IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)

NOT REPORTABLE

Case no: 518/2022

In the matter between:

LUVUYO SOGA **Applicant**

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH, **First Respondent**
EASTERN CAPE

MINISTER OF FINANCE **Second Respondent**

JUDGMENT

Govindjee J

Background

[1] The applicant was employed by the Eastern Cape Department of Health ('the Department') in 1986, and occupied a position at Assistant Director level until he

retired early, at the age of 55 years, effective from 1 January 2021. His primary complaint is that he was penalised in respect of pension benefits upon early retirement, and that the respondents acted unlawfully by contravening s 16(6) of the Public Service Act, 1994 ('the Act'). That section provides for state employees to retire before the normal age of 60 years, and without imposition of any pension penalties, subject to the approval of the executive authority.[1] A circular from the Department: Public Service and Administration ('DPSA'), dated 25 February 2019, ('the circular') explains the workings of the system. The applicant seeks to 'enforce' the circular by way of a legality review challenging a decision of the first respondent ('the MEC') to refuse an application for early retirement without pension penalty on 8 December 2020. The applicant also challenges the decision, dated 10 December 2020, to impose pension penalties upon his retirement.

The circular

[2] The authority to grant early retirement without pension penalties vests in the relevant executive authority, in this case the MEC.[2] National treasury agreed to 'assist in providing additional funding to departments and governmental components, both nationally and provincially' in order to operationalise s 16(6) of the Act.[3] National treasury set conditions for funding instances where departments chose to utilise the option of early retirement without pension penalties.[4] The circular highlights the following:

'5.1 In terms of section 16(6) of the PSA, the relevant EA or his / her delegated authority, is empowered to, upon receipt of a request from such employees, approve ER applications without pension penalties, if sufficient reasons exist for the retirement based on criteria.

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[1] Section 16(6) of the Act provides as follows:
(a) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17(2), if sufficient reason exists for the retirement.
(b) If an employee is allowed to so retire, he or she shall, notwithstanding anything to the contrary contained in subsection (4), be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection.

[2] Para 1.4 of the circular.

[3] Para 1.5 of the circular.

[4] Para 1.6 of the circular.

5.2 The approval of any ER application without pension penalties, in respect of employees from the age of 55 to 60 years, shall be subject to the pension laws, criteria and conditions determined by the employer *and the availability of funding*, supported by NT.' (own emphasis).

[3] Attached to the circular was a DPSA 'Guideline on Managing Early Retirement in the Public Service' ('the DPSA Guidelines') and national treasury 'Guidelines for the 2019 MTEF Period Criteria for Early Retirement Funding Provision to Departments ('the NT Guidelines'), which explained the processes and conditions for the provision of supplementary funding to support early retirement applications. It is readily apparent from notes to these documents that the intention was for the documentation to be read together.

[4] The circular provides that, subject to conditions, pension expenditure incurred as a result of granting early retirement without pension penalties would be funded by national treasury for departments who applied for such funding. Where funding was required from national treasury, departments were to demonstrate how the granting of such early retirement to employees would yield potential future savings in terms of national treasury conditions.[5]

[5] The circular informed qualifying employees wishing to apply for early retirement without pension penalties to submit their application to their human resource office, '[to] be considered based on the management plans and criteria set by relevant departments'.[6]

The DPSA Guidelines

[6] The DPSA Guidelines confirm that employees aged between 55 and 60 years may retire from the public service subject to pension penalties.[7] Each executive authority enjoys the discretion to approve early retirement requests for qualifying

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[5] Para 5.3 of the circular.
[6] Para 5.5 of the circular.
[7] Para 1.1 of the DPSA Guideline.

employees without pension penalties, 'based on reasonable criteria set by that executive authority'.[8]

[7] Approval of early retirement applications was not automatic on application and was to be considered on its own merits and measured against criteria provided for in the DPSA Guidelines as well as contextual factors, to be considered by each executive authority.[9] In determining the criteria for early retirement applications within their respective departments, each executive authority was obliged to ensure, inter alia, that there would be no negative impact on the delivery of services by the department and that potential future fiscal savings would be realised in terms of national treasury's conditions.[10]

[8] While the approving department was usually required to bear the financial costs of any consequent pension penalties, the DPSA Guidelines provided for the associated financial implications to be funded by national treasury, '[making] special provision to support such initiatives, if it is in the interest of fiscal savings and supporting Human Resource (HR) Planning within a department'.[11] The NT Guidelines canvass eligibility and funding criteria, also explaining the limitations of the funding support to be provided by national treasury to departments.[12] Furthermore, departments benefiting from national treasury assistance were expected to generate permanent future savings linked to the resultant vacant posts and a permanent reduction in the average unit costs of personnel.[13]

[9] There are various disputes of fact on the papers that require resolution in accordance with the accepted approach to determining applications for final relief on motion. For present purposes, it may be noted that it is the MEC's contention that the applicant was one of approximately 200 employees of the Department who applied for early retirement without pension penalties. The Office of the Premier was asked by

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[8] Para 1.3 of the DPSA Guideline.
[9] Para 2.1 of the DPSA Guidelines.
[10] Para 3.1 of the DPSA Guidelines.
[11] Paras 1.1 and 1.4 of the DPSA Guidelines.
[12] Paras 5.3 – 5.5 of the NT Guidelines. For example, each respective department would still be obliged to fund pro-rata service bonus pay, balance of capped leave over 160 days and unused annual leave from within their baseline budgets when approving early retirement applications.
[13] Paras 5.8, 5.9 and 6 of the NT Guidelines.

the Department to make application for funding to the DPSA and national treasury. The applications were remitted to the relevant provincial treasuries and the Eastern Cape Provincial Treasury required the respective departments to fund pension penalties associated with approved early retirement. Departmental circular, 10/2021, seemingly signed on 17 February 2021 but dated 8 April 2021, ('the departmental circular') explains the following:

'In July 2020, due to the advent of the COVID-19 pandemic, National Treasury issued communique that departments will now take responsibility of all the costs arising out of the Early Retirement without Penalty process. This was due to diversion of the funds that were earmarked for this process to fighting of COVID-19.

Based on the above paragraph, the department will not be able to process applications for Early Retirement without Penalization of pension Benefits in terms of section 16(6) of the Public Service Act, 1994 due to lack of funding.'

[10] Prior to that, on 8 December 2020, the Deputy Director-General: HR and Corporate Services, corresponded with the applicant as follows:

'**Application for Early Retirement With Penalisation from the Public Service in terms of Public Service Act, 1994, as amended, section 16(6): Yourself**

1. The MEC for Health has not approved your application for Early Retirement Without Penalisation in terms of the Public Service Act, 1994, as amended, section 16(6) based on the following reasons:
   (a) Based on the precarious financial position of the Department, projected into the MTEF, there are insufficient funds available to pay the resultant penalties to the Government Employee Pension Fund.

2. Please note that you are welcome to apply for Early Retirement with penalties in terms of the Public Service Act, 1994, as amended, section 16(6)(a).

3. Please also be informed that should you choose to opt for point 2 as mentioned above, there will be a downscaling of 4% per annum on pension benefit.'

[11] Ms Thembeka Nqumashe, the Human Resource Manager of the Department, responsible for employee service benefits and exit management benefits for employees in the position of the applicant, deposed to an answering affidavit on behalf of the MEC. The affidavit confirms that the deponent had been involved in the process leading to the applicant's retirement. It is averred that after he was informed of the non-approval, the applicant did not want to continue in employment after December 2020. He verbally communicated that the Department should proceed to approve early retirement with penalty. The applicant denies this. This was approved by way of correspondence dated 10 December 2020, and the applicant's last day of duty was at the end of that month.

[12] It is relevant to add that the applicant had drafted correspondence to the District Manager of the Department some seven weeks prior to this, as follows:

'**Forced application for early retirement with penalisation of pension benefits to be payable by Eastern Cape Department of Health'**

After non-approval and or delayed approval on time of all my earlier submitted applications for Early Retirement without Penalisation of Pension Benefits for reasons better known by the Department, I now wish to apply for the processing of Early Retirement with Penalisation of Benefits with a sin qua non (sic) that such penalisation will be paid by the Department.

I therefore grant authority for the processing of my benefits accruing from such retirement and that I be regarded as having been retired as from 1 December 2020. All letters for payment of the penalties have been submitted to the office of the Honourable MEC for Health who I had a telephone contact with today, Acting SG Dr Zungu and also the DDG Mrs Mavuso.'

[13] More than 19 months after retiring, and some 17 months after receiving payment of his pension gratuity from the Government Employees' Pension Fund, the applicant launched the present application, also contending that he would have remained in employment until normal retirement age in the absence of approval of early retirement without pension penalties.

[14] One of the points *in limine* taken by the MEC is undue delay in launching the application for review.

Undue delay

[15] The founding affidavit fails to address the issue of delay and the following factual averments on the part of the MEC are not contested in reply. The applicant became aware that he had been placed on early retirement with the imposition of pension penalties by no later than 14 December 2020. His last day on duty was at the end of that month. His early retirement commenced with effect from 1 January 2021 and the GEPF paid his pension gratuity on 23 March 2021. Only at the end of August 2022 did he launch the present application.

[16] In response to the point, the applicant avers only that the parties 'have been engaging on the matter until it was clear that the first respondent is not relenting on their stance not to pay my penalised pension benefits' and that the 'last encounter was in November 2022 when first respondent's officials requested me to consider going back to work at lower salary'. In amplification, the applicant refers to paragraphs of the answering affidavit that 'sets out the encounters that ensued between the Department and I'. Those paragraphs, however, refer only to the circular dated 17 February 2021, a prior complaint to the Director-General in the Office of the Premier about the delay in obtaining a response to the application, seemingly during 2020, and an application to the District Manager, apparently also during 2020. No further explanation is offered by the applicant. The applicant argues that there is no prejudice suffered by the MEC as a result of the alleged delay. Inexplicably, he adds only that that the departmental circular puts paid to the point.

[17] The applicant seeks to review the decisions to refuse his request for early retirement without pension penalty and to impose a penalty on his pension benefits as unlawful. Courts have the power to regulate their own proceedings and to refuse a review application if the aggrieved party has been guilty of unreasonable delay in initiating the proceedings.[14] The first part of the rationale for this is that failure to launch a review within a reasonable time may cause prejudice to the respondent. There is,

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[14] *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA); [2004] 4 All SA 133; [2004] ZASCA 78 ('*Van Zyl*') paras 46-47.

secondly, also a public-interest element in the finality of administrative decisions and the performance of administrative functions.[15] The application of the rule requires consideration of whether there was an unreasonable delay and, if so, whether the delay should, in all the circumstances, be condoned.[16]

[18] The reasonableness or unreasonableness of a delay is dependent on the facts and circumstances of each case. It requires a value judgment, in light of all the relevant circumstances, based on a factual enquiry and bearing in mind the nature of the challenged decision.[17] The relevant circumstances to be considered includes any explanation that is offered for the delay. Put differently, it requires an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable.[18] *Mr Zono*, for the applicant, conceded that the delay in launching the application was unreasonable. This concession was properly made considering the lengthy period of time that has elapsed and the absence of any cogent explanation for this.[19]

[19] Exercising the discretion whether or not to condone the delay cannot be evaluated in a vacuum and must be informed by constitutional values.[20] In *Department of Transport and Others v Tasima (Pty) Ltd*,[21] the point was made that a court should exhibit 'vigilance, consideration and propriety' before exercising its discretion to overlook a late review. There must, however, be a basis for a court to exercise its

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[15] *Madikizela-Mandela v Executors, Estate Late Mandela and Others* 2018 (4) SA 86 (SCA) ('*Madikizela-Mandela*') para 9. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has lapsed: *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F.
[16] Ibid.
[17] *Gqwetha v Transkei Development Corporation Ltd and Others* [2006] 3 All SA 245 (SCA) ('*Gqwetha*') para 24.
[18] *Madiizela-Mandela* above n 15 para 10. In *Van Zyl*, the court emphasised that while this involved the exercise of a value judgment, it was not to be equated with the judicial discretion involved in the next question, dealing with condonation: *Van Zyl* above n 14 paras 48, 49. *Van Zyl,* it may be emphasised, was an ordinary appeal against a finding of fact and law and did not involve an appeal against the exercise of a judicial discretion by a court of first instance.
[19] See *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A).
[20] *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) ('*Khumalo*') paras 44, 52 and 53. It must be noted that, in the context of public-sector employment, the value of security for employees, and mitigating the arguably inherent workplace inequality, are to be kept in mind, together with a court's power to grant an 'appropriate order' in mitigating the effects of a declaration of invalidity
[21] *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('Tasima') para 160.

discretion to overlook the delay and that basis must be gleaned from the facts made available by the parties or objectively available facts.[22] As indicated, the applicant has failed to address the unreasonable delay whatsoever in his founding affidavit. In reply, he has satisfied himself with the barest of responses to the point raised by the MEC, including only vague allegations of attempts to settle the dispute.

[20] In doing so, the applicant appears to operate under the misapprehension that the MEC was obliged to detail the prejudice suffered, and that in the absence of that the point is technical. This point receives further consideration, below. Furthermore, the applicant appears to attempt to obfuscate the issue by referring to engagements that predate the impugned decisions, rather than addressing his own inactivity subsequent to being placed on early retirement with pension penalty. It is the delay in instituting the review that requires explanation. The applicant concedes that the delay was unreasonable. Yet he has failed to advance any basis for the exercise of a discretion in his favour. The bald hint of subsequent engagements with the MEC is wholly inadequate. Similarly, the suggestion that he was left astonished and dumbstruck by the 10 December 2020 correspondence is belied by his subsequent inaction. Given the absence of a proper basis for condoning the delay, to do so would be baseless and in the manner deprecated by the highest court.[23] That on its own should be the end of the matter.

[21] There is also authority that the nature of the second impugned decision, which had the effect of terminating the applicant's employment, should itself have precipitated a prompt review, before the consequences of that decision became entrenched.[24] In the context of an Assistant Director employed by the Department, and whose position would need to be filled immediately once vacated,[25] the reasons for that are obvious. Instead, the applicant has not advanced any serious basis to suggest that he had not acquiesced in the decision to be placed on early retirement, even when it became clear to him that this was with pension penalty. Dilly-dallying

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[22] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para 49.
[23] *Ibid*.
[24] *Gqwetha* above n 17 para 36.
[25] Para 51.2 of the MEC's answering affidavit, and reference to the post being critical and would need to be advertised, at p 98 of the bundle.

suggesting acquiescence requires explanation.[26] As in *Gqwetha v Transkei Development Corporation Ltd and Others*[27] ('*Gqwetha*'), the applicant's difficulty is the failure to advance grounds for overlooking the unreasonable delay, and the court's inability to discern any basis for doing so from the papers.

[22] In the event that I am mistaken in this respect, or the approach adopted is considered overly strict, an enquiry involving a flexible factual, multi-factorial and context-sensitive framework yields the same result.[28] In *Sakhisizwe Local Municipality v Tshefu and Others*,[29] Lowe J extracted, inter alia, the following dimensions of the approach to condoning an unreasonable delay from *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* ('*Asla*'):[30]

a. It must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision.[31]
b. The nature of the impugned decision is to be considered – deviation and its extent from constitutional prescripts impacts on condonation, requiring analysis of the impugned decision and the legal merits of the challenge against it.
c. The conduct of the applicant is to be considered.

[23] The court's discretion is broad and is to be exercised in the light of all relevant facts.[32] It must be noted that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings because of undue delay. In *Gqwetha*, Nugent JA explained that this is because of the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain.[33] In the present

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[26] *MEC for Health, EC v Kirland Investments* 2014 (3) SA 481 (CC) pars 70 - 72; *Merafong City v Anglogold Ashanti* 2017 (2) SA 211 (CC) para 40.
[27] *Gqwetha* above n 17 para 36.
[28] *Tasima* above n 21 para 144.
[29] *Sakhisizwe Local Municipality v Tshefu and Others* [2020] 2 All SA 299 (ECG) para 41.
[30] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 ('*Asla*') para 54.
[31] *Gqwetha* above n 17 para 34.
[32] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA) para 57.
[33] *Gqwetha* above n 17 para 23.

circumstances, a successful review of the second decision would inevitably necessitate the applicant's return to work, as *Mr Zono* acknowledged. The papers reflect that the final decision was that applicant's position 'would need to be filled immediately hence the approval [of early retirement without pension penalty] could not be made'. The inherent potential of prejudice to the MEC in the event that the review succeeds is self-evident in these circumstances. It is also important to acknowledge that the passage of a considerable period of time may weaken the court's ability to assess an instance of unlawfulness on the facts.[34]

[24] That notwithstanding, even accepting that the MEC's failure to detail such prejudice is a relevant consideration in favour of the applicant is not sufficient on its own for purposes of overlooking the delay. While that may have been decisive had the delay been 'relatively slight', this is not the case for reasons already canvassed and conceded.[35] In addition, consideration of the nature of the impugned decision is also relevant, as is the extent to which the delay constrained an accurate review.[36] This requires analysis of the 'impugned decision within the legal challenge made against it and considering the merits of that challenge'.[37]

[25] Those merits must be determined on the accepted approach to factual disputes in applications for final relief.[38] A final order reviewing the impugned decisions can only be granted if the facts averred in the applicant's affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order.[39] The papers must be considered in this way. Doing so reveals that the applicant was one of a number of department employees who applied for early retirement without penalisation of pension benefits. Those applications were not

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[34] *Khumalo* above n 20 para 48.
[35] Ibid. In *Khumalo*, the potential prejudice to the employee, who had been promoted despite not meeting the minimum requirements for the job, did not favour non-suiting the MEC (as the applicant seeking condonation) in the face of the delay.
[36] *Khumalo* above n 20 para 69.
[37] *Khumalo* above n 20 para 57.
[38] *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635D.
[39] The position may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers: *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA). In the present instance, there are no relevant irresoluble real and genuine factual disputes which prevent the dispute being determined on the papers.

funded by the DPSA and national treasury and were remitted to the relevant provincial treasuries. The Eastern Cape Provincial Treasury transferred the duty to fund the penalties on pension benefits to the respective department to which applications for early retirement without penalisation had been made. The Department determined that it lacked the funds to support applications for early retirement without penalisation. The departmental circular is attached to the MEC's answering affidavit and explains the position, as described. This is supported by correspondence from the Director-General of the DPSA, dated 12 October 2020 and attached to the second respondent's papers. That correspondence, which is uncontested, confirms that '[w]ith respect to provincial applications, the Technical Committee on Finance has taken a decision to have provincial cases processed at the respective provinces. All provincial applications have therefore been handed over to the respective Provincial Treasuries'.

[26] The point is that national treasury commitment to assist provinces with funding applications for early retirement without penalty, subject to various conditions, had been overtaken by events during 2020. The MEC based the decision to refuse the application for early retirement without penalty on the Department's funding constraints. The applicant's reply to the second respondent's answering affidavit is particularly revealing. Here, in direct contradiction to his reply to the MEC's answering affidavit, he accepts that the Department lacked funds 'and is in precarious financial position'.

[27] He persists nonetheless, seemingly on the basis of an unqualified entitlement that the second respondent was obliged to fund any penalties once application had been made. The applicant contends, untenably, that '[h]ad it been true that the respondent[s] experienced inadequacy of funds they should and could not have invited the application of that nature'. His contention that his application for early retirement had been approved and that, given that he had applied for early retirement without pension penalisation, pension penalty funding was obligatory, is equally far-fetched considering the facts available. The court cannot be satisfied as to the inherent credibility of the applicant's factual averments related to such submissions. The denials of the respondents to such averments, even absent foolproof supporting documentation, are not so far-fetched or clearly untenable to warrant this court's

rejection on the papers.[40] In the circumstances, the prospects of the applicant succeeding in reviewing the decision to refuse his application for early retirement without pension penalty are remote.

[28] A robust, common-sense approach to the dispute of fact as to whether the applicant opted for early retirement with pension penalty, resulting in the letter dated 10 December 2020, also favours the respondents. Part of the reason for this is the applicant's own averments and the contents of correspondence attached to the founding papers.[41] This reveals that the applicant was fully aware of the option of early retirement with penalisation of benefits, and that pension benefits would ordinarily be penalised in cases of early retirement. He himself applied for this specifically on 6 November 2020, granting authority for the processing of retirement benefits and seeking to retire with effect from the following month. The applicant added only that he wished the Department to take responsibility for the penalties that he knew would accrue and that he had already submitted correspondence in support of that.

[29] It is clearly apparent that the correspondence dated 8 December 2020 explains that the application for early retirement without penalty had been refused based on the Department's lack of available funding. That correspondence indicated that it was nonetheless open to the applicant to apply for early retirement with penalties in terms of the Act. The MEC's case is that the applicant did not want to continue in service post-December 2020 and therefore communicated verbally that the Department should proceed to approve early retirement with penalisation, which was subsequently approved. The applicant's version is that he had never applied for early retirement with pension penalty. Attached to his founding affidavit is the memorandum from the Department's Acting Deputy Director: Human Resources to the Deputy Director-General: Clinical Services, dated 10 December 2020, seeking approval for early retirement with penalty. The recommendation makes reference to an application letter from the applicant, but this is not attached. That recommendation includes signatures indicating approval from various senior personnel, and must be considered as the trigger for the correspondence addressed to the applicant on 10 December 2020,

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[40] See *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 924A.
[41] As was the case in *Asla*, many of these documents speak for themselves: *Asla* above n 30 para 94.

indicating that he would be retired from service with penalty with effect from 1 January 2021.

[30] Whether this was based on his verbal request must also be considered against the backdrop of what occurred subsequently, namely the failure to protest upon receipt of that correspondence, the acquiescence to the stipulated last day of service on 31 December 2020, receipt of pension benefits, with penalty deduction, on 23 March 2021, and the subsequent inaction until the application was issued on 30 August 2022. It is certainly not the behaviour of a person taken by surprise at having his employment terminated by early retirement, to say the least. Again, the merits of the challenge against the second impugned decision appear to favour the respondents. Considering the circumstances, the conduct of the applicant, including the lengthy period of inaction and the paucity of factual information he has provided, also counts against granting condonation for the delay.

[31] In *Gqwetha*, the court that heard the application had exercised a discretion to condone an unreasonable delay of 14 months, for which there was no adequate explanation. The court had overlooked the delay on the basis that the period was 'not very long' and the applicant was 'quite strong on the merits'. That approach was criticised as being unduly narrow:[42]

'As to the first ground … I do not think that a delay that is unreasonable in its extent can simultaneously, and without more, serve as the basis for overlooking it. What the learned Judge overlooked, as correctly pointed out by the court *a quo*, was the inherent potential for resultant prejudice if the decision was set aside. It needs also to be borne in mind, when evaluating the potential for prejudice, that the consequential relief that the appellant sought was an order reinstating her in her employment, which, if granted, would require the first respondent to return her to her former position, and not merely to appoint her to some other unidentified position … As to the second ground … it is the prospect (or lack of it) of a meaningful consequence to the setting aside of an administrative decision, rather than merely the prospect of the administrative decision being set aside, that might be a relevant consideration to take into account … In my view it was in the nature of the decision to dismiss the appellant that any challenge to it ought to have been brought promptly, before its

[42] *Gqwetha* above n 17 paras 33 – 36.

consequences were entrenched. No adequate grounds have been advanced by the appellant for overlooking her default and I am able to discern none.'

[32] In sum, the respondents have failed to detail the prejudice caused by the delay and it may be accepted, in favour of the applicant, that there is nothing on the papers suggesting that the delay constrained an accurate review. The possible consequences of setting aside the impugned decisions are self-evident. That aside, the considerations in favour of granting condonation are roundly outweighed by the nature of the impugned decisions linked to the assessment of the merits of the application, and by the conduct of the applicant. There is also no other basis, constitutional or otherwise, for granting the relief sought.

[33] The Constitutional Court has highlighted that legality reviews must be initiated without undue delay and that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application in the face of an undue delay in initiating proceedings, or to overlook the delay.[43] The applicant has failed to provide any satisfactory explanation for the delay and there is an insufficient basis for overlooking the delay when considering all the circumstances. The court is therefore inclined to exercise its discretion to refuse the application. This is consistent with the sentiment that the procedural requirement to bring a review application without delay serves a substantive purpose, based on sound judicial policy and in the public interest, that there be certainty and finality in matters and that undue delay should not be tolerated in the absence of good reason.[44]

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[43] *Khumalo* above n 20 para 44, citing *Van Zyl* above n 14 para 46.
[44] *Khumalo* above n 20 paras 47-48; *Tasima* above n 21 para 160.

Order

[34] The following order will issue:

1. The application is dismissed with costs.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:27 July 2023

Delivered:08 August 2023

Appearances:

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