IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Of Interest to Other Judges

Case No: P 275/16

In the matter between:

Meshack Phopo **Applicant**

and

National Commissioner Of The South African Police Services **First Respondent**

PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES **Second Respondent**

MINISTER OF POLICE **Third Respondent**

DIVISIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES **Fourth Respondent**

Heard: **5 December 2018**

Delivered: **20 August 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The applicant, a former employee of the South African Police Services, brought this application before the Court in terms of the provisions of sections 158 (1)(h) and 157(1)(2) of the Labour Relations Act (LRA), to seek a variety of orders including;

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i. Condoning the late filing of the review application.

ii. Reviewing and setting aside the decision of the first respondent and that of the other respondents dated 16 October 2015 not to reinstate him, as his application for reinstatement was refused on account of it being brought more than 30 days contemplated in section 36 of the South African Police Service Act[1] (The SAPS Act) after the criminal appeal judgment.

iii. Substituting the above decision with an order directing that the respondents reinstate him with retrospective effect from the date of his discharge being 26 March 2011.

iv. Alternatively, remitting the issue of reinstatement to the respondents and directing them to take such administrative steps necessary to consider the application for reinstatement.

v. In the event of a finding that the 30 days contemplated in section 36 (2) of the SAPS Act are to be calculated from the date of the appeal judgment, and not from the date when the applicant knew of the judgment, then the reference to the time period of 30 days in section 36(2) without a provision of extending the period on good cause is unconstitutional, and therefore unlawful, insofar as the words *'or such longer period as may on good cause be allowed'* are not inserted in that provision.

vi. In the event of the Court making such a declaration of unlawfulness, it must then order suspension of the time period in section 36 (2) insofar as the applicant is concerned, and to refer the declaration of unlawfulness to the Constitutional Court for confirmation.

[2] In regards to whether the review application was launched timeously, the respondents conceded that there was no need for an application for condonation, and I agree.

[1] Act 68 of 1995

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[3] The background to this application is not in dispute and may be summarised as follows;

3.1 The applicant held the rank of Captain in the employ of SAPS, and was based at the Maclear Police Station in the Eastern Cape Province.

3.2 Allegations of indecent assault against him surfaced in 2007. An internal disciplinary enquiry held to establish the veracity of these allegations exonerated him in the same year.

3.3 On 12 November 2010, and subsequent to criminal charges being pursued, the applicant was convicted of indecent assault. The Elliot Regional Magistrate Court on 25 March 2011 sentenced him to 8 years imprisonment, of which 3 years were suspended for 4 years.

3.4 On 26 March 2011, the applicant was discharged from service by way of operation of the law in terms of section 36(1) of the SAPS Act.

3.5 The applicant had appealed against both his conviction and sentence. The Grahamstown High Court (Per Beshe J) on 20 November 2014 upheld his appeal, resulting in his conviction and sentence being set aside.

3.6 Section 36(2)(c) of the SAPS Act provides that an employee in the position of the applicant whose conviction and sentence were set aside on appeal may apply to the National Commissioner for reinstatement into the employ of the SAPS within 30 days of the handing down of judgment.

3.7 The applicant made such an application to the Provincial Commissioner on 13 February 2015, some 55 days after the judgment on appeal was handed down. Following various correspondence and demands for a response, including an appeal to the Minister of Police, in written responses dated 16 October 2015 and 8 August 2016 respectively, the applicant was advised that his application for reinstatement was declined on account of *inter alia* it having been

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launched outside of the 30-day period contemplated in section 36(2) (c) of the SAPS Act.

[4] The matter initially came before this Court on 7 August 2018, and following an agreement between the parties which was made an order of Court, the applicant was granted leave to file a supplementary affidavits in which he raised the principle of *Lex Non Cogit Ad Impossibilia,* which he contended applied to his application for reinstatement in terms of section 36 of the SAPS Act.

[5] In the supplementary affidavit, which was supported by confirmatory affidavits deposed to by Ms Van Staden of Legal Aid South Africa, PE Justice Centre, the applicant's main contention was that since he had no knowledge of the High Court judgment until 6 February 2015, he was unable to lodge the application as provided for in section 36 of the SAPS Act. He further contended that unless the respondents could prove that the judgment came to his attention at any earlier stage or in any other manner as per his submissions, it followed that the interpretation required in respect of the calculation of the 30-day period should run from the date of knowledge and receipt of the written judgment. To this end, he contended that no condonation was required if the Court were to accept that he had applied for reinstatement within 30 days from the date of knowledge and receipt of the judgment.

[6] The respondents had filed an answering affidavit deposed to by Mr Simphiwe Kapa, Justice Beshe's Clerk in the Eastern Division of the High Court, in which he had given a detailed explanation pertaining to how the parties in the application for appeal were notified of the date of the delivery and the noting of judgment. The nub of his contentions is that both parties (including the Grahamstown Justice Centre which had acted on behalf of the applicant in the appeal) were telephonically notified on the afternoon of the day prior to the handing down of judgment the following morning.

[7] The applicant had filed a replying affidavit, which was also supported by a supplementary affidavit deposed to by his Counsel in the appeal proceedings, Advocate McChonnanie. Counsel had confirmed having made several

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enquiries with the office of the Registrar of the High Court in Grahamstown regarding when the judgment would be delivered, and was not aware at all times until 6 February 2015.

The issues for determination*:*

[8] The main issues for determination of this dispute are;

a) whether the 30-day period under the provisions of section 36(2) of the SAPS Act is condonable;

b) If the question is answered in the affirmative, a further consideration is whether the decision of the National Commissioner to refuse condonation is reviewable;

c) If however it is found that the 30-day period is not condonable, and that the application for reinstatement was made outside of the 30-day period, the final issue that arises is whether the provisions of section 36(2) (c) of the SAPS Act are unconstitutional.

[9] Section 36 of the SAPS Act provides that;

‘ 36. **Discharge on account of sentence imposed**

(1) A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.

(2) A person referred to in subsection (1), whose-

(a) conviction is set aside following an appeal or review and is not replaced by a conviction for another offence;

(b) conviction is set aside on appeal or review, but is replaced by a conviction for another offence, whether by the court of appeal or review or the court of first instance, and a sentence to a term of

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imprisonment without the option of a fine is not imposed upon him or her following on the conviction for such other offence; or

(c) sentence to a term of imprisonment without the option of a fine is set aside following an appeal or review and is replaced with a sentence other than a sentence to a term of imprisonment without the option of a fine, may, within a period of 30 days after his or her conviction has been set aside or his or her sentence has been replaced by a sentence other than a sentence to a term of imprisonment without the option of a fine, apply to the National Commissioner to be reinstated as a member.

(3) In the event of an application by a person whose conviction has been set aside as contemplated in subsection (2)(a), the National Commissioner shall reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged.

(4) In the event of any application by a person whose conviction has been set aside or whose sentence has been replaced as contemplated in subsection (2)(b) and (c), the National Commissioner may-

(a) reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged; or

(b) cause an inquiry to be instituted in accordance with section 34 into the suitability of reinstating such person as a member.

(5) For the purposes of this section, a sentence to imprisonment until the rising of the court shall not be deemed to be a sentence to imprisonment without the option of a fine.

(6) This section shall not be construed as precluding - any administrative action, investigation or inquiry in terms of any other provision of this Act with respect to the member concerned, and any lawful decision or action taken in consequence thereof.'

The submissions:

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[10] The applicant's contentions were that;

10.1 He had submitted his application for reinstatement together with relevant documents and affidavits confirming the date upon which the judgment of the High Court came to his attention.

10.2 He had explained the failure to make the application within the 30 days, and averred that even though the judgment was delivered on 20 November 2014, a copy in that regard was only received by his Counsel Advocate McChonnanie on 6 February 2015, which was the date upon which he became aware of it. A confirmatory affidavit deposed to by Counsel was also submitted in support of his application, explaining the circumstances under which the judgment only became known on 6 February 2015.

10.3 To the extent that his application for reinstatement was not considered or was declined on the basis that it was made outside of the 30-day period, the provisions of section 36 of the SAPS Act must be interpreted purposively, and that it could neither be reasonable nor rational that the 30-day period commenced from the date on which judgment was delivered in court, if the person whom it concerned or his representatives were not notified by the Registrar of the High Court that such judgment was to be handed down.

10.4 The 30-day period has to commence upon the date of the judgment coming to the attention of the employee concerned and/or his chosen representative, and that a written judgment would be required in order to substantiate any claim of reinstatement.

10.5 Following his application for reinstatement, and before the final decision of the National Commissioner, the matter had received the attention of various senior individuals within SAPS, including the Acting Head-HR Practices and Administration; the Divisional Commissioner Management; Deputy National Commissioner: Corporate Service Management.

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10.6 A legal opinion dated 16 July 2015 by the Executive Legal Officer that was addressed to the Divisional Commissioner had recommended his reinstatement. He submitted that notwithstanding all legal opinion and recommendations that supported his reinstatement, the National Commissioner had merely relied on the Provincial office's original recommendation, which in any event was unknown or unspecified in declining the reinstatement. In the end, the National Commissioner failed to apply her mind in a rational, reasonable manner to the recommendations, opinions and issues before her.

10.7 From the recommendations, it appears that condonation was indeed applicable and reinstatement was recommended. The original recommendations relied upon by the National Commissioner in arriving at her decision did not support the respondents' defence and view that the 30-day period was peremptory, and that the late filing of the application on its own did not render it invalid or irrelevant for consideration.

10.8 He was always committed to have his name cleared and be granted appropriate relief hence his initial application for reinstatement on 8 September 2011 which the SAPS considered to be premature.

10.9 Any decision taken in respect of an application for reinstatement lodged in terms of section 36(2) of the SAPS Act must be lawful/valid, reasonable, rational and not taken arbitrarily, and the National Commissioner had failed in these duties.

The respondents' submissions:

[11] In the answering affidavit, the SAPS' Section Head: Resources of Legal Services, De Villiers Odendaal averred the following;

11.1 The 30-day period is not condonable because no provision is made in the SAPS Act allowing for condonation.

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11.2 To the extent that the application for reinstatement was made outside of the 30-day period, there was no application at all and the National Commissioner had no jurisdiction to consider it at all.

11.3 The National Commissioner did not have discretion to condone non-compliance with the stipulated 30-day period, and would thus be acting *ultra vires* if she sought to condone any application made outside that period.

11.4 The recommendations which were made to the National Commissioner for reinstatement were anomalous as they motivated for reinstatement notwithstanding the fact that the application was made out of time.

11.5 The National Commissioner agreed with the approach taken by the Provincial office (Major General Billet) who had recorded that in his view, the explanation furnished for the delay was not adequate and that the fault for the delay lay at the foot of the applicant's legal representatives.

11.6 The decision to decline the application for reinstatement was taken by the National Commissioner on 13 August 2015. Subsequent to that decision, the then National Commissioner, Riah Phiyega, was placed on suspension. Following her suspension and subsequent investigations into her fitness to hold office, an acrimonious relationship had developed between her and SAPS, and she had not cooperated with SAPS in relation to litigation generally, and thus an affidavit could not be obtained from her in respect of this matter.

11.7 What could however be extrapolated from the decision of the National Commissioner were her concerns about the delay in making the application, and the need for consistency in the application of the relevant prescripts.

11.8 To the extent that the National Commissioner had in her decision made reference to the 30-day period ('prescripts'), and found the applicant's explanation for the delay to be unacceptable, that was merely *obiter.*

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11.9 Any reference to 'consistency' in the decision of the National Commissioner was in reference to the fact that SAPS had consistently declined to approve applications made outside of the 30-day period irrespective of the explanation for the delay. The reasoning for this consistency was that the provisions of section 36(2) of the SAPS Act were peremptory, but did not take into account any budgetary considerations. Thus the strain on the budget of SAPS would be crippling if the provisions were not read and applied in a strict sense.

The legal framework:

[12] It is trite that legislation is to be interpreted textually, contextually and purposively.[2] To the extent that there is a dispute in respect of the interpretation of section 36(2)(c) of the SAPS Act, the legal position in regards to interpretation of statutes is that by virtue of the provisions of section 39(2) of the Constitution of the Republic,[3] any such interpretation must promote the spirit, purport and objects of the Bill of Rights. The Courts are accordingly obliged to prefer interpretations of legislation that falls within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.[4] Thus, if more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen.[5]

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[2] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22; [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC) at para 41

[3] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), as amended

[4] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001(1) SA 545 (CC) at para 23

[5] *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 42; See also *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at n 17 at para 88, where it was held that;

> "It is apparent from *Fraser* that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question."

[13] In a further restatement of these general principles, it was held in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6] that;

> 'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

And,

> 'An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'[7]

[14] The respondents relied on various authorities in contending that as a general principle, administrative authorities have no inherent power to condone a failure to comply with peremptory requirements, as any such provision must be found in the provisions of the statute.[8] Accordingly, it was submitted that an authority had the power to condone non-compliance only if it has been afforded the discretion to do so.[9]

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[6] [2012] 2 All SA 262 (SCA) at para 18a-c

[7] at para 26f-g

[8] See *Amandla GCF Construction CC and Another v Municipality Manager of Saldanha Bay Municipality and Others* [2018] ZAWCHC 77; 2018 (6) SA 63 (WCC) at para 44, where it was held that;

> "As in *Pepper Bay & Smith* supra, it may seem unfair as the parties were, for all intents and purposes, possessed of compelling arguments as to why the late filing of the applications should be condoned. However, as Brand JA put it, as a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. Such a discretion must be found in the provisions of the statute."

Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith 2004 (1) SA 308 (SCA) at para 31.

[9] *South African Co-operative Citrus Exchange Ltd v Director- General: Trade and Industry* 1997 (3) SA 236 (SCA) at 241

[15] The Courts have over the years drawn a distinction between requirements in statutes that are peremptory (or mandatory) and those that are directory. The traditional view was that requirements which are classified as mandatory ought to be strictly complied with, failing which the purported act will be a nullity. This is clearly the approach favoured by the respondents in this case.

[16] There has recently been a shift in the traditional approach of interpretation. In regards to requirements which are directory, Courts have held the view that "substantial compliance" with the prescripts would be sufficient,[10] and it is now recognised that in appropriate cases, there might be sufficient compliance with a mandatory requirement even in cases where there has not been exact compliance. In terms of this approach, mandatory requirements will not be held to require exact compliance where substantial compliance will achieve all the relevant objects.[11] This modern approach was confirmed in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO South African Social Security Agency*[12], where it was held that;

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[10] *Roux v Griggs-Spall* 1946 AD 244 at 250

[11] See *Nkisimane & others v Santam Insurance Co Ltd* 1978 (2) SA 430 (AD) at 433H-434A and at 434C, where Trollip JA stated that;

> 'Preliminary I should say that statutory requirements are often categorised as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular.'

And,

> 'In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see JEM Motors Ltd v Boutle & another 1961 (2) SA 320 (N) at 327 in fin 328B and Shalala's case supra at 587F-588, and cf Maharaj & others v Rampersad 1964 (4) SA 638 (A) at 646C-E).'

See also *Makwetlane v RAF* 2003 3 SA 439 (W) at 457-458; *Observatory Girls Primary School v Dept of Education* 2003 4 SA 246 (W) at 255D; *Cowan v Hathorn NO and Other*s (176/2013) [2013] ZASCA 159 (25 November 2013) at para 10, where it was held that;

> "However, 'even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved'. See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209 G-I."

[12] (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 30

> "Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose". This is not the same as asking whether compliance with the provisions will lead to a different result."

[17] Insofar as the issue of whether the decision not to reinstate is reviewable or not, it is accepted that a discharge of a police officer as contemplated in section 36(1) of the SAPS Act arises by operation of law, and is not dependant on an administrative decision which may be challenged in review proceedings.[13] It can also be accepted that the objectives of the provisions of section 36(2) of the SAPS Act are to reinstate an ex-member previously discharged by operation of the law on account of a criminal conviction, and upon an appeal Court having exonerated him/her as contemplated under the provisions of section 36(2)(a) of the SAPS Act. In effect, the upholding of an appeal exonerates the member from any criminal wrongdoing, thus degrading the basis upon which the discharge by operation of the law took place.

[18] In circumstances where such an ex-member has no other alternative remedies in the event that his or her application for reinstatement was rejected on account of non-compliance with the relevant prescripts or for whatever reason under the provisions of the SAPS Act, and further to the extent that such an employee relies on the provisions of section 158(1)(h) of the LRA, it is my view that guidance is obtained from *Member of the Executive*

[13] See *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA), which judgment considered the constitutionality of section 14 (1) of the Employment of Educators Act 76 of 1998, which section is similar, in certain respects, with section 36 (1) of the SAPS Act

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Council for the Department of Education Western Cape Government v Jethro N.O and Another[14], where it was recently stated that;

"[38] Section 1 of PAJA defines administrative action as, *inter alia*, a decision of an administrative nature taken by an organ of state when exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person and which has a direct, external legal effect. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, the Constitutional Court held that the determination of whether a decision constitutes administrative action has to be done on a case by case basis. What matters is not so much the functionary as the function. Various considerations may be relevant, such as: the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.

[39] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*, the Supreme Court of Appeal held that at the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary. The qualification that administrative action must, as a fact, adversely affect the rights of any person, and must have a direct external legal effect, was intended to convey that administrative action is action that has the capacity to affect legal rights, i.e. it impacts directly and immediately on individuals.

[40] While labour rights and administrative justice rights should be compartmentalised and are derived from different constitutional and legislative sources, rigid categorisation should be avoided. Decisions and actions taken by the state as an employer may in certain circumstances constitute reviewable administrative action, especially where no remedy of review or appeal against such decision exists under the unfair dismissal or unfair labour jurisdiction in the LRA. As the Constitutional Court stated in *Gcaba v Minister for Safety and Security and Others*, human rights are intrinsically interdependent, indivisible and inseparable and the

[14] (CA10/2018) [2019] ZALAC 38 (13 June 2019)

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constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes. Accordingly, legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights, including the right in section 23(1) of the Constitution to fair labour practices.

[41] A letter informing an employee of his or her deemed discharge by operation of law under section 14(1) of the EEA involves no decision or exercise of a public power, and thus cannot constitute administrative action; but a decision taken under section 14(2) of the EEA constitutes an exercise of a statutory power and the performance of a public function by the Department. It is a decision of an administrative nature (as opposed to an executive, legislative or judicial nature), which is informed by policy considerations regarding efficiency, and may adversely affect the rights of persons outside the Department, such as the respondent. The decision cannot be challenged under Chapter VIII of the LRA because it does not constitute a dismissal as defined in section 186(1) of the LRA - the dismissal having been deemed and the decision in terms of section 14(2) of the EEA being concerned solely with a request for reinstatement on good cause. The decision likewise cannot constitute an unfair labour practice under section 186(2) of the LRA because it does not relate to the rights and interests protected by that remedy. In the premises, a decision by the Head of Department, charged with the exercise of a statutory discretion to reinstate on good cause shown by an employee deemed to have been discharged, constitutes administrative action reviewable in terms of PAJA. The Labour Court accordingly did not err in its finding in that regard." (Citations omitted)

Evaluation and application of the legal principles to the facts*:*

[19] The issue that arises from the above legal principles is whether the interpretation of section 36(2) of the SAPS Act as favoured by the respondents would lead to the promotion of the spirit, purport and objects of the Bill of Rights. Aligned to that enquiry is that it being not seriously disputed that the provisions in question are peremptory, and further in view of the fact that the traditional approach in interpreting such provisions has since been discarded, the question that follows is whether there are facts placed before

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the Court, that demonstrates that the applicant's application for reinstatement can be said to be substantially compliant with the provisions of section 36(2) of the SAPS Act, and to that end, whether the decision of the National Commissioner to simply deny a reinstatement on account of the application in that regard having been made outside the 30-day period is reviewable.

[20] In line with the principles and authorities elucidated above, the following conclusions in regards to the facts of this case ought to be made;

20.1 It is correct as pointed out on behalf of the respondents that the 30-day period is reasonable. The approach however favoured by the respondents, that non-compliance with the provisions of section 36(2) of the SAPS Act is not condonable is clearly unsustainable, as it is not supported by the respondents' own conduct in dealing with the matter, nor is it in concert with the promotion of the spirit, purport and objects of the Bill of Rights, and in particular, the applicant's right to fair administrative action as shall further be illustrated below.

20.2 The respondents' contention that a failure to comply with the time periods in making applications for reinstatements causes a strain on the SAPS' budget can hardly serve as a legitimate excuse to trump over the rights of employees to fair administrative action. In a nutshell, administrative convenience cannot lightly be allowed to override the exercise of a Constitutional right. In any event, the legislators could not have anticipated the duration between a conviction of a SAPS member and his/her successful appeal. Furthermore, I am certain that budgetary constraints when drafting the provisions of section 36(2) (c) of the SAPS Act where the least of the legislators' concerns.

20.3 Equally without merit is the contention made on behalf of the applicant that it should be read into these provisions that the 30-day period runs from the date when the ex-member became aware of the judgment on appeal. This approach would clearly lead to absurdity and uncertainty.

20.4 In line with what was stated in *Member of the Executive Council for the Department of Education Western Cape Government v Jethro N.O and*

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Another[15], a decision taken under section 36(3) of the SAPS Act ordinarily constitutes an exercise of a statutory power and the performance of a public function by the National Commissioner. It is a decision of an administrative nature which adversely affect the rights of ex-members of SAPS such as the applicant, who had their criminal convictions set aside on appeal.

20.5 The setting aside of a criminal conviction invariably negates the basis upon which such ex-members were discharged from service. To the extent that ultimately it is the National Commissioner who is enjoined by the provisions of section 36(3) of the SAPS Act to reinstate such ex-members upon an application for reinstatement having been made, it was thus expected of her to make any such decision that would meet the standard of lawfulness, reasonableness and procedural fairness within the meaning of section 33(1) of the Constitution.

20.6 The mere fact that the provisions of section 36(2) of the SAPS Act are peremptory cannot be the end of the enquiry. On the authority of *Allpay,* the issue remains whether the applicant's application for reinstatement, *albeit* outside the 30-day period, constituted substantial compliance with the statutory provisions, viewed specifically in the light of the purpose they are meant to serve.

20.7 The provisions of section 36(2) of the SAPS Act textually, contextually and purposively interpreted, can only be meant to reinstate an ex-member whose criminal conviction (which led to his/her discharge), was set aside on appeal. In this regard, it cannot be doubted that the applicant always had an intention to be vindicated and to be reinstated after he was exonerated by the internal enquiry and after he was criminally charged. He had lodged his application, *albeit* belatedly. His initial application was not accompanied by an application for condonation. On his version, an affidavit explaining the lateness of the application was submitted *after he was advised* by SAPS functionaries that he needed to do so. Both he and his Counsel had submitted

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affidavits explaining the circumstances under which the 30 day period was not complied with.

20.8 *Prima facie*, there is nothing to suggest from the reason of the decision of the National Commissioner that despite the respondents' arguments that the provisions in question ought to be restrictively interpreted, she had not considered the explanation why the application for reinstatement was launched outside of the 30-day period. Self-evidently, the National Commissioner had indeed considered whether the lateness ought to be condoned. Once she had done so, any decision that she took as to whether the lateness should be condoned ought to have fallen within the bounds of rationality, lawfulness and reasonableness.

20.9 In the light of the above, once the SAPS functionaries had advised the applicant to seek condonation for the late submission of the application for reinstatement, and once the National Commissioner had considered the reasons for lateness and based her decision on those reasons, it follows that the respondents cannot argue that reference to the reasons for lateness was merely made *obiter*.

20.10 Had the Commissioner's decision in this case been solely based on a strict interpretation of the provisions as suggested, this in my view would have been the end of the matter, which would invariably have necessitated a consideration of the constitutionality of those provisions as sought by the applicant. In the end however, the process followed by the respondents, and the reasons for the decision by the National Commissioner not to reinstate in this case, ultimately erodes the need for a constitutional enquiry.

20.11 There is however a further difficulty confronted by the respondents which ought to be highlighted. Their approach that any attempts to interpret the provisions as favoured by the applicant would led to a nullity is countered by a contrary view that these provisions, do not in any event say what the consequences of non-compliance with the 30-

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day period are. It cannot therefore be merely read into these provisions that a consideration of why there was non-compliance would ordinarily lead to a nullity.[16]

20.12 To the extent that the provisions are significantly silent in the event of non-compliance with the 30-day period, the invariable interpretation of section 36(2) of the SAPS Act that accords with constitutional compliance is that nothing prevented the National Commissioner (As she had done), from considering the reasons why the application was late, and to make a reasonable decision in that regard. This approach takes into account the purpose of condonation, which is to forgive non-compliance or faulty compliance, provided that the requirements for reinstatement under the provisions of section 36(2)(a) of the SAPS Act were met, which was not an issue in this case. This is even more so, as the National Commissioner was obliged to reinstate under the provisions of section 36(3) of that Act.

20.13 The respondents took issue with attempts by the applicant to supplement his explanation for the delay in submitting the application for reinstatement in the supplementary affidavits, which were belatedly filed in pursuance of the defence of *Lex Non Cogit Ad Impossibilia.* The National Commissioner, to the extent that she had considered the explanation for the delay, could only have dealt with the material and explanation that was before her at the time. Thus, any attempts at an elaboration of the reasons for the delay via the belated supplementary affidavit are clearly *excipiable*. My conclusions in regards to the further

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[16] See *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC) at para 20, where it was held that;

> "Thus, the provisions of the Act must be interpreted purposively so as to give effect to the Constitution, the objects of the Act itself and the purpose of the provisions in issue. But, this approach does not necessarily equate to an expansive construction of the provisions of the Act. This is so because the purpose of the Act may well require a restrictive interpretation of the particular provisions so that the exercise of a protected right is not unduly limited. Therefore, due regard must be had to the express language used in the provisions under consideration. Furthermore, care must be taken against unduly limiting a fundamental right which has been conferred (as in this case) without express limitation by reading implied restrictions into it."

supplementary affidavit in my view ought to dispose of the arguments surrounding a defence of *Lex Non Cogit Ad Impossibilia.*

[21] The issue of whether the decision not to reinstate the applicant is reviewable ought to be considered within the context of what was said in *Executive Council for the Department of Education Western Cape Government v Jethro N.O and Another.* The decision taken by the National Commissioner under section 36(3) of the SAPS Act not to reinstate the applicant constitutes an exercise of a statutory power and the performance of a public function by her. It is a decision of an administrative nature which is informed by *inter alia*, whether the requirements under section 36(2)(a) of that Act were met.

[22] In the ordinary course, the decision of the National Commissioner, cannot be challenged under Chapter VIII of the LRA because it does not constitute a dismissal as defined in section 186(1) of the LRA, as the discharge from service was by operation of the law. The decision to refuse to reinstate similarly cannot constitute an unfair labour practice under section 186(2) of the LRA, because it does not relate to the rights and interests protected by that remedy.

[23] It follows that in terms of section 158(1)(h) of the LRA, this Court is empowered to review any decision taken by the State in its capacity as employer, on such grounds as are permissible in law. It is appreciated that this Court will not entertain an application to review 'any act performed by the State in its capacity as employer' in terms of s 158(1)(h) of the LRA as a matter of course.[17] Effectively, this Court will not assume jurisdiction to review a decision taken by the State as an employer under those provisions, if the employee affected by the decision has other remedies provided for under the provisions of the LRA.

[24] It has already been stated that given the circumstances under which the applicant was discharged from service, there can be no doubt that he has no other remedies, except those envisaged under section 158(1)(h) of the LRA.

[17] *Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and Another* (JA91/09) [2012] ZALAC 14; [2012] 9 BLLR 888 (LAC); (2012) 33 ILJ 1822 (LAC)

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This is so in that as it was held in *De Villiers v Head of Department: Education, Western Cape Province*[18]

> "Even if the decision not to reinstate the applicant did not constitute administrative action, this court retains review jurisdiction on the grounds of legality (at least), which incorporates most, if not all, of the grounds of review relied upon by applicant in his founding affidavit. These would certainly require that functionaries exercise public power in a manner that is not irrational or arbitrary, and that they be accountable for the manner in which that power is exercised"[19]

[25] It is worth repeating that in bringing this application under the provisions of section 158(1)(h) of the LRA, the applicant contends that his review is lodged with emphasis on the residual principle of legality, and further contends that the National Commissioner's decision was invalid, unlawful, irrational, unreasonable, contradictory, procedurally unfair, and arbitrary. I am of the view that the applicant's submissions in this regard have merit for the following reasons;

25.1 The SAPS own functionaries, *viz*, the Acting Provincial Commissioner: Eastern Cape; the Section Head: Employee Relations, as supported by a legal opinion[20] had either recommended a reinstatement or that the matter be referred to the National Commissioner for consideration whether condonation for the late application ought to be granted.

25.2 For reasons that are difficult to comprehend, the National Commissioner was dismissive of these recommendation, stating in her decision that;

> *'The reinstatement is not approved. I support the original recommendation by the province. The late submission is a matter of negligence by the lawyers of the dismissed member. It's therefore not an issue for SAPS. The lateness cannot be proved in any manner.*

[18] (2010) 31 ILJ 1377 (LC)
[19] At para [30]
[20] Pages 12; 13; 14; 31 - 32 of the Record

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The burden of proof is for the member and can be argued in Court. SAPS must comply with prescripts and be consistent' (Sic).

25.3 Emanating from the above reasons and the recommendations made by other functionaries, and further contrary to the respondents' contentions that the late lodging of an application was not condonable, it has been concluded elsewhere in this judgment that the respondents and indeed the National Commissioner, had in any event considered the explanation for the lateness of the application to reinstate. The latter had however simply rubbished those reasons and downgraded them to '*negligence by lawyers'* or failure to prove the lateness (whatever that meant), without any application of her mind to the issues.

25.4 At the time that the reinstatement was recommended by Major General Jacobs of Operational Legal Support, he had specifically mentioned that in accordance with the provisions of section 36(3), the National Commissioner did not enjoy any discretion to reinstate, and that the applicant would be 'harshly prejudiced' if his application was not processed. He had further stated that the lateness of the submission of the application was not excessive and did not prejudice the Department in any manner.[21] If this was the view of Operational Legal Support at the time, I fail to appreciate the reasoning of the National Commissioner in refusing to reinstate.

25.5 In the light of the above conclusions, it is apparent that the National Commissioner had not applied her mind to the application before her. To the extent that she had considered the reason for the late application for reinstatement in a dismissive manner as she had done, it cannot in the light of other views expressed on the matter by other functionaries, be said that her decision was reasonable or rational. On the opposite scale, the decision is not only contradictory, but it is also arbitrary.

[21] At page 62 of the Record

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[26] In summary, the approach favoured by the respondents that non-compliance with the provisions of section 36(2)(c) of the SAPS Act is not condonable is not in concert with the promotion of the spirit, purport and objects of the Bill of Rights, and in particular, the applicant's right to fair administrative action. The approach is further not supported by the very conduct of the respondents in this case.

[27] The applicant's application for reinstatement was clearly out of time. However, in line with a purposive interpretation of the peremptory provisions, it is accepted that the application, despite being late, was substantially compliant for the purposes of achieving the objectives of section 36(2) of the SAPS Act, primarily of which is to reinstate an ex-member who was discharged from service on account of a criminal conviction, which conviction has since been set aside on appeal.

[28] The respondents, despite holding a firm view that the provisions are not condonable had in any event, required the applicant to seek condonation, and in this regard, the applicant had complied. To the extent that the refusal to reinstate the applicant was predicated on the reasons that he had proffered for the lateness of his application for reinstatement other than purely on a strict interpretation of the provisions of section 36(2), the decision does not accord with the standards of reasonableness, rationality and procedural fairness. On the opposite scale, the reasons are arbitrary, making the entire decision reviewable. The facts of this case further makes an enquiry into the constitutionality of the provisions of section 36 (2)(c) of the SAPS Act superfluous.

[29] In the light of the above conclusions, the only appropriate order to make given the history and the circumstances of this case, is to review and set aside the decision of the National Commissioner, and for the matter (the application to reinstate) to be remitted to the respondents for reconsideration. There is further no basis upon a consideration of the requirements of law and fairness, for a costs order to be made.

[30] Accordingly, the following order is made;

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Order:

1. The decision of the First Respondent dated 16 October 2015 not to reinstate the Applicant in terms of the provisions of section 36 of the South African Police Service Act is reviewed and set aside.

2. The Applicant's application for reinstatement in terms of the provisions of section 36(2)(c) of the South African Police Act is remitted to the First to Fourth Respondents for reconsideration.

3. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Ms. E Van Staden, of Legal Aid South Africa
For the First – Fourth Respondents:	Adv P N Kroon SC with Adv A Rawjee, and Adv Desi, instructed by the Office of the State Attorney

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