 (CC) and *Long v South African Breweries (Pty) Ltd and others* (2019) 40 ILJ 965 (CC).

		Incorporated
The 2nd, 11th and 12th Respondents	:	M Kufa and C Nkosi
Instructed by	:	Machaba Attotrneys
The 4th Respondent	:	M Kufa and C Nkosi
Instructed by	:	Nyapotse Incorporated
The 6th Respondent	:	S Seepamore of SG Seepamore Incorporated
The 9th Respondent	:	G Snyman
Instructed by	:	Fluxmans Incorporated
The 13th Respondent	:	Mr M Mkhatshwa
Instructed by	:	Poswa Incorporated
The 15th and 23rd Respondents	:	J Moroka of KD Magabane Inc
The 16th Respondent	:	M Makhura of Cheadle Thompson & Haysom
The 17th, 18th and 25th Respondents	:	H Gerber
Instructed by	:	Ndzabandzaba Attorneys Inc.
The 19th Respondent	:	Mokhari SC

Instructed by	:	SLL Motlogelo Moroka Attorneys
The 22nd Respondent	:	TM Serage of TM Serage Attorneys
The 26th Respondent	:	M Kufa and C Nkosi
Instructed by	:	Gwina Attorneys
The 27th Respondent	:	M Kufa and C Nkosi
Instructed by	:	Motlatsi Seleka Attorneys