CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 21/21, 28/21, 29/21 and 44/21

Case CCT 21/21

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Applicant

and

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	First Respondent
MINISTER OF BASIC EDUCATION	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF POLICE	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Eighth Respondent
DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA	Ninth Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	Tenth Respondent

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS UNION	Eleventh Respondent
SOUTH AFRICAN POLICING UNION	Twelfth Respondent
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	Thirteenth Respondent
PUBLIC SERVANTS ASSOCIATION	Fourteenth Respondent
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Fifteenth Respondent
HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA	Sixteenth Respondent
SOUTH AFRICAN TEACHERS UNION	Seventeenth Respondent
NATIONAL TEACHERS UNION	Eighteenth Respondent

Case CCT 28/21

In the matter between:

SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	First Applicant
POLICE AND PRISONS CIVIL RIGHTS UNION	Second Applicant
DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA	Third Applicant

and

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	First Respondent
MINISTER OF PUBLIC SERVICES AND ADMINISTRATION	Second Respondent
MINISTER OF FINANCE	Third Respondent
PUBLIC SERVICE CO-ORDINATING	

BARGAINING COUNCIL	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Sixth Respondent
MINISTER OF BASIC EDUCATION	Seventh Respondent
MINISTER OF POLICE	Eighth Respondent
SOUTH AFRICAN POLICE UNION	Ninth Respondent
PUBLIC SERVANTS ASSOCIATION	Tenth Respondent
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Eleventh Respondent
HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA	Twelfth Respondent
SOUTH AFRICAN TEACHERS UNION	Thirteenth Respondent
NATIONAL TEACHERS UNION	Fourteenth Respondent
NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION	Fifteenth Respondent
NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS UNION	Sixteenth Respondent

Case CCT 29/21

In the matter between:

PUBLIC SERVANTS ASSOCIATION	First Applicant
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Second Applicant
HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA	Third Applicant
SOUTH AFRICAN TEACHERS UNION	Fourth Applicant

NATIONAL TEACHERS UNION	Fifth Applicant

and

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	First Respondent
MINISTER OF BASIC EDUCATION	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF POLICE	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Eighth Respondent
DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA	Ninth Respondent
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Tenth Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	Eleventh Respondent
NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS UNION	Twelfth Respondent
SOUTH AFRICAN POLICING UNION	Thirteenth Respondent
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	Fourteenth Respondent

Case CCT 44/21

In the matter between:

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS	Applicant
and	
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	First Respondent
MINISTER OF BASIC EDUCATION	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF POLICE	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Eighth Respondent
DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA	Ninth Respondent
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Tenth Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	Eleventh Respondent
SOUTH AFRICAN POLICING UNION	Twelfth Respondent
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	Thirteenth Respondent
PUBLIC SERVANTS ASSOCIATION	Fourteenth Respondent
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Fifteenth Respondent

HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA Sixteenth Respondent

SOUTH AFRICAN TEACHERS UNION Seventeenth Respondent

NATIONAL TEACHERS UNION Eighteenth Respondent

Neutral citation: *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others; South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others; Public Servants Association and Others v Minister of Public Service and Administration and Others; National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration and Others* [2022] ZACC 6

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J.

Judgments: Madondo AJ (unanimous)

Heard on: 24 August 2021

Decided on: 28 February 2022

Summary: Sections 213, 215 and 216 of the Constitution — regulations 78 and 79 of the Public Service Regulations — collective bargaining

Leave to appeal is granted — clause 3.3 of the collective agreement is invalid and unlawful — appeal is dismissed — no order as to costs

---

ORDER

On appeal from the Labour Appeal Court of South Africa (hearing the matter as a court of first instance), in respect of CCT 21/21; 28/21; 29/21 and 44/21, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

MADONDO AJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring)

Essential context

[1] In this matter the applicant unions, representing their respective members employed in the public sector, seek leave to appeal against the judgment and order of the Labour Appeal Court, in which it declared the enforcement of clause 3.3 of Resolution 1: Agreement on the Salary Adjustments and Improvements on Conditions of Service in the Public Service for the Period 2018/2019; 2019/2020 and 2020/2021 (the collective agreement), regulating the salary structures of public service employees for three consecutive financial years, invalid and unlawful. The Labour Appeal Court dismissed the application for enforcement of such collective agreement on the grounds that it had been concluded in contravention of regulations 78 and 79 of the Public Service Regulations (Regulations),[1] read with sections 213, 215 and 216 of the Constitution.

[2] At issue in this matter is the validity and enforceability of clause 3.3 of the collective agreement concluded in 2018 between the State and various trade unions, which determined public sector wage increases for the 2020/2021 period.

[1] Public Service Regulations, GN R877 *GG* 40167, 29 July 2016.

[3] At the heart of this issue is regulation 79 of the Regulations, which provides that the State can enter into a collective agreement *only if*—

(a) there is a realistic calculation of the costs involved in both the current and the subsequent fiscal year;
(b) the agreement does not conflict with Treasury regulations; and
(c) the relevant governmental authority can cover the costs from its own departmental budget or based on a written commitment to provide additional funds from Treasury; or from the budgets of other departments with their written agreement and Treasury approval.

[4] The State contends that these mandatory requirements were not satisfied before it entered into the impugned collective agreement, and it is therefore unlawful and unenforceable. It contends further that enforcing the agreement would cost the fiscus R29 billion, which it does not have.

[5] By contrast, the unions allege that on 25 April 2018, Cabinet approved the conclusion of the collective agreement, and since the Minister of Finance is a member of Cabinet, this constituted substantial compliance with regulations 78 and 79. The unions, therefore, contend that the collective agreement is lawful and enforceable and that even if the collective agreement was not lawfully concluded, it should still be enforced. This, the unions contend further, is because the State unreasonably delayed in applying to declare the collective agreement unlawful, and that the interests of justice demand that the agreement be enforced.

Parties

[6] This matter comprises four consolidated applications. The parties in each application are described in turn. The applicant in the first application is the National Education Health and Allied Workers Union (NEHAWU), a trade union duly registered in terms of the Labour Relations Act[2] (LRA) and a signatory to the collective agreement.

[2] 66 of 1995.

The first, second and third applicants in the second application are the South African Democratic Teachers Union (SADTU), the Police and Prisons Civil Rights Union (POPCRU), and the Democratic Nursing Organisation of South Africa (DENOSA), trade unions duly registered in terms of the LRA. The applicants in the third application, the Public Servants Association (PSA), the National Professional Teachers Organisation of South Africa (NAPTOSA), the Health and Other Services Personnel Trade Union of South Africa (HOSPERSA), the South African Teachers Union (SATU) and the National Teachers Union (NATU), are also trade unions registered as such in terms of the LRA. And the applicant in the fourth application is the National Union of Public Service and Allied Workers (NUPSAW), a trade union duly registered in terms of the LRA. The applicant unions in the third and fourth applications were not signatories to the collective agreement but their members are nonetheless bound by its terms.

[7] The respondents, in part, are the Minister of Public Service and Administration and the Department of Public Service and Administration (collectively referred to as the DPSA), the employer responsible for the negotiation and implementation of the collective agreement, and the Minister of Finance, the Minister responsible for public finance principles and policy. The respondents are referred to as the State.

Background

[8] On 31 October 2017, the Committee of Ministers (COM) consisting of, among others, the Minister of Public Service and Administration and Minister of Finance, mandated the DPSA's chief negotiator to negotiate public sector wage increases for the 2018 to 2021 period with trade union representatives at the Public Service Co-ordinating Bargaining Council (PSCBC).

[9] In November 2017, the National Treasury (Treasury) prepared the 2017 Medium Term Budget Policy Statement (MTBPS) in terms of which R128.5 billion was set aside to fund the compensation increases for all public service employees over the period 2018/2019 to 2020/2021. Of this amount, R110 billion was allocated to fund the cost

of compensation increases for employees in the PSCBC bargaining unit. Effect was given to these and other recommendations in the MTBPS with the passing of the Adjustments Appropriation Act,[3] and various other pieces of legislation. Subsequently, wage negotiations began.

[10] The first relevant offer was tabled by the State's representative on 7 December 2017 and would have kept the total compensation expenditure within the budgeted R128.5 billion. The trade union representatives rejected the offer and proposed a substantially larger increase. As a result, negotiations were adjourned until 9 January 2018.

[11] On 25 January 2018, the State's representative tabled a five-year offer strikingly different to its previous one. However, it was not mandated to make this offer, and the offer exceeded the budgeted amount of R128.5 billion. The applicants initially rejected this offer and again countered with a larger increase. The following day, the parties produced a draft agreement for a three-year wage agreement exceeding the budgeted amount by R30.2 billion – including an excess amount of R13.2 billion required for the enforcement of clause 3.3 – which they undertook to seek mandates to enter into.

[12] On 7 February 2018, at a meeting of the COM, the State's representative requested that Treasury approve a R15 billion increase of the budgeted amount for compensation increases. It remains unclear why an increase of R15 billion rather than R30.2 billion was sought, when the draft agreement would have exceeded the allocated budget by the latter amount. On 14 February 2018, the then Minister of Finance, Mr Malusi Gigaba, rejected this request. To free up funds for the proposed increase, he suggested that bonus packages be restricted, that voluntary retirement be offered to approximately 19 000 public servants, and that overtime payments be curtailed. It is apparent that even if these measures had been successfully implemented, the State

[3] 12 of 2017.

would have battled to free up sufficient funds to bring the draft agreement within budget.

[13] On 20 March 2018, the COM met and reprimanded its negotiating team for failing to observe its mandate by tabling an offer which exceeded the allocated budget. On 4 April 2018, negotiations recommenced, and the State proposed a reduced offer which was within the budgeted amount but was rejected by the applicants who insisted that effect be given to the offer of 25 January 2018.

[14] On 19 April 2018, the COM met again to receive clarity on the state of the negotiations. The State's representative explained that there were three options in respect of the 25 January 2018 offer: the first was to withdraw the offer, but that carried the risk of being accused by the unions of negotiating in bad faith; the second was to confirm the offer, however this would mean that the agreed wage increases would exceed the allocated budget; and the third was to confirm the offer subject to an agreement on measures which would bring it within the budget. The COM resolved to seek direction on this issue from Cabinet.

[15] On 25 April 2018, Cabinet resolved that the DPSA and the Minister of Finance should deliberate on the cost implications of the offer of 25 January 2018. The State was not able to withdraw it and Cabinet instructed the DPSA to regularise the offer and proceed to conclude the agreement.

[16] On 2 May 2018, Treasury delivered a presentation to the COM and explained that, given the State's financial position it could not implement the offer of 25 January 2018 (which entailed annual increases exceeding the Consumer Price Index (CPI)) without a headcount reduction of 36 000 public servants. The scope for reducing the headcount, however, was limited since this could adversely affect service delivery. Over the three-year term of the proposed wage deal, Treasury thought that a plausible headcount reduction would be only 14 263 public servants. The other option was to limit increases to the CPI for all three years. Together with the implementation of the

equalisation of pay progression, and the extension of the housing allowance to spouses in 2020/2021, this would allow the State to stay within the budget for the three-year term of the wage deal. The following day, negotiations recommenced and there was engagement about the need for cost cutting measures to bring the offer within the budget.

[17] On 21 May 2018, the State entered into an agreement with the relevant trade union representatives which incorporated the collective agreement. This agreement was signed by a majority of trade union representatives at the PSCBC and became binding on all parties. The State suggests that this agreement was conditional on it implementing various cost cutting measures but admits that the applicants refused to allow a clause to this effect to be included in the agreement. However, the applicants contend that the collective agreement was never intended to have such a condition.

[18] The collective agreement comprised three central clauses—

(a) clause 3.1 regulated wage increases for 2018/2019;
(b) clause 3.2 regulated wage increases for 2019/2020; and
(c) clause 3.3 regulated wage increases for 2020/2021.

The 2020/2021 wage increase expired on 31 March 2021. The effect of these three clauses was that the allocated budget would be exceeded by R30.2 billion, an excess not approved at all by any Act of Parliament.

[19] After the conclusion of this agreement, South Africa's economic situation deteriorated markedly. Despite this, the 2018/2019 and 2019/2020 increases were implemented. In his 2018 MTBPS, the Minister of Finance drew attention to the fact that the public service wage agreement exceeded budgeted baselines by R30.2 billion over the medium term, and said that Treasury had not allocated additional money for this, and that national and provincial departments would "be expected to absorb these costs within their compensation baselines". In other words, the departments needed to engage in cost-cutting measures to afford the wage increases. It seems that this was

successfully achieved in the first two financial years of the wage agreement but not in the third year. The State contends that this was because enforcement of the two clauses did not result in it exceeding the allocated budget. Enforcement of clause 3.3 would cause the State to exceed that budget. As at May 2018, when the collective agreement was concluded, the amount by which implementing clause 3.3 was anticipated to exceed the budget for the 2020/2021 period was R13.2 billion.[4] However, by 2020, the cost of implementing clause 3.3 in terms of the State was expected to substantially exceed this amount.

[20] In 2019, South Africa's economic situation deteriorated further and on 30 October, Mr Tito Mboweni, the then Minister of Finance, noted in his MTBPS that public sector wages had increased by about 66% in the last 10 years and that cost cutting measures were therefore urgent. A document annexed to the 2019 MTBPS revealed that in 2018/2019, spending on the compensation of State employees accounted for 35.4% of consolidated national expenditure. On 26 February 2020, Treasury announced that it had revised downward its projections of South Africa's economic growth and that real growth for 2019 was 0.9%.

[21] Additionally, on 25 March 2020, the PSCBC reconvened, and the State's representative proposed a revised wage increase for the 2020/2021 period. This increase would still have afforded certain public sector employees above inflation wage increases and would still have exceeded the allocated budget, but it was a reduction on the amount promised in terms of clause 3.3 of the collective agreement. This offer was rejected by the applicants, and the State maintained that it was simply unable to implement clause 3.3. The unions refused to revise the agreement and insisted on its implementation. It is common cause that clause 3.3 was not implemented on 1 April 2020.

[4] See [11].

Litigation history

Bargaining Council, Arbitration, and Labour Court

[22] On 2 April 2020, some of the applicants referred a dispute to the PSCBC. The dispute was conciliated on 20 May 2020. However, the conciliation was unsuccessful, with the issue about the enforcement of clause 3.3 of the collective agreement remaining unresolved. Consequently, the applicants referred the dispute to arbitration.

[23] Before the arbitration was finalised, on 8 June 2020, the applicants launched an application in the Labour Court seeking an order to compel the State to comply with the collective agreement for the 2020/2021 financial year. The State launched a counter-application seeking declaratory relief regarding the legality of the collective agreement and its enforcement. The arbitration was subsequently postponed by agreement pending the outcome of the Labour Court applications.

[24] The parties agreed to request the Labour Appeal Court to hear the matter as a court of first instance in terms of section 175 of the LRA. This request was granted.

Labour Appeal Court

[25] The Labour Appeal Court had to determine whether the impugned clause 3.3 was concluded in contravention of regulations 78 and 79. It recognised that the two regulations imposed—

> "a requirement for the conclusion of a collective agreement by the State to this extent: the cost of the collective agreement must be covered from the budget of the relevant department of State or on the basis of a written commitment from the Treasury to provide additional funds or, alternatively, from the budget of other departments or agencies with their written consent together with approval from National Treasury."[5]

[5] *Public Servants Association v Minister of Public Service and Administration* [2020] ZALAC 54; (2021) 42 ILJ 796 (LAC) (Labour Appeal Court judgment) at para 14.

[26] The Court found that the "cost of the collective agreement could not be covered solely" from the Minister of Public Service and Administration's budget; that Treasury had not provided a written commitment to guarantee additional funding and no further agreements were made by other departments or agencies in accordance with the regulations.[6] It also found that the Minister of Finance's letter dated 14 February 2018 evinced "the absence of any commitment by National Treasury of the kind required expressly by regulation 79" and the respondents' case was supported "by the lack of evidence of any written agreement by any other department of State".[7]

[27] On the issue of the delay by the respondents to approach the courts and review the collective agreement, the Labour Appeal Court acknowledged that:

> "While there is prejudice to the applicants and union respondents, there is also massive prejudice to the public interest at large, given that an additional R37.2 billion will have to be found to finance the costs of increases pursuant to clause 3.3 of the collective agreement. This imposes a significant burden on the fiscus."[8]

Therefore, it held—

> "the prejudice caused by refusing to adjudicate upon the legality of clause 3.3 in circumstances where so large a sum of money is required from the public purse and where it is common cause that the State finances are in an even more parlous state than they were before the advent of Covid-19, all dictate that the discretion of this Court should be exercised in favour of examining whether there is a legal justification for the payment of so large a sum of public monies to a relatively small cohort of the South African population."[9]

[28] The Labour Appeal Court considered the applicants' contention that the State was bound by Cabinet's approval of the draft agreement dated 26 January 2018 and that

[6] Id at para 15.

[7] Id at para 23.

[8] Id at para 30.

[9] Id at para 31.

the DPSA had been authorised to act on behalf of the State at the PSCBC. The applicants' contention was that, on this authority, the DPSA made an offer to the applicants which they accepted. On this, the Court held:

> "That, however, does not represent compliance with the express wording of regulation 79, read together with section 216(2) of the Constitution which provides that '[t]he national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures'.
>
> National Treasury is given a particular status under the Constitution. The constitutional provision set out in section 216 of the Constitution ensures that National Treasury is one of the guardrails to ensure that the appropriate standard of constitutional governance is adhered to by the executive. The inclusion of the role of National Treasury in regulation 79 fits together with the purpose of section 216 of the Constitution. Absent compliance with regulation 79, it matters not whether Cabinet might have approved the agreement, in that, whatever the Minister of Finance may or may not have said in Cabinet cannot be read to equate to compliance with section 216 of the Constitution read together with regulation 79. The argument that the collective agreement breached the applicable regulations, namely regulations 78 and 79, must thus be upheld."[10]

[29] On the consequence of declaring the collective agreement invalid, the Labour Appeal Court considered section 172(1)(b) of the Constitution, which grants a court deciding a constitutional matter wide remedial powers, and the Constitutional Court's decision in *Gijima*.[11] The Labour Appeal Court found that this matter and *Gijima* are distinguishable:

> "In that case, the concern related to one contract entered into between Gijima and SITA. It was understandable in the circumstances that the Court found it just and equitable,

[10] Id at paras 32-3.

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

> under the circumstances of an inordinate delay, to justify an order which would not penalise the innocent party, being Gijima.
>
> In the present case, the dispute is far more complex; hence the problem of the polycentric dispute which is set out in the introduction to this judgment. The submission on behalf of certain of the respondent unions is illuminating in that it reflects that certain of these parties have understood the parlous financial position in which the fiscus finds itself and thus the country in the wake of the Covid-19 pandemic. They were prepared to accept a staggered approach to the compliance with clause 3.3."[12]

[30] Consequently, the Labour Appeal Court found that the exercise of discretion is case specific and in the exercise of such discretion it is important to consider the "effect on the public purpose in general and the impact on millions of South Africans who barely survive on a day-to-day basis and need all the help the State may be able to provide".[13] Furthermore, it found that—

> "it does not appear to be just and equitable to order government to expend significant and scarce financial resources on employees whose jobs are already secured and salaries have been paid in full, particularly in circumstances where the imperative exists for the recovery of the economy to the benefit of millions of vulnerable people. For example, the provision of social grants to fellow South Africans living on the margin could well be imperilled by such a decision, as might the need to pay for significant and critical additional medical costs caused by the pandemic".[14]

The Court therefore declared the enforcement of clause 3.3 unlawful for violating sections 213 and 215 of the Constitution, as well as the impugned regulations and as a result dismissed the application.[15]

[12] Labour Appeal Court judgment above n 5 at paras 43-4.

[13] Id at para 46.

[14] Id at para 45.

[15] Id at para 51.

Submissions before this Court

Applicants' submissions on jurisdiction and leave to appeal

[31] The applicants argue that this matter engages this Court's constitutional jurisdiction because it concerns the effect of section 23(5) of the Constitution on the validity and enforceability of the impugned collective agreement.

[32] They contend further that this matter engages the Court's general jurisdiction because it requires this Court to assess: whether the common law rules of contract require enforcement of the collective agreement; the effect of regulations 78 and 79 on the collective agreement; and whether the Labour Appeal Court correctly applied the rules on delay. They submit that the interests of justice require that leave be granted because the application has prospects of success, and the Labour Appeal Court's decision, if left undisturbed, will have far-reaching consequences for the enforceability of collective agreements.

Applicants' submissions on merits

NEHAWU's submissions

[33] NEHAWU argues that the Labour Appeal Court's judgment undermines the scheme of the LRA and the right to collective bargaining. In this regard, it alleges that the effect of the judgment is to limit section 23(5) of the Constitution read with section 23(1) of the LRA without that Court having ascertained that such a limitation is justified by section 36 of the Constitution. It also submits that the LRA specifically regulates disputes about collective agreements hence it was impermissible for the Labour Appeal Court to rely on sections 213 and 215 of the Constitution, in circumstances where the relevant provision of the LRA had not been challenged.

[34] NEHAWU also argues that the Labour Appeal Court erred in relying on the Minister of Finance's letter dated 14 February 2018 as a basis for refusing to accept that the respondents had authority to conclude the collective agreement on behalf of the

State. This is because in terms of the *Oudekraal*[16] principle, Cabinet's decision to approve the conclusion of the collective agreement was valid and binding until set aside by a court of law. Finally, it also argues that the State's delay in prosecuting the review of its decision to conclude the collective agreement should not have been condoned by the Labour Appeal Court. This, it says, is because the delay was inordinate, and the State failed to provide an adequate explanation for the delay.

SADTU, POPCRU and DENOSA's submissions

[35] Similar to what NEHAWU contends, SADTU, POPCRU and DENOSA submit that the Labour Appeal Court erred in condoning the State's delay in prosecuting its review application. In particular, they argue that the Labour Appeal Court weakened the test for delay to an interest of justice inquiry, without properly applying the principles set out in *Gijima* and *Buffalo City*.[17]

[36] They contend further that the collective agreement was lawfully concluded because, in terms of section 91(2) of the Constitution, once Cabinet approved the offer to be made to the applicants, all Ministers were bound by the approval, including the Minister of Public Service and Administration and Minister of Finance. And since Cabinet approved the conclusion of the collective agreement, the Labour Appeal Court should have inferred that the requirements of regulation 78 and 79 were satisfied. Furthermore, the agreement was therefore lawfully concluded.

[37] SADTU, POPCRU and DENOSA further contend that, even if the collective agreement is found to be unlawful, justice and equity demand that clause 3.3 be enforced. This is because, among other things, as State employees they are innocent bystanders to the State's failure to act lawfully, and they have relied, to their prejudice, on the representation that the agreement would be enforced. In addition, if the agreement is not enforced, it will breed distrust and debilitate the process of collective

[16] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

[17] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) (*Buffalo City*).

bargaining with the State. In any event, enforcement can take place on a staggered basis, which the parties can be ordered to negotiate. And although the collective agreement lapsed on 31 March 2021, the matter is not moot. This is because, they submit further, if the collective agreement is valid, the delay in getting the matter resolved by the courts has not extinguished the State's obligations. And even if the matter is moot, they submit that it raises important questions of principle and the interests of justice therefore require that it is decided.

PSA, NAPTOSA, HOSPERSA, SATU and NTU's submissions

[38] These applicants submit that the collective agreement was validly concluded pursuant to the provisions of the LRA which take precedence over the impugned regulations, and the collective agreement is thus enforceable. After the Minister of Finance's letter of 14 February 2018, he failed to object to the conclusion of the collective agreement, and approved funding for enforcement of the collective agreement. In addition, regulation 4 of the PSA regulations permits the Minister of DPSA, under justifiable circumstances, to authorise deviation from any regulation, and such authorisation need not be in writing. The conduct of both the Minister of Finance and of DPSA thus demonstrates that Treasury approved the conclusion of the agreement, alternatively, that deviation from the regulations was authorised. As such, there was actual, alternatively, substantial compliance with the regulations.

[39] They submit that although it is settled law that estoppel cannot be invoked if its effect is the perpetuation of a situation prohibited by law, a distinction must be drawn between cases where the State acts *intra* and *ultra vires* (with and without legal authority). Where the State has the power to act and is required to comply with necessary formalities, then in the absence of anything to the contrary, a party contracting with it is entitled to assume that these formalities have been complied with. In the latter situation, it is not a question of the State acting *ultra vires* but rather whether, in exercising the power that it has, the State has complied with its internal procedures. In this situation, the counter-party to the contract with the State may successfully invoke the doctrine of estoppel.

[40] Additionally, they aver that even if there was non-compliance with the regulations, it does not render the collective agreement a nullity. That is so because it is a well-established legal principle that a contract which is entered into contrary to a statutory prohibition is void if the statute expressly or impliedly lays down nullity of the contract as the sanction for its breach. Properly interpreted, the PSA and its regulations do not provide for such a consequence. In addition, this Court must always seek an interpretation of legal provisions that upholds a collective agreement rather than one which renders a collective agreement a nullity, because this would denude constitutional rights.

[41] They argue that a finding that clause 3.3 of the collective agreement was invalid has profound consequences, with which the Labour Appeal Court did not grapple, and which this Court must. In particular, the collective agreement would be invalid in its entirety, and the past and present public sector wage payments would thus be without legal basis. And, such a finding also permits the State to resile from a collective agreement, where it has breached its own procedures, despite there being no fault on the part of the counter-parties. This, they submit, deals a death-blow to the very heart of collective bargaining.

[42] This group of unions further submit that policy considerations and the maxim *pacta sunt servanda* (agreements must be honoured) demand that clause 3.3 should be implemented, albeit at the cost of retrenchments, and its enforcement is therefore not objectively impossible. Finally, they submit that contrary to the Minister of Finance's submission, if the collective agreement is found to be lawful, it would be just and equitable to require specific performance. This is because their members have had the collective agreement imposed on them without consent as it is a product of collective bargaining and they have been precluded from exercising their right to strike for three years by virtue of the collective agreement.

NUPSAW's submissions

[43] NUPSAW submits that the Labour Appeal Court failed to consider the implications of concluding a collective agreement. Declaring the agreement unlawful not only infringes its members right to collective bargaining, but undermines the very purpose of collective bargaining.

[44] NUPSAW argues that the Labour Appeal Court failed to consider the doctrine of estoppel which prevents the State from seeking to escape its contractual obligations under the agreement in question, which it entered into upon approval by Cabinet and fulfilled the first two clauses of the agreement. NUPSAW argues further that the sanctity of contracts must be upheld and the principle of *vertrouensteorie* (reliance theory) applied. Allowing the State to escape its obligations, the argument continues, would undermine the purpose and enforceability of collective agreements. If the Labour Appeal Court had applied the maxim *pacta sunt servanda*, it would have come to a different conclusion. Thus, if this Court finds that there was non-compliance with the prescripts of regulations 78 and 79, it should find that there was substantial compliance as evidenced by the COM's and Cabinet's decisions authorising, inter alia, clause 3.3 of the agreement. Furthermore, the Court should consider the *Oudekraal* principle which provides that an unlawful act may produce legally recognisable consequences.

[45] Lastly, NUPSAW submits that the Labour Appeal Court misdirected itself by relying on the incorrect excess amount of R37.8 billion when the true figure is R13.2 billion. This alone, NUPSAW argues, should have the judgment set aside.

Respondents' submissions on jurisdiction and leave to appeal

[46] The respondents argue that this matter does not engage the Court's jurisdiction because the unions' founding affidavits in the Labour Appeal Court, in which they sought specific performance, made no mention of section 23 of the Constitution. Instead, the dispute was merely contractual, and section 23 has been belatedly invoked to engage this Court's jurisdiction. The applicants' reliance on section 23 is in any

event impermissible, as absent an attack on regulations 78 and 79, the applicants cannot contend that section 23 trumps these regulations. Similarly, the applicants cannot rely directly on section 23 when the LRA gives effect to section 23 rights. The various arguable points of law raised by the applicants are not in reality arguable, because they have no prospects of success. In short, the respondents submit that it is trite law that agreements which do not comply with mandatory requirements are unenforceable. For the same reason, the respondents argue further that the interests of justice militate against granting leave, because the application bears no reasonable prospects of success.

Respondents' submissions on merits

DPSA's submissions

[47] The DPSA argues that the conclusion of the collective agreement did not comply with the mandatory statutory provisions prescribed by regulations 78(2) and 79(c) because the common cause evidence reveals that: they could not cover the cost of the wage increases from their department's own budget; they could not recover the cost from other departments; and the Minister of Finance did not approve the collective agreement. Therefore, it contends that the collective agreement is invalid and unenforceable.

[48] The DPSA argues further that although the Minister is permitted in terms of regulation 4 to deviate from regulations 78 and 79 under justifiable circumstances, no such authorisation took place. They argue that this raises an allegation of fact that the Minister of Public Service and Administration in fact permitted a deviation from the regulations. Therefore, continues the argument, this had to be raised by the unions in their affidavits – which they never did – to enable the DPSA to respond.

[49] On whether Cabinet authorised the conclusion of the agreement, the DPSA submits that the applicants' submission is factually flawed. This is because Cabinet's approval was conditional on the successful implementation of the cost-cutting

measures. In addition, they submit that Cabinet's mandate made clear that it did not approve the collective agreement.

[50] The DPSA contends that the result of non-compliance with regulations 78 and 79 is invalidity. This, they explain, is because the legal rationale for the consequence of invalidity is that courts should not validate the very mischief that legislation or regulations seek to prevent and here, the mischief that regulations 78(2) and 79(c) seek to prevent is expending public funds without approval.

[51] The DPSA submits that the applicants cannot rely on estoppel because the State's failure to comply with statutory requirements cannot be remedied by it and to allow such reliance would be to validate an unlawfully concluded contract.

[52] The DPSA further submits that if the Labour Appeal Court refused to condone the delay, it would have refused to declare unlawful a collective agreement that conflicted with the mandatory regulations. Importantly, it submits, had it refused, it would have abandoned its constitutional duties in terms of section 172(1)(a) of the Constitution of declaring conduct inconsistent with the Constitution invalid. Therefore, it submits further, that the prejudice to the State far outweighs any prejudice the unions and its members suffered because of the delay.

[53] In addition, the DPSA contends that in its opposition to the relief sought by the PSA (as opposed to its counter-application), the DPSA did not raise a collateral challenge, and therefore was not subject to the ordinary rules of delay. It explains that this is because a collateral challenge occurs where a functionary is seeking to coerce compliance with an administrative act, and not where an organ of state contends that a contract is invalid for want of compliance with mandatory legislative requirements. The DPSA contends further that on the strength of *Khumalo*,[18] the Labour Appeal Court was

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

correct to conclude that whatever the nature of the objection to validity, it had a discretion to decide whether to condone any delay in raising the defence of invalidity.

[54] On the appropriateness of the remedy, the DPSA submits that a just and equitable remedy requires an outcome fair to all implicated parties. They argue that the applicants failed to put up facts to support a just and equitable remedy in their favour. Furthermore, the State must discharge its obligations to the poor and vulnerable members of society by stretching its resources to assist them, which would be just and equitable, as opposed to requiring the enforcement of a clause which would place a strain on the State's capacity to fulfil its constitutional obligations while benefitting a comparatively small group of public servants who are guaranteed a job and a salary.

Minister of Finance's submissions

[55] The Minister submits that State organs are obliged to act within the law, and courts are obliged to declare any contrary conduct unlawful and inconsistent with the Constitution. This requires that collective agreements must satisfy the standard of lawfulness which ensures that public power, especially that which has fiscal consequences, complies with the rule of law. The Minister submits further that where a collective agreement is concluded in contravention of a statute, and where enforcement of the impugned contract would defeat the purpose of the statute, such non-compliance results in invalidity of the impugned contract.

[56] It is clear, the submission goes, that the costs of the collective agreement could not be covered by the DPSA, no written commitment was made by Treasury, and no written agreements were forthcoming from other departments or agencies. Therefore, there was no compliance with regulations 78 and 79. In addition, the purpose of these regulations is to prevent public funds from being syphoned off via collective agreements without sufficient public funds. In the instant case, non-compliance with regulations 78 and 79, and the consequent conclusion of the collective agreement, are plainly at odds with this purpose. Therefore, the agreement is invalid and unenforceable, and the question of specific performance does not arise.

[57] However, even if it did, to require specific performance is inappropriate in the circumstances because this would be unjust or unfair. It would not be fair or just to enforce the clause where this would interfere with the State's obligation to protect the lives of vulnerable people exposed to the consequences of the Covid-19 pandemic. And because civil servants receive inflation-beating and private sector outperforming salary increases, to insist on specific performance will infringe on section 7(2) of the Constitution. The Minister submits that where it is not just and equitable to enforce a particular clause in the circumstances of a concrete case, then non-enforcement is the constitutionally appropriate remedy. And if the clause or contract in question does not comply with the law, then enforcement is precluded per se and no discretion even arises. Relatedly, the Minister submits that the refusal to enforce the collective agreement will not, as the applicants contend, sound the death-knell of collective bargaining because, as the unions concede, the impugned point of law is specific to this case.

[58] To the extent that the applicants have properly raised a section 23 argument, the Minister contends that their interpretation of section 23(5) of the Constitution is untenable. This is because the applicants contend for an interpretation which immutably results in the specific performance of a collective agreement irrespective of the social and economic conditions applying at the time of concluding and enforcing the collective agreement in question. The Minister also contends that this interpretation runs contrary to *CUSA*,[19] where it was suggested that collective agreements must yield to the rule of law. He also contends that such an interpretation runs contrary to international law, which plays an important role in interpreting section 23.

[59] In this regard, the Minister contends that relevant international law, including documents adopted by the International Labour Organisation, and foreign law, reveal that public sector wage agreements are subject to fiscal constraints, parliamentary approval and emergency measures which may freeze the increases.

[19] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC).

[60] In response to the applicants' reliance on waiver or estoppel, the Minister submits that this argument is legally untenable because it is not permissible in law to purport to waive compliance with a requirement imposed in the public interest, or to effect something forbidden by law. And it is factually untenable, because waiver and estoppel (neither of which is readily presumed) have not been established by the applicants, which bear the full onus in this respect.

[61] Regarding the argument that the Minister of Finance approved the collective agreement through Cabinet's approval, the Minister argues that Cabinet had no power to grant the approvals required under regulations 78 and 79, and did not purport to grant any such approval. In any event, its approval or non-approval is not a jurisdictional fact falling within the powers of the Cabinet, but that of Treasury. Lastly, contrary to the applicants' submissions, section 92(2) of the Constitution does not provide that Cabinet members are bound in law by the decisions of Cabinet in the exercise of their own separate powers and duties under legislation applicable to them individually. Thus, no collective Cabinet accountability arises.

[62] Regarding the respondents' delay in initiating the counter-application, the Minister submits, relying on *Khumalo*,[20] that it is clear that condonation was not required; the Labour Appeal Court judicially exercised its discretion and no prejudice is alleged by the applicants.

Issues

[63] The issues for determination are whether the matter engages this Court's jurisdiction, and the validity and enforceability of the impugned collective agreement, particularly clause 3.3. An enquiry into these issues requires one to grapple with: whether this matter is moot, and if it is, whether it is in the interests of justice for this Court to adjudicate on it; whether the State is entitled to renege on the collective

[20] *Khumalo* above n 18 at para 44.

agreement it voluntarily entered into in its capacity as the employer; whether the doctrine of estoppel finds application in the matter; whether the State's delay in challenging the legality of the impugned collective agreement is reasonable; whether specific performance is an appropriate remedy in this matter; and the determination of a just and equitable remedy.

Jurisdiction and leave to appeal

[64] The matter engages the jurisdiction of this Court as it deals with issues relating to the breach of sections 213, 215 and 216 of the Constitution read with regulations 78 and 79 and the interpretation and limitation of the right to engage in collective bargaining as enshrined in section 23 of the Constitution and regulated by the LRA which, among other things, gives effect to such right.[21]

[65] Whether the State acted beyond its powers when concluding the wage agreement and the question of validity of the resultant wage agreement are constitutional matters.[22] Also, the matter raises arguable points of law of public importance, namely, the effect the non-compliance with the impugned regulations has on the validity and enforceability of the collective agreement entered into between the parties in terms of the LRA, and whether the State is entitled to raise its non-compliance with regulations 78 and 79 and relevant constitutional provisions as a defence against the enforcement of a collective agreement which it freely and voluntarily entered into.

[66] When the State's negotiators enter into collective agreements on behalf of the State, they are exercising a power derived from the Constitution and legislation in pursuit of constitutional obligations. For this as well this matter raises constitutional issues and engages the jurisdiction of this Court. Furthermore, O'Regan J in *CUSA* said:

[21] Sections 167(3)(b) and (c) and 167(7) of the Constitution.

[22] See *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

> "If it is clear that the enforcement of the bargaining agreement materially affects the right to engage in collective bargaining or any other right in the Bill of Rights, its interpretation will give rise to a constitutional issue. Where, however, the interpretation is concerned with a provision that does not affect the right to engage in collective bargaining nor any other right entrenched in the Bill of Rights, but concerns substantive terms and conditions which have been negotiated (which by and large are the stuff of bargaining council agreements), it does not seem to me that a constitutional issue is automatically engaged."[23]

[67] The rationale for this is that the right to collective bargaining is entrenched under section 23(5) of the Constitution and regulated by the LRA in order to safeguard the rights to equality and dignity for the benefit and protection of employees and employers. In light of the complex issues this matter raises, it is in the interests of justice that leave to appeal is granted.

Mootness

[68] This issue arises from the fact that the 2020/2021 wage increase expired on 31 March 2021. It has been argued on behalf of the applicant unions that if the collective agreement is valid, the delay in getting the matter resolved by the courts does not have the effect of extinguishing the State's obligations, hence it may be ordered to meet its obligations with effect from the date they fell due. The State may also be ordered to meet its obligations in future in accordance with the terms of a just and equitable remedy granted by this Court. An inevitable conclusion in this regard is that the non-fulfilment of clause 3.3 of the impugned collective agreement has the effect of extending the life of the collective agreement beyond its duration.

[69] In *Langeberg Municipality*,[24] this Court held that the factors a court must consider when deciding whether a matter is moot include "the nature and extent of the

[23] *CUSA* above n 19 at para 126.

[24] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2009 (9) BCLR 883 (CC) (*Langeberg Municipality*).

practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced".[25] It is so that the collective agreement covered a period of three financial years ending 31 March 2021. But it is mistaken to think that rights, if any, that accrued in terms, and during the existence, of the collective agreement terminated on the last date covered by the agreement. Once those rights, if any, had accrued, they remained enforceable beyond the existence of the collective agreement. And that endures until enforcement is not possible through, for example, prescription. Thus, that this matter is moot is plainly without merit.

Validity of the collective agreement

[70] The State contends that the collective agreement falls foul of the constitutional principle of legality for violating the provisions of regulations 78 and 79 read with sections 213, 215 and 216 of the Constitution. It is, therefore, unenforceable. It further contends that the mandatory requirements set out in these provisions were imposed precisely to ensure fiscal affordability and sustainability.

[71] A formal distinction was previously drawn between *mandatory* or *peremptory* provisions on the one hand, and *directory* ones on the other. The former "needs exact [strict] compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity".[26] And the latter only needs to be substantially complied with to have full legal effect.[27] However, such strict mechanical approach was abandoned by this Court's endorsement of *Van Dyk*[28] in *African Christian Democratic Party*, where it held that:

[25] Id at para 11. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) fn 18.

[26] *Nkisimane v Santam Insurance Co. Ltd* 1978 (2) SA 430 (A) at 433H-434B. See also Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2012) at 48-50 and 292-5.

[27] *Nkisimane* id at 434C-D.

[28] *Weenen Transitional Local Council v Van Dyk* [2002] ZASCA 6; 2002 (4) SA 653 (SCA) (*Van Dyk*).

> "It seems . . .that the correct approach to the objection that the appellant had failed to comply with the requirements of section 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular. Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc. may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret."[29]

[72] The purported compliance with a statutory injunction can no longer be determined by a mere label such as *peremptory* or *directory*. The distinction between whether the legislation is mandatory or directory is not necessarily determinative of the question whether failure to comply with its provisions inevitably results in nullity. All statutes must be construed consistently with the Constitution.[30] In deciding whether there has been compliance with the statutory injunction, what is important is the object sought to be achieved by the injunction and whether this object has indeed been achieved.[31] The central element is to link the question of compliance to the purpose of the provision. It has to be determined "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose".[32]

[73] It is also a fundamental principle of our law that an actor must be legally empowered to perform any act in question and that public power may only be exercised

---

[29] *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at para 25.

[30] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[31] See *Maharaj v Rampersad* 1964 (4) SA 638 (A) at 643G.

[32] *African Christian Democratic Party* above n 29. See also *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 30.

by a lawfully constituted authority. The act must be performed in accordance with substantive and procedural requirements prescribed by the empowering provisions.[33]

[74] In *Fedsure*, this Court held:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law.
>
> There is of course no doubt that the common-law principle of *ultra vires* remains under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality."[34]

[75] The State contends that since clause 3.3 of the collective agreement was concluded in violation of sections 213, 215 and 216 of the Constitution by failing to comply with the provisions of regulations 78 and 79, it is therefore invalid and unlawful and should be set aside on that ground alone. It has been argued further, on behalf of the State, that an organ of state is only permitted to act within the limits of powers conferred on it by the law.[35] This is done to ensure accountability in the allocation of public resources, and compliance with the rule of law.

[76] The State further contends that the common law position is that in order for a collective agreement to have any legal force, compliance with the statute is essential.[36] The statutory regime provides that a collective agreement may only be concluded if

---

[33] Hoexter above n 26 at 254-6.

[34] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at paras 58-9.

[35] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241(CC) at para 79 and *Fedsure* id at para 56.

[36] *Consolidated Woolwashing and Processing Mills Ltd v President of the Industrial Court* [1985] ZASCA 54 at 858 H-859 H relying on *South African Association of Municipal Employees (Pretoria Branch v Pretoria City Council)* 1948 (1) SA 11 (T) at para 17.

specific requirements are met. The rule of law principle requires that all State action must comply with the law, particularly the Constitution.

[77] Section 213 of the Constitution provides for payments from the National Revenue Fund only insofar as money has been appropriated by an Act of Parliament, or is a direct charge authorised by the Constitution or under national legislation.[37] It has been argued on behalf of the Minister of Finance that as there was non-compliance with section 213 of the Constitution, section 39 of the Public Finance Management Act[38] (PFMA) was flouted. This section outlines the responsibilities of the accounting officer of the relevant department which, among other things, are to ensure that "expenditure of the department is in accordance with the vote of the department and the main divisions within the vote" and that "effective and appropriate steps are taken to prevent overspending". These are procedural formalities that the accounting officer in any department must comply with, and are aimed at ensuring that there is no unwarranted expenditure. Such procedural formalities are designed purely for the purposes of financial and fiscal control, and preventing overspending of public resources to the detriment of citizens by the department. They, therefore, serve to protect members of the public at large.

[78] Section 215 of the Constitution provides for effective financial management of the economy, debt and the public sector through budgetary processes.[39] It has been

---

[37] Section 213 of the Constitution provides:

> "(1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.
>
> (2) Money may be withdrawn from the National Revenue Fund only—
>
> (a) in terms of an appropriation by an Act of Parliament;
>
> (b) as a direct charge against the National Revenue Fund, where it is provided for in the Constitution or an Act of Parliament.
>
> (3) A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund."

[38] 1 of 1999.

[39] Section 215 of the Constitution provides:

argued on behalf of the Minister of Finance that the public sector's unbudgeted wage bill results in debilitating debt. The unbudgeted wage bill also circumvents financial management as contemplated by the Constitution and national legislation. By-passing financial management does not augur well for proper fiscal control. The budget must also contain proposals as to how any anticipated deficit will be financed. Regulation 79(b) provides mechanisms to cover the deficit by allowing "the relevant governmental authority" to do so "from the budgets of other departments with their written agreement, and Treasury approval". In the present case such proposals were mooted between the parties as the collective agreement was concluded without compliance with the Regulations, hence it did not form part of the budget.

[79] The respondents argue that in declaring the collective agreement invalid, the Labour Appeal Court relied on the wording of section 216(2) of the Constitution, read with regulation 79, which provides that Treasury "must enforce compliance with the measures established in terms of sub-section (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures".

"(1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of economy, debt and public sector.

(2) National legislation must provide—

(a) the form of national, provincial and municipal budgets;

(b) when national and provincial budgets must be tabled; and

(c) that budgets in each sphere of government must show the sources of revenue and the way which proposed expenditure will comply national legislation.

(3) Budgets in each sphere of government must contain—

(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;

(b) proposals for financing any anticipated deficit for the period to which they apply; and

(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year."

[80] The Labour Appeal Court in this regard held:

> "The constitutional provision set out in section 216 of the Constitution ensures that National Treasury is one of the guardrails to ensure that the appropriate standard of constitutional governance is adhered to by the Executive. The inclusion of the role of National Treasury in regulation 79 fits together with the purpose of section 216 of the Constitution. Absent compliance with regulation 79, it matters not whether the Cabinet might have approved the agreement, in that, whatever the Minister of Finance may or may not have said in Cabinet cannot be read to equate to compliance with section 216 of the Constitution read together with regulation 79."[40]

[81] The Minister of Finance argued that the collective agreement in question was incongruent with section 216 of the Constitution,[41] which provides that national legislation must establish Treasury and prescribe measures to ensure transparency and expenditure control in each sphere of government. This pertains to the regulation of financial and fiscal matters as well as treasury control, which is also done in the public interest. These internal procedures are designed for the purposes of financial and fiscal control, and management by the departments as well as the political accountability of the Minister of Finance to ensure the safety of the public purse. And they must be complied with.

[40] Labour Appeal Court judgment above n 5 at para 33.

[41] Section 216 of the Constitution provides:

> "(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—
>
> (a) generally recognised accounting practice;
>
> (b) uniform expenditure classifications; and
>
> (c) uniform treasury norms and standards.
>
> (2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures."

[82] The conditions imposed on an appropriation in the Schedule to the Adjustments Appropriation Act[42] were imposed to promote transparency, accountability and the effective management of the appropriation.[43] The Minister of Finance argues that the statutory regime applicable to the current contract provides that a collective agreement may only be concluded if specific fiscal requirements are met. Sections 213, 215 and 216 of the Constitution serve as a check on the executive authority or departments when using money from the public purse to ensure transparency, accountability, and sound management of the revenue, expenditure and assets for the benefit of the citizens at large. It therefore follows, the Minister argues, that failure to comply with such provisions is fatal to the resultant collective agreement.

[83] Regulation 78, mandating and managing collective bargaining, empowers the executive authority to engage in negotiations and conclude collective agreements on behalf of the State. In setting the prerequisites which the executive authority must comply with on entering into a collective agreement, regulation 78(2) provides the following:

> "(2) An executive authority may enter into a collective agreement on a matter of mutual interest only if that authority—
>
> (a) is responsible for managing collective bargaining on behalf of the State as employer in that forum;
>
> (b) has authority to deal with the matter concerned; and
>
> (c) meets the fiscal requirements contained in regulation 79."

[84] Regulation 79 provides:

> "An executive authority shall enter into a collective agreement in the appropriate bargaining council on any matter that has financial implications only if—
>
> (a) he or she has a realistic calculation of the costs involved in both the current and the subsequent fiscal year;

[42] 12 of 2017.

[43] Section 4(1) of the Adjustments Appropriation Act.

(b) the agreement does not conflict with the Treasury Regulations; and

(c) he or she can cover the cost—

(i) from his or her departmental budget;

(ii) on the basis of a written commitment from the Treasury to provide additional funds; or

(iii) from the budgets of other departments or agencies with their written agreement and Treasury approval."

[85] Regulations 78 and 79 were promulgated by the Minister of Public Service and Administration under section 41 of the Public Service Act,[44] and must be read and interpreted in conjunction with it.[45] Under regulation 78(2) the Minister may enter into a collective agreement "only if the fiscal requirements contained in regulation 79" are met. In terms of regulation 78(3), the Minister is authorised to negotiate a collective agreement on behalf of the State, as the employer, in the PSCBC. Regulation 79(c), in turn, authorises the Minister to enter into a collective agreement with financial implications only if the Minister concerned can cover the costs of the collective agreement from his or her departmental budget, or on the basis of a written commitment from Treasury to provide additional funds, or if the costs can be covered from funds from other departments or agencies with their written consent coupled with Treasury approval.

[86] These are conditions precedent to the Minister's exercise of the power to negotiate and conclude collective agreements on behalf of the State. These conditions are also referred to as jurisdictional facts simply because the exercise of power depends on their existence.[46] In the present case, the evidence has established that no such jurisdictional facts existed when the Minister purported to enter into the collective agreement on behalf of the State.

[44] 103 of 1994.

[45] See regulation 2 of the Regulations.

[46] *Premier, Gauteng v Democratic Alliance* [2021] ZACC 34; 2022 (1) SA 16 (CC); 2021 (12) BCLR 1406 (CC) at para 69.

[87] Upon a proper construction, the provisions of regulations 78 and 79 clothe the Minister of Public Service and Administration with the necessary authority to negotiate and conclude a collective agreement on behalf of the State and set the parameters within which this must be done. If the Minister acts outside these regulations she or he lacks the necessary authority and acts *ultra vires*. Approval by the Cabinet or COM is not one of the jurisdictional facts, which must exist, when the Minister exercises his or her powers and performs his or her functions under regulations 78 and 79. The Cabinet has no power to grant the approval required under these regulations. Such power is invested in the Minister of Public Service and Administration, subject to the prerequisites set by the regulations.

[88] Section 92(2) of the Constitution, which the applicant unions referred to, does not provide that the members of the Cabinet are collectively bound in law to the decisions of the Cabinet in the exercise of their own separate powers and performance of their functions under legislation applicable to them individually. Needless to say, in the exercise of their powers and performance of their duties, the Ministers are, in terms of section 92(2), held collectively accountable to Parliament. The Cabinet or COM approval could not have had the effect of authorising the Minister to legally conclude a collective agreement in contravention of the provisions of regulations 78 and 79. As a consequence, the applicants' reliance on section 92(2) in this context is misconceived.

[89] The end result is that the State's failure, in its capacity as the employer, to comply with the requirements of regulations 78 and 79 renders the resultant collective agreement entered into between the parties under the LRA invalid and unlawful. To hold otherwise, would amount to validating the mischief the relevant constitutional provisions and regulations seek to prevent.

Estoppel

[90] I turn to consider whether the State can be estopped from relying on its non-compliance with the regulations.

[91] An essential element of estoppel is that there must have been a *representation* of some kind consisting of words or conduct including acts, omissions or silence.[47] The applicants must prove that relying on the truth of the representation, they acted to their prejudice. However, they cannot be heard to say they were misled into relying on a representation when they had knowledge of the true facts and therefore knew that the representation was untrue or incorrect. The estoppel assertor can only successfully rely on estoppel if the reasonable person in the position of the estoppel assertor would also have been misled by the conduct on which estoppel is found. Persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal formalities have indeed been complied with.[48] Such persons may rely on estoppel if the defence raised is that the relevant internal formalities were not complied with. The applicants and their members knew from the outset that there were no funds guaranteed for the implementation of the salary increments over the period of three years. And they were aware from the onset that the lack of funds flouted the regulations. They also knew that cost-cutting measures which could have brought the increase within the allocated budget had not been implemented. This was because the unions did not agree to cost-cutting measures being a condition of the agreement. This being the position, on first principles the applicants cannot claim that there was a representation on which they relied to their prejudice. They were as much aware of the non-compliance with the prescripts set by regulations 78 and 79 as the State was. What prejudice their members have suffered is not the result of a representation by the State on something of which the applicants were unaware. It is the result of the applicants' insistence that the agreement be concluded despite the fact that the prescripts had not been complied with.

[92] Thus, it is not necessary to deal with the question whether public policy does not permit estoppel to operate in circumstances where its application would produce a result which is not permitted by law.

---

[47] *Universal Stores Ltd v Ok Bazaars* 1973 (4) SA 747 (A).

[48] *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A).

Delay in challenging the legality and validity of the collective agreement

[93] The long standing rule is that legality reviews must be initiated without undue delay and that the courts have the discretion to refuse a review application because of the delay or to overlook the delay.[49] As this Court has held on several occasions, undue delay should not be tolerated as it brings about various difficulties ranging from prejudice to the other party, weakening a court's ability to consider the merits of a review and undermining the public's interest in certainty and finality.[50] It is common cause that the State challenged the validity of the impugned collective agreement after two years of its conclusion when it had performed its obligations in terms clauses 3.1 and 3.2 of the collective agreement.

[94] This begs the question whether the State's delay can be overlooked and whether the State is entitled to rely on its failure to comply with the provisions of regulations 78 and 79 read with the relevant provisions of the Constitution as a defence against the enforcement of the collective agreement and thereby evade its obligations. The applicants argue that allowing the State to do so would offend the principles of fairness and justice as well as the rule enunciated in *Gijima*, that a party should not benefit out of its wrongdoing.[51]

---

[49] *Altech Radio Holdings (Pty) Ltd v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) at para 18 and *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit Van Kaapstad* [1977] ZASCA 2; 1978 (1) SA 13 (A) at 39H-40A.

[50] *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima)* at para 160.

[51] In *Gijima* above n 11 at para 54, this Court held—

> "it seems to us that justice and equity dictate that, despite the invalidity of the award of [Department of Defence] agreement [State Information Technology Agency SOC Ltd] must not benefit from having given Gijima false assurance and form its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while [State Information Technology Agency SOC Ltd] sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid with the rider that the declaration of invalidity must not have the effect to divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled."

[95] The applicants seek an order forcing the State to perform in terms of clause 3.3. The State reacted by contending that the impugned collective agreement was not valid or lawful since it had failed to comply with the procedures and formalities contained in regulations 78 and 79. The applicants argued that the State was not entitled to invoke a collateral challenge because it had, throughout, been aware of the invalidity and unlawfulness of the collective agreement. Such point seems not to take the case of the applicants any further. Given the conclusion I reach on the issue of delay, it is unnecessary to decide whether the State was entitled to raise the validity of the collective agreement as a collateral-challenge defence[52] in response to a coercive application by the unions, or whether the State was required to raise its challenge by way of a counter-application for review. There was in fact such a counter-application. I shall assume that the counter-application was necessary and that ordinary delay principles apply to the counter-application.

[96] Though the Labour Appeal Court tersely dealt with the question whether the State's delay in initiating the proceedings reviewing the legality and validity of the impugned collective agreement was unreasonable, it rightly found that such a delay was quite inordinate and unreasonable. The Court relied on *Khumalo* which recognised that it should be "slow to allow procedural obstacles to prevent it from investigating a challenge to the lawfulness of the exercise of public power".[53] It thus found that the prejudice caused by a refusal to adjudicate upon the legality of the clause in question, where so large a sum of money was required from the public purse in circumstances

[52] A collateral challenge can be raised when the impugned administrative act is invoked to coerce compliance. In *Oudekraal* above n 16, the Supreme Court of Appeal at para 35 stated that a person may mount a collateral challenge "because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question". In these cases, it was also held in *City of Cape Town v Helderberg Park Development (Pty) Ltd* [2008] ZASCA 79; 2008 (6) SA 12 (SCA) at para 50 that there is no time limit within which the collateral challenge should be raised. It is in fact settled law that the target of the compulsion "is entitled to await events and resist only when the unlawful condition is invoked to coerce it into compliance". A notable example given is that of a person who may have been supine until an attempt to compel is made and only then he or she can contend that he or she should not be ordered to comply because the act is itself invalid. Neither failure to challenge the unlawfulness by appeal or review is a bar to exercise the right to defend oneself in such a case. The rationale for this is that for the impugned administrative act to be enforced, it must be valid and lawful. If the agreement or administrative act in question is invalid and unlawful, the compliance sought will be inconsistent with the rule of law.

[53] *Khumalo* above n 18 at para 45.

where State finances were in an even more parlous state than before the advent of Covid-19, dictated that the Court's discretion should be exercised in favour of examining whether there was a legal justification for the payment of such a sum of money to a relatively small section of the population.[54]

[97] This Court in *Khumalo* carefully considered the question of delay and said—

> "it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of the 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. This discretion is not open-ended and must be informed by the values of the Constitution."[55]

In the present case, the State was required to explain its delay in challenging the legality of the impugned collective agreement proactively. To date, it has not proffered any plausible explanation for its delay for such a lengthy period. The Minister was made aware that no additional funds would be made available to fund a collective agreement that exceeded the fiscal envelope by R30.2 billion. The State committed itself to addressing the shortfall and that was not successful either. Instead of instituting proceedings reviewing the legality of the impugned collective agreement, it performed in terms of clauses 3.1 and 3.2 of the collective agreement.

[98] After finding that the delay by the State was unreasonable, the Labour Appeal Court correctly went on to determine whether in the circumstances of this case there was a basis for overlooking the delay. In *Gijima*, this Court stated that there must be a basis for the exercise of a discretion to overlook the inordinate delay and held that:

> "From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us

[54] Labour Appeal Court judgment above n 5 at para 31.

[55] *Khumalo* above n 18 at para 44.

> to do so. That basis may be gleaned from the facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here."[56]

[99] In the present case, after declaring the impugned collective agreement invalid, the Labour Appeal Court exercised its discretion to overlook the inordinate delay. It did so, among others, on the basis that it would not be just and equitable to order the State to expend significant and scarce financial resources on employees whose jobs were secured and whose salaries had been paid in full, particularly in circumstances where the imperative existed for the recovery of the economy to the benefit of millions of vulnerable people. The Labour Appeal Court had regard to the provision of social grants to fellow South Africans living on the margin who could be imperilled by such a decision. In the opinion of the Labour Appeal Court, the polycentric nature of the dispute was far more complex. Regard being had to the State's financial constraints, the impact on millions of South Africans who barely survive on a day-to-day and need all the help the State may be able to provide formed part of the considerations.

[100] The respondents argue that it is not possible for the State to implement clause 3.3 due to the Covid-19 pandemic. The Minister of Finance, argued that it is not fair or just to enforce clause 3.3 in circumstances where this would necessarily impede the State's ability to protect the lives and livelihoods of vulnerable people exposed to severe consequences of the Covid-19 pandemic. He went on to argue that the enforcement of clause 3.3 would infringe section 7(2) of the Constitution and rights entrenched in the Bill of Rights. Further, he contends that the State must fulfil its fiscal, constitutional and legal obligations towards human rights bearers.

[101] The State is now compelled by the Covid-19 circumstances to spend additional funds to protect vulnerable people, some of whom have been rendered destitute by job losses or salary cuts in the private sector. This, according to the respondents, creates a

[56] *Gijima* above n 11 at para 49.

great need for accelerated progressive realisation of the rights to health care, food, sanitation or social welfare as the Covid-19 circumstances demand.

[102] On account of the Covid-19 pandemic, it is also imperative for the State to spend public funds (which are already in deficit) to alleviate the plight of the poor and vulnerable citizens. Among other things, the deficit is exacerbated by drastically reduced tax and other revenue, and the State's increased constitutional obligations arising from the pandemic. Regrettably, according to the respondents, the State cannot in the circumstances accede to the applicants' claim for further increases. It has been argued on behalf of the State that the outcome for which the applicant unions contend is not just and equitable. It is unaffordable, unbudgeted for and unauthorised by law.

[103] The emphasis is now only on the enforcement of clause 3.3 but it is, however, not in dispute that clause 3.3, if implemented, would indeed precipitate a fiscal crisis directly detracting from the State's ability to alleviate the plight of the poorest of the poor. According to the Minister of Finance, enforcing clause 3.3 is not sustainable particularly during the prevailing Covid-19 pandemic as it would plunge the State into substantial excess debt. Contrary to NUPSAW's submission, and as the Minister of Finance contends, whether the correct amount of this excess is R13.2 billion or R37.8 billion or R29 billion as the State says in this Court, enforcement of clause 3.3 will have significant and prejudicial budgetary implications. Accordingly, to the extent that the Labour Appeal Court incorrectly assumed that the correct amount of the forecasted excess was R37.8 billion, this could not have had a material effect on its decision.

[104] The evidence establishes that none of the Covid-19 consequences were foreseen or reasonably foreseeable when the collective agreement was concluded. Not even the adverse fiscal developments pre-dating the Covid-19 pandemic were foreseen. Instead, all the parties involved in the collective bargaining process knew that the budgetary deficit in the collective agreement was proposed to be reduced by way of cost-cutting measures. But, this did not occur as it was frustrated by the applicants and other trade

unions. According to the State, the material change of circumstances, and the applicants' negative attitude towards re-negotiation and revision of clause 3.3, rendered the enforcement of the collective agreement practically impossible. Taking into account the fact that the conclusion of the collective agreement in question was from the outset in breach of the provisions and the Constitution, it ought not to have been implemented at all. Given the circumstances preventing compliance with clause 3.3, the inevitable conclusion is that the Labour Appeal Court rightly condoned the delay by the State to challenge the legality of the impugned collective agreement. Regard being had to that Court's treatment of the dispute between the parties, I am satisfied that all the factors for and against the condonation of the delay were properly considered.

Just and equitable remedy

[105] Ultimately, I turn to consider a just and equitable remedy in terms of section 172(1)(b) of the Constitution pursuant to the declaration that clause 3.3 of the impugned collective agreement is invalid and unlawful. The circumstances of the case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral, the interests involved and the extent or materiality of the breach that occurs in each particular case.[57]

[106] The evidence establishes that the State, in its capacity as the employer, duly complied with its obligations in terms of clauses 3.1 and 3.2 of the impugned collective agreement by effecting the necessary salary adjustments for the 2018/2019 and 2019/2020 financial years. The controversy began on the eve of the implementation of salary increases for the 2020/2021 financial year. In the third year, the State, conscious not to threaten the lives of the entire nation and the economy, could not honour its obligations in terms of the agreement. Realising that it could not afford to pay the salary increments in terms of clause 3.3 of the agreement, the State approached the applicants

[57] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 85.

in good faith to renegotiate clause 3.3, so as to bring it within the approved budget. The applicants repeatedly repudiated these efforts and demanded that the State fulfil its obligations regardless of the Covid-19 pandemic. They argued that section 7(2) of the Constitution provides that the State must respect, protect, promote and fulfil the rights of the citizens entrenched in the Bill of Rights, and in terms of section 2 of the Constitution, it is obliged to fulfil such duty.

[107] According to the applicants, the State has since repudiated and defaulted on the implementation of the salary adjustments for the final year. They submit that the State's contention regarding the invalidity and unlawfulness of the collective agreement is just a stratagem to evade its obligations. As a consequence, the applicants seek specific performance on the grounds that the State has reneged on its obligations, which it had freely and voluntarily entered into, and that the delay in challenging the validity of the collective agreement was inordinate and unreasonable.

[108] Furthermore, the applicants contend that specific performance is a just and equitable remedy on the basis that there had been substantial performance under the collective agreement. However, because the agreement was *void ab initio* (has no legal force) this question does not arise, and this Court need not address it. Thus, the contention is without merit. The general rule is that if an invalid agreement is void, it gives rise to no legal obligations, which means the State cannot be ordered to comply nor can it be expected to perform, as there is nothing in the eyes of the law to be complied with nor enforced. In the circumstances, ordering specific performance would be unjust and defeat the purpose of regulations 78 and 79.

[109] The applicants also contend that public policy requires the implementation of clause 3.3 despite its invalidity. They say that one would consider the intention of the parties which could be said to be the compelling reason for the conclusion of the impugned agreement and its enforcement for a period of two years, notwithstanding the parties being aware of its invalidity from inception. The applicants also argued that the State should not benefit from its wrongdoing, being its failure to comply with the

jurisdictional prerequisites prescribed in regulations 78 and 79 for the conclusion of a collective agreement. And because the State may be said to have benefitted by staving off strike action in the public sector, thereby securing and maintaining labour peace for the period of three years, whilst precluding the applicants and their members from exercising their right to strike, the applicants are entitled to an equitable remedy. However, the applicants seem to ignore the fact that the State has expended a huge sum of money at the expense of poor citizens, in adjusting and paying out salary increases to public servants for the period of two years under an invalid collective agreement.

[110] Compared to the State, the applicants and their members can be said to have been unjustifiably enriched, they actually and materially benefitted from the impugned collective agreement. Firstly, the employees had their jobs secured and received year-on-year salary increments in the public sector outstripping inflation and outperforming the private sector salary increases. This occurred at a time when the rest of the country's workforce, including high-echelon public servants, Cabinet and Parliament, had suffered salary cuts or freezes as a consequence of the economic and the Covid-19 pandemic. Secondly, clauses 3.1 and 3.2 by default still stand, as they are not being challenged.

[111] The Labour Appeal Court found that the *Gijima* decision was distinguishable from the present case since the contract had been entered into between two parties, whereas, in this case, the dispute is far more complex and has polycentric consequences. In the present case, the applicants benefitted from the agreement despite the fact that it was invalid and unlawful from the outset. It is also clear that the State has expended substantial financial resources on the adjustment of the public servants' salaries over the period of two years and requiring the enforcement of clause 3.3 will directly affect its difficult task of managing the recovery of the economy and protecting the lives and livelihoods of the nation's people during the Covid-19 pandemic.

[112] In the Labour Appeal Court, the applicants proposed that the State should be ordered to meet its obligation in a "phased in manner" without proffering any

explanation as to how this would be structured. However, before this Court, the applicants changed their stance on specific performance and proposed that the declaration of invalidity be suspended on condition that the parties renegotiate with a view to agree on the manner in which clause 3.3 can be fairly and justly implemented. Such a proposal has already been overtaken by events. The evidence establishes that the wage negotiations for the next wage cycle were already underway by the time this matter was heard in the Labour Appeal Court. The State had by then opened its doors to renegotiate or consult on any compensation-related matter including the impugned collective agreement. Unfortunately, the applicants and their members did not avail themselves of such an opportunity.

[113] In sum, if clause 3.3 were to be enforced, the amount available for service delivery in all its manifestations would be significantly reduced. In this regard, the State has laid emphasis on the impact that the Covid-19 pandemic has had on its financial resources, including the need to protect the lives and livelihoods of vulnerable people exposed to the severe consequences of the pandemic. In the present economic and health circumstances facing the country, it would not be just and equitable to require the State to make good the illicit salary increases it promised at the expense of far more pressing needs affecting the country.

Order

[114] In respect of CCT 21/21; 28/21; 29/21 and 44/21, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

For the Applicants in CCT 21/21:	W Mokhare SC and E Masombuka instructed by Mdhluli Pearce Mdzikwa Incorporated
For the First to Third Applicants in CCT 28/21:	N Maenetje SC and M Salukazana instructed by Cheadle Thompson & Haysom Incorporated
For the First to Fourth Applicants in CCT 29/21:	C Orr SC, C Whitcutt SC and G Phajane instructed by Bowmans Gilfillan Incorporated
For the Applicants in CCT 44/21:	D Gomba instructed by Ndumiso Voyi Incorporated
For the First to Fifth and Seventh Respondents in CCT 21/21; 29/21 and 44/21; and the First, Second, Fifth, Seventh and Eight Respondents in CCT 28/21:	T J Bruinders SC and J Thobela-Mkhulisi instructed by the State Attorney, Pretoria
For the Sixth Respondents in CCT 21/21; 29/21 and 44/21; and Third Respondents in CCT 28/21:	J J Gauntlett SC QC and F B Pelser instructed by the State Attorney, Pretoria