IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 61630/20

In the matter between:

CENTRE FOR CHILD LAW	First Applicant
MOTHER OF TZ	Second Applicant
MOTHER OF MPM	Third Applicant

And

SOUTH AFRICAN COUNCIL FOR EDUCATORS	First Respondent
VANGILE MIRRIAM MOKOENA	Second Respondent
KHUTSO FRANCINAH SETHEKGE	Third Respondent
MEC EDUCATION: GAUTENG PROVINCE	Fourth Respondent
MEC EDUCATION: LIMPOPO PROVINCE	Fifth Respondent
MINISTER OF BASIC EDUCATION	Sixth Respondent
SCHOOL GOVERNING BODY: MADUME PRIMARY SCHOOL	Seventh Respondent
SCHOOL GOVERNING BODY: REABILWE PRIMARY SCHOOL	Eighth Respondent
CHILDREN'S INSTITUTE	Amicus curiae

APPLICANTS' HEADS OF ARGUMENT: LEAVE TO APPEAL

INTRODUCTION

1 This is an application for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court, against paragraph 1 of the order and paragraphs 41 to 71 of the judgment handed down by this Court on 13 October 2022.

2 This matter concerns a review of the decisions of the South African Council of Educators ("SACE") in disciplinary proceedings against two educators, Ms Mokoena and Ms Sathekge, who both pleaded guilty to corporal punishment. The applicants also sought systemic relief directing SACE to reconsider and revise its 2020 "Mandatory Sanctions on Contravention of the Code of Professional Ethics (Towards a robust SAGE Sanctioning Philosophy)" ("Revised Mandatory Sanctions").

3 This Court dismissed the review application on the basis that it was unreasonably delayed, but nevertheless granted the systemic relief. We submit that leave to appeal ought to be granted in respect of the dismissal of the review application, in terms of both grounds in section 17(1)(a) of the Superior Courts Act:[1]

3.1 There are reasonable prospects that another court would find differently; and

3.2 There are compelling reasons to grant leave.

4 Though there are several grounds on which a court of appeal may reach a different conclusion, we place particular emphasis on the following:

[1] 10 of 2013.

4.1 First, this Court held, as a matter of law, that different "*trigger dates*" apply to the determination of unreasonable delay and the further calculation of the 180-day period under section 7(1) of the Promotion of Administrative Justice Act.[2] Whereas the "*trigger date*" for the 180-day period is the date on which the applicant receives reasons for the decision under review, the reasonableness of the delay is determined according to the date on which the applicant was informed of the decision. This is a novel interpretation of section 7(1), and one which is inconsistent with decisions of the Constitutional Court, Supreme Court of Appeal and other divisions of the High Court.

4.2 Second, this Court held that it was unreasonable for the applicants to delay launching their review application until they obtained reasons for the decisions under review. In reaching this conclusion, the Court reasoned that the applicants should have relied on the provisions of Rule 53 to obtain reasons. This approach conflicts with the long-standing principle that the absence of reasons is an acceptable reason for delaying the launch of review proceedings.[3]

5 In respect of these findings, therefore, we submit that this Court's judgment departs from established precedent and is in tension with judgments of other divisions. On this basis alone, we submit that leave to appeal must be granted to the SCA.

[2] 3 of 2000 ("PAJA").
[3] *Joubert v Galpin Searle v Road Accident Fund* 2014 (4) SA 148 (ECP) at para 55.

6 The first respondent, SACE, has brought an application for leave to cross-appeal, coupled with a condonation application, in respect of the systemic relief and costs order granted by this Court in paragraphs 2, 3, 4, and 5 of the order. While the applicants do not concede that SACE's grounds of appeal have any merit, they do not oppose these applications and accept that there are compelling reasons for the respective appeals to be heard together, given the overlapping issues.

7 These heads of argument address the following points in turn:

7.1 The proper standard of scrutiny on appeal;

7.2 This Court's findings of law and fact in relation to delay and condonation;

7.3 The applicants' stance on SACE's applications; and

7.4 Why leave to appeal should be granted to the SCA.

THE PROPER APPROACH ON APPEAL

8 In dismissing the review application, this Court made two dispositive findings against the applicants, namely:

8.1 that the applicants' delay in bringing the review was unreasonable; and

8.2 that the delay ought not to be condoned.

9 The finding that there was an unreasonable delay is a factual finding.[4] Although the enquiry requires a court to make a value judgement, it does not involve the

[4] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (6) BCLR 661 (CC) at para 48.

exercise of a true discretion.[5] Therefore, an appeal court would be entitled to uphold the appeal if it holds that this Court's findings were incorrect.

10 At the second stage of the test for assessing undue delay, which concerns whether an unreasonable delay should be condoned, a court exercises a true discretion and the strict test for interference on appeal applies.[6] At this stage, a lower court's decision to grant or refuse condonation can only be interfered with where the discretion was not exercised judicially or where it had been influenced by wrong facts or principles or where the decision reached is one which "*could not reasonably have been made by a court properly directing itself to all the relevant facts and principles*".[7]

FIRST GROUND: NO UNREASONABLE DELAY

There was no delay for the purposes of section 7(1) of PAJA

11 Despite acknowledging that the applicants were never provided with any reasons for the decisions under review,[8] this Court nevertheless held that there was an unreasonable delay in launching the review.

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

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

[6] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para 88.

[7] *Steenkamp and Others v Edcon Limited* 2019 (7) BCLR 826 (CC) at para 67.

[8] Judgment p 042-15 para 43; p 042-18 para 54 ("*When these proceedings were ultimately instituted, the applicants had still not received any reasons*").

12 In reaching this conclusion, this Court expounded a novel interpretation of section 7(1) of PAJA. This provision states that any review proceedings must be instituted without unreasonable delay and not later than 180 days after the date "*on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons*" (Own emphasis).

13 This Court reasoned, without citing authority for this proposition, that although the 180-day time period in section 7(1) did not begin to run in the absence of reasons for the decisions under review, the absence of reasons was irrelevant for purposes of determining the reasonableness of the delay. In effect, this Court held that when determining whether the 180-day period has been exceeded, the proverbial clock starts running only once reasons are provided. By contrast, when determining the reasonableness of the delay, the clock starts ticking from the date that the applicant became aware or reasonably ought to have become aware of the action taken.

14 The proper interpretation of section 7(1) is a question of law. On this legal question, this Court's judgment contradicts authority from the Constitutional Court and Supreme Court of Appeal which confirms that in calculating a period of delay under section 7(1), "*the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant*."[9]

[9] *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) at para 41; *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* [2022] ZASCA 56 (22 April 2022) at para 30.

15 This Court's judgment is also in conflict with the decision of the Western Cape Division in **Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd**,[10] in which Rogers J held that *"[i]n both legality and PAJA reviews, time starts to run from the date the applicant becomes aware or reasonably ought to have become aware of the impugned action and the reasons for it (I call this the trigger date)*".

16 In these cases, the "*trigger date*" in section 7(1)(b) of PAJA applies to both the determination of unreasonable delay and the further calculation of the 180-day period under PAJA. No distinction is drawn between the determination of the reasonableness of the delay and the determination of whether the 180-day time period has started to run.

17 By virtue of this Court's decision in the present matter, there are now conflicting judgments on the proper determination of the "*trigger date*" in section 7(1) of PAJA. On this basis alone, there are compelling reasons to grant leave to appeal to the SCA.

18 In **Caratco**, the SCA held that "*[a] compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes*".[11] This is such a case, as the proper computation of delays is a matter that affects all review applications.

[10] *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd* [2020] ZAWCHC 164 (20 November 2020) at para 287.

19 Applying the correct test, there are reasonable prospects that the SCA would hold that, in the absence of any reasons for the decisions under review, the clock never started running. In other words, zero days elapsed in terms of section 7(1)(b), with the result that there was no delay, reasonable or otherwise.

To the extent that there was a delay, it was reasonable

20 But even if the clock had started to run, there are reasonable prospects that another court would conclude that the applicants' delay, which was caused in the main by SACE's failure to provide reasons, was reasonable in the circumstances.

21 When assessing the reasonableness of the applicants' delays, the starting point is that a delay of less than 180 days will only be found to be unreasonable in cases that are "*rare and have exceptional characteristics*".[12] Indeed, since the advent of the PAJA, "*the 180-day limit has tended to be regarded as the dividing line between reasonable and unreasonable delay*".[13]

22 The timeline set out in the founding affidavit shows that before launching their review application, the applicants, via their attorneys, made repeated requests to SACE to provide reasons, over many months.[14] SACE was unresponsive to most of these requests, and when the applicants did receive responses from SACE's Manager of Legal Affairs and Ethics, Mr George Morasui, SACE blamed

[12] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA) at para 64, citing Plasket J in *Joubert* above n 3 at para 40.
[13] *Joubert* id at para 40.
[14] FA p 001-28 - 31 paras 71 – 84; Annexures FA 9 – FA 16.

the Covid lockdown restrictions and the closure of the SACE offices for the delays and promised to revert.[15]

23 There are reasonable prospects that an appeal court would find that the applicants' diligence was befitting of responsible public interest litigants. Instead of launching a review application in the dark, the applicants persisted in their attempts to engage with SACE to obtain reasons that would confirm whether a review was warranted. As Plasket J emphasised in **Joubert**, the absence of reasons has long been regarded as an acceptable excuse for delaying the launch of review proceedings:

> *"It cannot be expected of an applicant that he or she rush to court to review and set aside administrative action without investigating and attempting to determine whether he or she has a case. It is no answer to say that rule 53 enables an applicant to launch a review on the thinnest of bases and then supplement his or her case when reasons are provided, if they are, and the record is furnished in due course."*
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> *. . .*
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> *Litigants should, I believe, be encouraged to engage with adversaries in an effort to find acceptable settlements, rather than be forced into rushing to court lest they be non-suited for their delay. They should also be encouraged to investigate their positions adequately before launching proceedings. All of this requires time – in some cases more than in others. It has always been accepted that delays for these types of reasons are acceptable and nothing in the PAJA suggests to me that this is no longer to be the case."*[16]

24 In light of these remarks, which accord with the basic principle that litigants ought to be encouraged to take steps to avoid litigation through engagement,[17] there

[15] See Section27's correspondence and communications with Mr Moroasui of SACE, FA p 001-30 para 79 (15 April 2020); FA Annexure 15 p 001-87 (4 May 2020); FA Annexure 16 p 001-91 (26 June 2020).
[16] *Joubert* above n 3 at paras 52 and 55.
[17] *Eke v Parsons* 2016 (3) SA 37 (CC) at paras 22 – 23; *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at para 37; *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677B-D.

are reasonable prospects that another court would conclude that the applicants' delay in launching the review was reasonable in the circumstances.

25 Moreover, SACE has failed to offer any explanation on affidavit for its failure to provide reasons, in breach of its constitutional obligations of openness and accountability.[18] SACE ought not to be permitted to use its own unexplained recalcitrance as a shield against judicial review and accountability.

SECOND GROUND: CONDONATION

26 Despite acknowledging that the reviewable irregularities were "*egregious*"[19] and that "*the prospects of success would favour the applicants*",[20] this Court concluded that it would not be in the interests of justice to grant condonation on the basis that:

26.1 no proper explanation was given for the delay;[21]

26.2 the second and third respondents would be prejudiced if the impugned decisions were set aside and remitted for another disciplinary hearing;[22]

26.3 the administration of justice and the public interest in bringing certainty and finality to administrative action had to be taken into account;[23]

26.4 instead of awaiting reasons, the applicants ought to have been content to rely on the presumption in section 5(3) of PAJA;[24] and

[18] See AA p 003-37 para 95, in response to FA p 001-28 - 31 paras 71 – 84.
[19] Judgment p 23 - 25 paras 65 – 70.
[20] Judgment p 25 para 70.
[21] Judgment p 21 para 60.
[22] Judgment p 22-3 para 64.
[23] Judgment p 21-2 paras 62-3.
[24] Judgment p 18 para 53.

26.5 the applicants should have launched their review and then relied on the procedure contemplated in Rule 53(1)(b) to obtain reasons.[25]

27 There are reasonable prospects that another court would find that in reaching this conclusion this Court misdirected itself and acted on wrong principle in the following respects:

28 First, the period of delay was accounted for, as the applicants set out the full timeline of their attempts to engage with SACE to obtain reasons.[26]

29 Second, this Court omitted from its assessment of the interests of justice any consideration of the best interests of the child principle, which requires that the rights and best interests of affected children be given paramount importance in all matters affecting them, including an assessment of condonation.[27] Indeed, as was held in **Centre for Child Law v Minister of Basic Education**,[28] "*[t]he fact that [a] case involves constitutional rights, especially of children would . . . on its own warrant the grant of condonation of the unreasonable delay and adjudication of the merits of the matter*" (Own emphasis).[29]

30 This Court also did not acknowledge that the review application concerns SACE's obligations to address corporal punishment in schools, which is a

[25] Judgment p 21 para 61.
[26] FA p 001-28 - 31 paras 71 – 84; Annexures FA 9 – FA 16.
[27] See the approach taken in *Majikija v Mxo and Another* (1596/2015) [2016] ZAECPEHC 7 (8 March 2016) at paras 6 – 9.
[28] 2020 (3) SA 141 (ECG).
[29] Id at para 52.

question of public importance with broader significance for the rights of children.[30]

31 Third, having accepted that the reviewable irregularities appear to be "*egregious*",[31] the Court was bound by the **Gijima** principle: that even if there is an unreasonable delay, section 172(1)(a) of the Constitution compels courts to declare impugned decisions to be invalid where they are "*indisputably and clearly inconsistent with the Constitution*".[32] In other words, if the unlawfulness of the decision is sufficiently clear, a court must even overlook a delay "*for which there is no basis for overlooking*".[33]

32 On SACE's own version, there were patent reviewable irregularities, which were clear and indisputable:

32.1 SACE contended that its Mandatory Sanctions are binding and permit of no discretion,[34] despite its clear discretion under section 5(c)(iii) and (iv) of the SACE Act and the well-established principles on the unlawful fettering of discretion.[35]

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[30] FA p 001-42 para 115; AA p 003-38 para 100.
[31] Judgment p 23 - 25 paras 65 – 70.
[32] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) at para 52; *Buffalo City Metropolitan Municipality* id paras 66 and 71. See *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* above n 10, where Rogers J held that the *Gijima* principle applies to both PAJA and legality reviews. See also Hoexter and Penfold *Administrative Law in South Africa* (3ed) p 730 - 731.
[33] *Gijima* id at para 66.
[34] AA p 003-45 para 117.2: "the sentence or the sanction of the educators who have been found guilty is prescribed and deviation from the prescribed procedure would have amounted to an illegality"; AA p 003-46 para 122.1: "[t]here is absolutely no discretion at all to deviate from those mandatory sanctions."
[35] Judgment p 24 para 68, referring to *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at para 7.

32.2 SACE denied that it had any obligation to afford children and their parents any opportunity to be heard on the appropriate sanctions, given its belief that the mandatory sanctions are inflexible.[36] This is despite the Constitutional Court's judgment in **AB v Pridwin**[37] and the provisions of sections 6(3) and 10 of the Children Act which, this Court confirmed, afford children "*a right to express their views, either in person or through an appropriate representative, on matters that concern their interests.*"[38]

32.3 SACE confirmed that it gave no thought to rehabilitation-oriented sanctions, as it incorrectly asserted that it had no power to impose such sanctions and that such sanctions would somehow be unlawful.[39] This is despite the SCA's judgment in **Preddy v Health Professions Council of South Africa**[40] and this Court's conclusion that SACE ought to give regard to such sanctions as "*it is in the interests of a learner that his educator be provided with the necessary support and be taught the necessary skills regarding non-violent forms of discipline in the classroom and school environment.*"[41]

33 Fourth, this Court erred in holding that the Rule 53 mechanism for obtaining reasons is an adequate substitute for obtaining reasons prior to the launching of

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[36] AA p 003-44 para 117.2: "It needs to be emphasised that the circumstances of this case did not call for the evidence of the victims to be furnished. As stated hereinabove , the sentence or the sanction of the educators who have been found guilty is prescribed and deviation from the prescribed procedure would have amounted to an illegality". AA p 003-41 para 108.3: "There is absolutely no justification in the circumstances of these cases to have called the children to give testimony as the educators pleaded guilty and they were given mandatory sanctions."

[37] *AB and Another v Pridwin Preparatory School* 2020 (5) SA 327 (CC).

[38] Judgment p 30 para 86.

[39] AA p 003-40 para 106.4: "*the sanction that is proposed by the Applicant will be unlawful as it is not authorised by either the Act or the mandatory sanctions that were prevailing at the time of the offences and the hearing.*"

[40] *Preddy v Health Professions Council of South Africa* 2008 (4) SA 434 (SCA) at paras 2 and 17 to 19.

[41] Judgment p 31 para 87.

a review application. Again, as Plasket J emphasised in **Joubert**, "*[i]t is no answer to say that rule 53 enables an applicant to launch a review on the thinnest of bases and then supplement his or her case when reasons are provided, if they are, and the record is furnished in due course*".

34 Fifth, the presumption in section 5(3) of the PAJA, which operates where no reasons for a decision have been provided, is no surrogate for obtaining reasons. Like Rule 53, section 5(3) is intended to benefit applicants, rather than serving as a barrier to accessing justice.

35 Finally, this Court did not consider whether the exercise of its remedial discretion might ameliorate any prejudice suffered by the second and third respondents in the event that the impugned decisions are set aside.

35.1 As was noted in **Khumalo**, prejudice that may flow from the nullification of an administrative decision long after it was taken may be ameliorated by the exercise of the wide remedial power to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution.[42]

35.2 In **Notyawa**, the Constitutional Court emphasised that our law has thus "*moved on*" from the common law approach, whereby "*courts avoided prejudice to respondents by declining to entertain a review application*".[43]

35.3 In any event, the respondents' answering affidavits made no reference to alleged prejudice resulting from the applicants' alleged delays. On the

[42] *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 53.
[43] *Notyawa v Makana Municipality and Others* 2020 (2) BCLR 136 (CC) at para 50.

contrary, the second respondent, Ms Mokoena, welcomed a further disciplinary hearing.[44]

36 In the circumstances, there are reasonable prospects that another court, applying the correct principles set out above, would grant condonation and proceed to consider the merits of the review relief.

THIRD GROUND: MERITS

37 As this Court itself accepted, there were "*egregious*" irregularities in SACE's decision-making and good prospects of the applicants succeeding on the merits of its review.[45] As noted above,[46] this is fully apparent on SACE's own version, which is that, contrary to well-established legal principles and the SACE Act itself, it had no discretion to deviate from the Mandatory Sanctions, no obligation to afford children and their parents an opportunity to be heard, and no obligation to consider rehabilitation-oriented sanctions.

38 There are thus reasonable prospects that a court of appeal entertaining the merits of the review would uphold the grounds of review and grant the review relief sought by the Applicants.

[44] Ms Mokoena's AA p 003-2 para 8: "*When the matter is referred back to SACE, it will be a good opportunity to place the prayer plea, defence, since I did not assault the child*".
[45] Judgment pp 23 - 25 paras 65 – 70.
[46] See [32] above.

FIRST RESPONDENT'S CROSS-APPEAL

39 SACE seeks leave to cross-appeal against paragraphs 72 to 92 of the judgment and paragraphs 2, 3, 4 and 5 of the order. It also seeks condonation for the late filing of the cross-appeal.

40 As indicated above, the Applicants do not oppose the application for condonation and the application for leave to cross-appeal. In doing so, the applicants do not concede the merits of the grounds of cross-appeal.

41 Instead, the applicants accept that their grounds of appeal and the grounds of cross-appeal are intertwined and that these issues raise questions of law of broader public importance. There are therefore compelling reasons for the matter to be referred to the SCA as a whole, rather than adjudicating these issues piecemeal.

LEAVE TO APPEAL TO THE SUPREME COURT OF APPEAL

42 We submit that there are clear grounds to grant leave to appeal to the SCA in terms of section 17(6) of the Superior Courts Act.

43 First, the need for an effective response to corporal punishment and SACE's constitutional obligations to protect the rights of children in exercising its disciplinary functions raise important questions of law of broader importance, that will influence how SACE conducts future disciplinary proceedings.

44 Second, the question of delay in the absence of reasons raises important questions of administrative law that have implications for the treatment of delay

in all judicial reviews. The divergence between this Court's judgment and previous judgments ought to be resolved by the SCA.

45 Third, the administration of justice requires that these matters be heard by the SCA, given the implications of this Court's interpretation of section 7(1) of PAJA, and its divergent approach to assessing the reasonableness of delay caused by an absence of reasons.

CHRIS McCONNACHIE

THABANG POOE

Applicants' counsel
Chambers, Sandton
2 December 2022

LIST OF AUTHORITIES

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Secondary sources

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