

SOUTH AFRICA / JUDGMENT

Van Der Vyver Transport (Pty) Ltd v Minister of Labour and Others (A128/2023; 5842/2020) [2024] ZAWCHC 62; [2024] 2 All SA 581 (WCC) (29 February 2024) [2024] ZAWCHC 62

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward, Slingers, Nziweni

CASE / FILE NUMBER

A128/2023; 5842/2020

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Republic of South
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IN THE HIGH COURT OF
SOUTH AFRICA

(WESTERN CAPE
DIVISION, CAPE TOWN)

Appeal

Case No: A128/2023

WCHC Case No: 5842/2020

Before: The Hon. Mr

Justice Binns-Ward

The Hon. Ms Justice

Slingers

The Hon. Ms Justice

Nziweni

Hearing: 22 January 2024

Judgment: 29 February

2024

In

the matter between:

VAN
DER VYVER TRANSPORT (PTY) LTD
Appellant
and
THE
MINISTER OF LABOUR
First
Respondent
THE
COMPENSATION COMMISSIONER
Second
Respondent
THE
DIRECTOR-GENERAL OF
THE
DEPARTMENT OF LABOUR
Third
Respondent
This
judgment is deemed to be handed down electronically on Thursday, 29
February 2024 by email circulation to the parties’
legal
representatives’ email addresses and posting on SAFLII.

JUDGMENT

SLINGERS J (NZIWENI J concurring; BINNS-WARD J dissenting):

INTRODUCTION

- [1] The appellant is a private transport company which is registered as an employer with the Compensation Commissioner (‘the Commissioner’) in terms of the Compensation for Occupational Injuries and Diseases Act, Act 130 of 1994 (‘COIDA’).
- [2] In accordance with section 83 of COIDA an employer is assessed or provisionally assessed by the director-general (‘D-G’) according to a ‘tariff of assessment calculated on the basis of such percentage of the annual earnings of his, her or its employees as the director-general with due regard to the requirements of the compensation fund for the year of assessment may deem necessary.’
- [3] Section 86 of COIDA obliges an employer to pay the Commissioner within 30 days after the date of the notice of assessment.[1]
- [4] Section 85 of COIDA provides that:
- ’85 Variation of tariff of assessment

- (1) If in the opinion of the director-general the business of an employer is designed, equipped, organized or conducted in a manner which is calculated to prevent accidents and the number of accidents and the expenditure in connection therewith are or are likely to be less than those usually occurring in comparable businesses, the director-general may assess that employer at a lower tariff of assessment than the tariff of assessment for employers in like businesses.
- (2) If the accident record of an employer during a particular period is in the opinion of the Director- General less favourable than those of employers in comparable businesses and the director-general is of the opinion that such state of affairs will probably continue, the director-general may assess such employer at a higher tariff of assessment than the tariff assessment for employers in like businesses.
- (3) If the accident record of an employer during a particular period is in the opinion of the director-general more favourable than those of employers in comparable businesses, the director-general may give such employer a rebate on any assessment paid or payable by him.'
- [5] In assessing the appellant the D-G, acting in terms of section 85(2) of COIDA, in 2000 assessed it at a tariff of assessment 20% higher than the tariff assessment for employers in like businesses. Three years later, the loading on the appellant's tariff of assessment was increased to 40%. This loading remained unchanged since 2003 notwithstanding the appellant's improved situation, in which it consistently showed a net surplus of contributions over claims since 2009. The appellant's repeated requests to the D-G to reduce or remove the loading of 40% yielded no response.
- [6] It is the appellant's case that in maintaining a loading of 40%, the D-G failed to exercise his discretionary power in a reasonable

and rational manner. Furthermore, the appellant avers that the D-G ignored his administrative obligations and failed or refused to exercise his discretion.[2]

- [7] Consequently, the appellant instituted a review application in terms of section 6(2)(g) of the Promotion of Administrative Justice Act, Act 3 of 2000 ('PAJA') on or about 25 May 2020 wherein it sought the following substantive relief:
 - (i) a declaratory order that the failure of the D-G to take a decision to re-assess and to reduce or remove the loading of the appellant's tariff payable to the Commissioner in terms of section 85 of COIDA for the years 2015, 2016, 2017, 2018 and 2019 is an unlawful administrative action within the meaning of section 6(2)(g) of PAJA;
 - (ii) an order directing that the tariffs payable by the appellant to the Commissioner be reassessed from 40% to zero percent (0%) for the years 2015, 2016, 2017, 2018 and 2019;
 - (iii) a declaratory order that the appellant overpaid its assessments in the total amount of R8 540 259.33 for the years 2015 to 2019; alternatively

(iv) an order compelling the D-G to exercise his discretion as it relates to the appellant's assessments in terms of section 83 of COIDA and to provide the appellant with the reasons for his decision;

(v) and order that the Commissioner repay to the appellant the overpaid assessments in the amount of R8 540 259.33 for the years 2015 to 2019; alternatively

(vi) an order that the Commissioner give the appellant a rebate in terms of section 85(3) of COIDA in the amount of R8 540 259.33; and

(vii) an order to condone the late bringing of the review application insofar as it may be necessary.

[8] During November 2020 the appellant amended its notice of motion by inserting the following substantive relief:

(i) a declaratory order that in the years 2011, 2012, 2013 the Commissioner is not permitted or entitled to impose a loading onto the tariffs applicable to the levies payable by the appellant, or to perpetuate the loading previously imposed on the tariff applicable to the appellant's levies;

(ii) a declaratory order that the appellant's claim costs for the years

2014 in the amount of R32 436.66;

2015 in the amount of R344 871.00;

2016 in the amount of R539 496.00;

2017 in the amount of R358 685.00;

2018 in the amount of R401 633.00

are to be regarded as the official and correct amounts in the records of the Workmen's Compensation Fund;

(iii) an order reassessing the loading of the tariffs on the levies payable by the appellant to the respondent from 40% to 0%, for the years 2010 to 2014;

(iv) the insertion of the years "2011, 2012, 2013, 2014" before the recordal of the years "2015, 2016, 2017, 2018 and 2019" wherever it occurred in paragraphs 1, 2, 3, 5 and 6 of the notice of motion; and

(v) by the deletion of the amount of R8 540 259.33 where it occurs in paragraphs 3, 5 and 6 and by the insertion of the amount of R5 524 563.03 in its place.

[9] The respondents opposed the application. They averred that the application was brought outside the 180 days provided for in section 7(1) of PAJA and that it was not in the interests of justice to grant an extension in terms of section 9 of PAJA. The respondents argued that as there was no condonation application, the appellant failed to satisfy the court that it would

be in the interests of justice to extend the 180-day period[3]. Furthermore, the respondents alleged that the appellant failed to exhaust the internal remedy provide for in section 91 of COIDA.

- [10] On 19 July 2022 the court a quo dismissed the application. In dismissing the application, the court a quo found that the appellant had unreasonably delayed the bringing of the application and failed to provide a satisfactory explanation for the entire period for which it seeks redress. Furthermore, it found that the appellant failed to exhaust an internal remedy.
- [11] On 11 November 2022 the court a quo refused leave to appeal. However, on 8 March 2023, the Supreme Court of Appeal granted leave to a full court of this Division. It is this appeal which serves before us.

DELAY

- [12] In accordance with section 7(1) of PAJA any proceedings for judicial review must be instituted without unreasonable delay and no later than 180 days after any internal remedies have been concluded or after the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons therefor.
- [13] Section 7(1) of PAJA must be read with section 5 thereof. Section 5 provides that any person whose rights have been adversely affected by an administrative action and who has not been furnished with reasons therefor, may within 90 days after the date on which he/she became aware of the action or might reasonably have become aware of the action request the administrator to furnish written reasons. The administrator is then statutorily obliged to provide written reasons within 90 of receipt of the request. Should the administrator fail to furnish adequate reasons for the administrative action, and in the absence of proof to the contrary, the administrative action will be presumed to have been taken without good reason in any proceedings for judicial review.
- [14] Section 9 of PAJA provides that the period of 90 and 180 days referred to in sections 5 and 7 may by agreement between the parties be extended for a fixed period, failing which it may be extended by a court or tribunal on application by the person concerned. A court may grant such an application where the interests of justice so require.
- [15] When judicial review proceedings instituted in terms of PAJA are brought outside the statutory period of 180 days it must be accompanied by an application for an extension of time contemplated by section 9(2). A failure to bring an extension application is fatal to the review proceedings as a court would have no authority to enter into the substantive merits. [4] If the respondents' contention is correct that the appellant did not bring a condonation application[5] that would be decisive of the matter and there would be no need to inquire into whether the interests of justice require that an extension of the 180-day period.

[16] In *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* the court considered what was meant by an application for an extension of the 180-day period and held that:

‘What an application for an extension of the 180-day period in terms of s9 contemplates – just like any other application for condonation for that matter – is that the applicant must, in general, proffer a reasonable and satisfactory explanation for the delay. This entails that the explanation proffered must not be bereft of particularity and candour and that a full explanation must be proffered not only for the nature and extent of the delay, but also for the entire period covered by the delay. And the explanation proffered for the delay must also be reasonable. It is well to bear in mind that in considering whether the court should come to the aid of the applicant, the substantive merits of the review application will also be a critical factor in determining whether the interests of justice dictate that the delay should be condoned.’[6]

[17] The appellant received the following assessments / invoices:

- (i) assessment dated 29.6.2019 in the amount of R3 044 512.03[7];
- (ii) assessment dated 15.6.2018 in the amount of R3 087 308.23[8];
- (iii) assessment dated 26 .7.2017 in the amount of R2 894 787.05[9];
- (iv) assessment dated 29.6.2016 in the amount of R2 348 862,76[10];
- (v) assessment dated 25.6.2015 in the amount of R2 105 687.98[11];
- (vi) assessment dated 17.5.2013 in the amount of R2 085 157,12[12];
- (vii) assessment dated 28.6.2014 in the amount of R2 185 749,28[13];
- (viii) assessment dated 7.9.2012 in the amount of R2 062 868,83[14]
- (ix) assessment dated 8.1.2012 in the amount of R2 258 976.93[15];
- (x) assessment dated 2.11.2010 in the amount of R1951390.41[16]; and
- (xi) assessment dated 28.8.2009 in the amount of R1717619.80[17]

[18] On 25 August 2014 the appellant addressed correspondence to the Commissioner requesting information it required to make a formal application to reduce the tariff loading. There was no response to this correspondence. In 2015 the appellant approached the Office of the Public Protector to obtain administrative justice but it yielded no results. In July 2017 the appellant again sent correspondence to the Commissioner. Similarly, no response was received.

[19] During October 2017 the appellant lodged an unsuccessful application in terms of the Promotion of Access to Information Act (‘PAIA’). During November 2017 the appellant filed an internal appeal in terms of PAIA and during May 2018 and September 2018, the appellant communicated with the Office of the Public Protector urging it to take legal action.

- [20] On 25 November 2018 the appellant applied for a cancellation of section 85(2) tariff loading. In September 2019 the appellant made a second application in terms of section 85(2) of COIDA but received no response thereto.[18]
- [21] It is evident from the dates of the assessments that the appellant received them annually. Upon receipt of each assessment, the appellant would have become aware of the administrative action or could reasonably have been expected to have become aware of the administrative action which it seeks to challenge in these review proceedings.
- [22] It is evident from the above that the appellant could have been expected to reasonably have been aware of the administrative action annually upon receipt of the assessment. In the alternative, the appellant was aware or could reasonably have been expected to be aware of the administrative action/s since 2014 when it conveyed an intention to make a formal application to reduce the tariff loading, made an application in terms of PAIA and lodged a complaint with the office of the Public Protector.
- [23] In the circumstances, as the appellant instituted the PAJA review application during May 2020, it cannot be gainsaid that it brought the application outside the 180-day statutory prescribed period.
- [24] In the absence of an application for the extension of the 180- day period within which the appellant was obliged to bring the review application, the court would not need to determine whether it would be in the interests of justice to grant an extension and would be prohibited from engaging with the merits of the matter. In my view the appellant did not bring the requisite extension application. The phrasing of the prayer seeking condonation supports this contention.
- [25] It is worded in general terms and does not accord with the substantive relief sought by the appellant. For the sake of completeness I set out the prayer in full.
- ‘7. An order condoning the delay in bringing this application to review and set aside the abovementioned decisions insofar as it may be necessary.’ (my emphasis)
- [26] However, none of the prayers which precede or follow the prayer for condonation seek the review and setting aside of any decisions. The first prayer seeks a declaratory order that the D-G’s failure to take a decision to re-assess and reduce or remove the loading of the appellant’s tariff constitutes an unlawful administrative action within the meaning of section 6(2)((g) of PAJA. It does not seek the review and setting aside of any decisions.
- [27] Prayer 2 pertains to an order compelling the reassessment of the tariffs payable by the appellant and prayer 3 pertains to a declaratory order that the appellant overpaid its assessments to the respondent. Prayer 4 is a request for an order directing the D-G to exercise his discretion in terms of section 83 and the relief sought in respect of prayer 5 is for the Commissioner to repay the alleged overpaid assessments. Prayer 6 is an alternative prayer to prayer 5 and seeks an order directing the Commissioner to give the appellant a rebate. The relief phrased in these prayers do not seek the review and setting aside of any

decisions. Similarly, none of the relief introduced by the amendment seek to review and set aside any decision.

[28] The prayer for condonation appears to be an accidental remnant of a copy and paste exercise. It does not appear to be an intentional insertion seeking condonation. This view is supported by the appellant's approach to condonation.

[29] The appellants' approach has consistently been that condonation is not required:

'30.3.1. Since the complaint is of a failure to take a decision, it is difficult – if not impossible- to say exactly when that failure took place;

30.3.2. Secondly, this statement fails to take into account the Appellant's arguments that, prior to seeing the Rule 53 record it was impossible for it to find out if it had a case at all. ...'[19]

[30] In the replying affidavit deposed to by Gert Petrus Bothma, the appellant states that it is difficult if not impossible to say exactly when the Commissioner failed to take a decision. Therefore, it is impossible to say when the 180-day period starts to count down. This argument was persisted with during the hearing of the appeal when appellant's lead counsel persisted with the argument that it could not be said that the application was out of time since it was near impossible to say when the administrative action occurred as a failure to take a decision was the cause of complaint.

[31] Similarly, the founding affidavits of Gert Petrus Bothma, Frederik Christoffel Van Niekerk, Celia Coetzer do not address the issue of condonation at all. The supplementary affidavit deposed to by Johannes Petrus Marias also fails to address the issue of condonation pertaining to the late bringing of the application. Moreover, it is noteworthy that the supplementary affidavit does not seek condonation for the late bringing of the application but does seek condonation for the late filing of the appellant's supplementary affidavits and amendments to the notice of motion. The supplementary affidavits deposed to by Frederick Christoffel Van Niekerk and Celia Coetzer are also silent on the aspect of condonation for the late bringing of the application.[20]

[32] In terms of section 9(1) of PAJA, a court may, on application extend the period of 90 or 180 days for a fixed period. In the present case the court is not told what that fixed period is. It is uncertain from the papers whether or not the 180-day period should be extended from 2009 based on the appellant's receipt of its annual assessments, or from 2014 when it asked for the information necessary to bring a formal application for the reduction of the tariff, or from 2015 when the Office of the Public Protector was approached or from 2017 when a PAIA application was pursued or from 2018 when the Office of the Public Protector informed the appellant that it considered its file closed.

- [33] The appellant's papers do set out the steps it took before it instituted this application. However, this does not constitute an application for condonation and falls far short of what was contemplated by section 9(2) as set out in the case of *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited*.
- [34] It is trite that an applicant must make out his/her case in the founding papers and cannot do so in reply.[21] As shown above, the appellants failed to bring an application for the extension of the 180-period as required by section 9(1) of PAJA in their founding papers.
- [35] Consequently, this court need not inquire into whether it would be in the interests of justice to grant the appellant an extension within which to bring the review application. The appeal stands to be dismissed on this ground alone.
- [36] However, in the event that I am wrong and it could be argued that the appellant brought an application for an extension of the 180-day period, I turn to whether it was shown that it would be in the interests of justice to grant such an extension. It is for the party seeking condonation to show that the interests of justice favours the granting of an extension.
- [37] In *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another*[22] the court addressed when the interests of justice required the grant of an extension in terms of section 7(1) of PAJA. It held that it was dependant on the facts and circumstances of each case; that the party seeking condonation must provide a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue raised in the intended proceedings and the prospects of success. In *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*[23] the court held that in condonation applications substantive merits may be relevant but are not necessarily decisive.
- [38] The issue of condonation for the extension of the 180-day period is dealt with directly for the first time in the replying affidavit deposed to by Gert Petrus Bothma when he states that:
- '14. In a nutshell, the reason why the Applicant delayed in bringing this review application was because the Applicant wanted to use all reasonable means to find out what was actually happening at the WCC. The Respondents, who held the knowledge and information, failed or refused to give the Applicant the information it needed. In the absence of knowing what the position was, it was extremely difficult for the Applicant to know what to do.'
- [39] It is insufficient to provide a cursory explanation as set out above, especially when it is contained in the replying affidavit for the first time. It falls far short of what would constitute a full and reasonable explanation.

[40] The appellant's papers are devoid of any explanations why no steps and/or action were taken between August 2014 - September 2014 when the appellant requested information from the Commissioner in order to bring a formal application to reduce the tariff loading and 13 March 2015 when the appellant approached the Office of the Public Protector for assistance. There is also no

explanation for the period from 23 October 2015 when the Office of the Public Protector informed Celia Coetzer (who was representing the appellant) that it considered its file closed and 18 July 2017 when the appellant again sent correspondence to the Commissioner.

There is no explanation for the period 27 November 2017 (the PAIA appeal was followed up on) and May- September 2018 when the Office of the Public Protector was again emailed and urged to take legal action. More importantly, there is no explanation for the

period between September 2018 (last correspondence with the Office of the Public Protector) and the 25 May 2020 when the application was instituted.

[41] In the circumstances, it could not be found that the appellant's explanation is full or that it covers the entire period of the delay. At the very least there should have been an explanation for the period of inaction between September 2018 and May 2020. The court is not told why or what caused the delay from September 2018 to May 2020.

[42] The appellant's failure and/or refusal to provide an explanation for the above periods of substantial inaction inevitably leads to the conclusion that there are no adequate or reasonable explanations.

[43] A material element of the appellant's complaint is that the Commissioner failed to provide reasons for the tariff imposed on it and that the respondents failed or refused to give the appellant the information it required.

[44] However, reliance on section 5 of PAJA would have provided the appellant with a most effective tool to obtain written reasons within the specified time of 90 days. In the event that the Commissioner failed and / or refused to furnish adequate reasons for the imposition of the tariff, then the imposition of the tariff would have been presumed unreasonable in any review proceedings. No explanation is furnished why the appellant failed to have regard to section 5 of PAJA.

[45] In considering an application to extend the 180-day period, the court also considers the impact on the efficient functioning of public bodies by a delayed challenge to the administrative decision. There are two reasons for this. Firstly, the failure to bring a review within a reasonable time could prejudice the respondent and secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. It would be contrary to the administration of justice and the public interest to allow administrative acts to be set aside after an unreasonably long period lapsed. Therefore, proof of actual prejudice to the respondent is not a pre-condition for refusing to entertain review proceedings by reason of undue delay.[24]

[46] In considering the applications' prospect of success, cognisance must be taken of the fact that the answering papers do not adequately explain why the appellant was assessed at the constant tariff rate of 40% since 2009. The court is also aware that after the application was instituted the D-G cancelled loadings applicable to all employers in July 2020 by way of Notice 780 in Government Gazette of 17 July

2020. Therefore, it cannot be said that the appellant's prospects of success are poor.

[47] In respect of whether the application raises issues of wide-ranging importance, the appellant unequivocally states that the dispute is essentially a private dispute with no industry-wide consequences.[25] There are also no facts nor evidence before us that a decision in this matter- irrespective whether it be favourable or not to the appellant- would have wide- ranging consequences.

[48] There are no facts before us that show that other employers have taken issue with its assessment or with the tariff imposed in respect of such assessment. It is not the appellant's case that the tariff applicable to it is applicable to similarly placed employers.

[49] Therefore, it can be accepted that the consequences of a decision in this application will only impact on the parties thereto.

[50] In the absence of any explanation for the periods of dormancy, the fact that the issue is primarily a private one between the parties and that it would have no wide-ranging impact as well as the public interest in the finality of administrative actions, the appellant's reasonable prospects of success do not tilt the scale in its favour to show that it would be in the interests of justice to grant the extension. As stated above, prospects of success may be important but is it not necessarily persuasive in an inquiry to extend the 180-day period.

[51] In my view, the interests of justice would not be served by granting an extension of the 180-day period.

INTERNAL REMEDY

[52] I turn now to the issue of an internal remedy and whether or not the court a quo was correct in its finding in this regard.

[53] Section 7(2) of PAJA provides that:

‘(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust internal remedy if the court or tribunal deems it in the interests of justice.’

[54] It has been held that the duty to exhaust internal remedies is a valuable and necessary requirement in our law. At the same

time, it has been recognised that the requirement to exhaust internal remedies should not be used to frustrate the efforts of an aggrieved person or shield the administrative process from judicial scrutiny. Section 7(2)(c) allows for flexibility, and in exceptional circumstances and upon application allows a court to condone the non-exhaustion of internal remedies.[26]

[55] A court may not review the administrative action unless the internal remedies have been exhausted or the aggrieved person has made an application in terms of section 7(2) to be exempted from exhausting the internal remedies.[27] Put differently, a court is precluded from reviewing any administrative action unless the aggrieved person has exhausted the internal

remedies provided for in any other law.[28] [29]

[56] What would constitute exceptional circumstances depends on the facts and circumstance of the case. It could include those circumstances where the internal remedy would not be effective or its pursuit would be futile, as alleged in the present matter.[30]

[57] Section 91 of COIDA provides that any person affected by a decision of the D-G may within 180 days after such decision, lodge an objection against that decision with the Commissioner. It is common cause that no such objection was lodged by the appellant with the Commissioner.

[58] In its founding papers the bald allegation is made that the appellant has exhausted all other remedies and that it has no alternative but to approach the High Court for relief.[31] During the hearing of the matter argument was also presented to the effect that the internal remedy provided for by section 91 was inadequate as the respondents had failed to provide the appellant with the necessary information it required to properly have recourse thereto.

[59] In its replying affidavits, the approach of the appellant is that it would be pointless to use internal remedies as it would be ignored by the respondents.[32] Furthermore, the appellant argues that since their complaint pertains to a failure to take a decision, section 91 cannot apply because it did not know what decision the Commissioner took. In dealing with this argument, the court a quo reasoned that the appellant’s actual complaint was the Commissioner’s refusal to reduce the tariff levy from 40% to 0%. This refusal would constitute a decision taken pursuant to section 85 of COIDA to which section 91 would be applicable. I cannot fault this reasoning.

- [60] Although it does not form part of the record, it is evident from the judgment of the court a quo and the respondents' heads of argument that the appellant launched an application to for an order exempting it from the obligation to exhaust internal remedies provided for by section 91 of COIDA the day before the hearing[33]. This was not denied by the appellant during the hearing of the matter.
- [61] The status and /or outcome of this application is not clear from the papers filed on record nor from the judgement of the court a quo.
- [62] However, it can be accepted that the appellant failed to exhaust the available internal remedies before instituting the proceedings and in the absence of being granted an exemption from having to do so.
- [63] The appellant argues that in accordance with the provisions of section 7(2)(b) of PAJA- the court a quo could not dismiss the application for a failure to exhaust the internal remedies and that it should either have directed it to exhaust the internal remedies or exempt it from doing so.
- [64] As the 180-day period stipulated in section 91 of COIDA has lapsed, it would serve no purpose to direct the appellant to have regard thereto. Furthermore, the appellant could not be exempted from exhausting its internal remedies as it failed to show the exceptional circumstances required for such an exemption.[34]

CONCLUSION

- [65] As the review application was brought outside the 180-day period without an application for an extension of this statutory prescribed period and as the appellant instituted the proceedings without exhausting the internal remedy provided by section 91 of COIDA in circumstances when it was not exempted from having to exhaust the internal remedies, I would dismiss the appeal with costs, which costs would include the costs of counsel where so employed.

ORDER

- [66] The appeal is dismissed with costs, which costs shall include the costs of counsel where so employed.

SLINGERS J

NZIWENI J:

I concur in the judgment of Slingers J.

NZIWENI J

BINNS-WARD J (dissenting):

[67] I have had the benefit of reading the final draft of the judgment prepared by my Colleague, Slingers J (the majority judgment). For the reasons that follow, I regret that I am unable to concur in it. As this is a minority judgment, I shall strive to be as brief as possible without prejudice to doing proper justice to the case. It is, however, necessary for my purposes to go into the facts of the matter in more detail than the majority judgment. As noted in the majority judgment, leave to

appeal was refused by the court of first instance (Kusevitsky J) and the appeal came before us with leave obtained from the Supreme Court of Appeal (Nicholls JA and Unterhalter AJA).

[68] The bases upon which the majority judgment concludes that the court a quo was right to dismiss the appellant's application are (i) that the application was brought outside the time limit fixed in s 7(1)(a) of the Promotion of Administrative

Justice Act 3 of 2000 (PAJA) and it did not apply for, alternatively, did not make out a case for, condonation in terms of s 9 of PAJA and (ii) that the appellant failed to exhaust its internal remedies under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and did not apply, in terms of s 7(2)(c) of PAJA, for exemption from the obligation to do so.

[69] The terms of the appellant's notice of motion in the application before the court a quo have been set out in the majority

judgment.

It would verge on understatement to describe them as ineptly framed. Read with the founding affidavits, it was clear enough, however, that the appellant sought an order reviewing and setting aside the alleged failure by the director-general of the Department of Employment and Labour to exercise the discretion conferred in terms of s 85 of COIDA to vary the applicable tariff of assessment in respect of its employer's contribution levied and/or grant it a rebate. In their answering affidavit, deposed to by the compensation commissioner,[35] the respondents acknowledged that that was the essence of the appellant's application. The appellant muddied the waters by also including in its notice of motion, prayers for orders declaring that it had overpaid its contributions and for the consequential repayment of a sum in money. Those heads of relief were entirely inappropriate because their validity was dependant on the outcome of the proper exercise of the very discretion which the appellant contended that the director-general had failed to exercise, and there was no prayer (nor indeed a proper case made out[36]) for the Court to exercise it in his stead.

[70] Section 85 of COIDA provides:

‘Variation of tariff of assessment

- (1) If in the opinion of the director-general the business of an employer is designed, equipped, organized or conducted in a manner which is calculated to prevent accidents and the number of accidents and the expenditure in connection therewith are or are likely to be less than those usually occurring in comparable businesses, the director-general may assess that employer at a lower tariff of assessment than the tariff of assessment for employers in like businesses.
 - (2) If the accident record of an employer during a particular period is in the opinion of the director-general less favourable than those of employers in comparable businesses and the director-general is of the opinion that such state of affairs will probably continue, the director-general may assess such employer at a higher tariff of assessment than the tariff of assessment for employers in like businesses.
 - (3) If the accident record of an employer during a particular period is in the opinion of the director-general more favourable than those of employers in comparable businesses, the director-general may give such employer a rebate on any assessment paid or payable by him.'
- [71] The language of the provision vests a discretion in the director-general, to be exercised with reference to the indicated criteria. It is not a discretion which he is at liberty to choose to exercise or not according to his whim. It is well recognised that such statutory provisions usually imply an obligation on the functionary to exercise the discretion when the postulated basis for its exercise presents itself. Professor Lawrence Baxter made the following pertinent observation in this regard in his seminal work, *Administrative Law* (1984), 'In a sense ... all public powers are coupled with a duty that they should be exercised. ... If the empowering legislation does create powers directed towards specific individuals, the public authority is always under a duty to decide whether or not to exercise them. Failure to do so will entitle a complainant to obtain an order of mandamus from a court, and where that authority has acted inconsistently with its duty the complainant may seek to have the action set aside.' [37] PAJA, somewhat peculiarly, requires not an application for a mandamus in such cases of failure by the administrator to act, but instead an application for the review and setting aside of the functionary's failure to make the decision he or she was bound to make. A mandamus might follow consequentially upon the review.
- [72] The underlying rationale for s 85 of COIDA is that employers who conduct their businesses in an exemplary manner so as to minimise claims on the Fund arising from occupational injuries or diseases should be rewarded with discounts on their assessments or rebates on their contributions, whereas those whose lower standards result in greater than average demands for compensation payments from the compensation fund established in terms of Chapter III of the Act should be proportionately penalised. The overall object of the provision is a levy structure that achieves fairness between all the employers in like businesses. It is axiomatic that the provision's object would be frustrated if the director-general were to fail to appropriately exercise the discretion vested in him by it. All employers, except those who did not strive to conduct their businesses in a manner that

reduced the likelihood of occupational injury or disease, have an interest in the assurance that the director-general will regularly and properly exercise his discretionary power. The provision allows no room for whimsy, capriciousness or neglect of duty. An alleged abrogation of duty under s 85 by the director-general was the essential basis for the appellant's application in the court a quo. It seems to me that the discretionary decisions implied by s 85(1) and (2) fall to be made before an assessment is issued to the affected employer, and that those in terms of s 85(3) would be made after the assessments had been issued and even after the resultant debt settled by the employer.

- [73] That will suffice for the present concerning the immediate statutory background to the proceedings in the court a quo. It is now necessary to examine the facts in some detail to lay the foundation for a proper consideration of the issues of undue delay and failure to exhaust internal remedies that informed the majority judgment.
- [74] The history of the appellant's employees' claims against the compensation fund resulted in the appellant's contributions assessments being 'loaded' by 20% with effect from the year 2000. The higher tariff of assessment applied to the appellant occurred pursuant to a decision made by the director-general exercising the discretionary power in terms of s 85(2) of COIDA. A further deterioration in the appellant company's claims record, led to the loading of the contributions it was required to make being increased to 40% with effect from 2003.
- [75] The uncontested evidence is that it was the practice of the director-general at the time to make decisions in terms of s 85(2) with regard to the ratio between the cost of meeting employees' claims and the sum of the employer's contributions during a three-year cycle. It was a deterioration in that ratio between 2000 and 2003 that informed the increased loading imposed with effect from 2003.
- [76] The appellant's evidence concerning the manner in which the director-general historically went about discharging his function in terms of s 85(2) is borne out by the letter addressed by the compensation commissioner to the appellant, dated 13 June 2003, which read:

'COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Section 85 increase in your rate refers.

In view of your unfavourable accident experience your prescribed rate has been increased by 20%.

Your accident experience has however deteriorated to such an extent that this loading has been increased to 40% as from 01/03/2003.

Your future assessments will, therefore be raised at the prescribed rate, plus 40%. This rate is however subject to review in the light of future accident figures.

Enclosed please find an accident experience schedule for your information.

In the light of the above I would strongly recommend that you consult the National Occupational Safety Association for assistance as it will be in your own interest to utilise all possible safety measures with a view to preventing accidents.

Yours faithfully [etc.]'

- [77] Despite an improving trend in the ratio between the cost of claims on the compensation fund by the appellant's employees and the amount of the appellant's levy contributions between 2004 and 2009, the 40% loading on the appellant's assessed tariff of contributions remained in place. From 2010 to 2019 the ratio between claims and contributions reflected a growing and substantial excess in rand terms of contributions over claims but, inexplicably, no consequential adjustment was made in terms of s 85(2) or (3) of COIDA to the appellant's tariff of contributions. (It should be noted in this regard that the respondents denied the accuracy of the calculations made by the appellant, but they failed to explain how they were wrong or provide any information as to what they might have contended were the correct figures.) The respondents also ceased, with effect from 2011, to provide the appellant with a record of claims costs.[38]
- [78] The administrative record produced by the respondents in terms of Uniform Rule 53 showed that the director-general had regularly applied his mind in terms of s 85 during the period 2000 to 2003. Nothing was found, however, to indicate that this had been done since then. An averment to that effect in the appellant's supplementary founding papers put in in terms of Rule 53(4) was not rebutted by the respondents, nor did they offer any explanation why the discretion had not been exercised.
- [79] In 2014, the appellant engaged the services of a business that specialised in managing workmen's compensation issues for employers. I shall refer to the business as the appellant's agent. The appellant was advised by its agent that it could make an application for a reduction or removal of the loading – apparently thereby requesting the director-general to make decisions in terms of s 85(2) and/or s 85(3). This might be something that happens in practice but there is no provision for it in the legislation. Section 85 provides for the director-general to exercise his discretion under the provision *mero motu*, as indeed he did when originally imposing and then increasing the loading of the appellant's tariff of assessment in terms of s 85(2) of COIDA.
- [80] The appellant's agent submitted written requests for the information concerning the expenses incurred by the compensation fund in respect of the claims made by the appellant's employees since 2011 and the attendant administration costs on 25 August 2014 and in follow-up emails thereafter when no response was received from the third respondent's office. The purpose of the appellant's request in 2014 was to obtain the information that the agent considered was necessary to support the contemplated application for a reduction or removal of the tariff loading and/or a rebate on levies already paid. The respondents denied that such a request had been submitted but it was shown by the copies of the correspondence annexed to the appellant's supplementary founding and

replying affidavits that the request had been made. It is in any event highly improbable that the appellant would have turned in desperation to the Public Protector for assistance in 2015 if it had not, as it asserts, previously sought redress directly from the respondents.

- [81] When the office of the Public Protector, in reaction to a complaint lodged by the appellant in March 2015 consequent upon the respondents' failure to respond to its requests for details of its employees' claims costs, sought an explanation from the respondents, it received the following reply on 11 September 2015:

'Re Assessment Rates – Van Der Vyfer Transport

Please accept our sincere apology for the delayed response. You will notice that my email address was not correct.

Please be informed that section 85 (loadings and reduction) is applied at the discretion of the Director-General as per the COID Act. The Fund has received audit findings relating the application (sic) of section 85 and the Auditor-General (AG) has recommended that the Fund should review all the section 85 cases previously applied. This will take some time and we cannot commit to a date when this exercise will be completed. Furthermore, there is a forensic audit currently being conducted which among others include (sic) the application of section 85. The pressure from Ms Coetzer (sic) [the appellant's agent] and other consultants who are ex-employees of the Fund is unfortunate. In view of this we are currently unable to provide the claims costs schedules.

Regards

Ella Ntshabele

Director: Income'

The reference in Ms Ntshabele's response to the Public Protector to the pressure she claimed was also being brought to bear by 'other consultants' suggests that the appellant was not the only registered employer that was encountering difficulties with the third respondent's inaction in terms of s 85.

- [82] It is evident from other internal departmental correspondence that an incorrect email address was not the real reason for the respondents' delayed response to the Public Protector's enquiry. The correspondence shows that the Public Protector directed its enquiry to the respondents on 10 June 2015. The appellant's complaint was described in the Public Protector's email as being the respondents' failure to give a response to a 'request made to yourself for claims accident schedule for a proper assessment rate to the employer'. A follow-up email was sent by the Public Protector on 5 August 2015. It is apparent that that email reached the attention of the Executive Secretary: Income, to whom it appears that the matter must have been referred by Ms Ntshabela (the Director: Income), on the same day; for, on 5 August 2015, the Executive Secretary: Income referred the enquiry to one Mashudu Mundalamo with a request to 'assist and revert'. On 6 August 2015, the Executive Secretary:

Income directed a further enquiry to Mundalamo asking whether the file (presumably relating to the appellant's records) had been requested. On 7 August 2015, Mundalamo replied as follows: 'No, I did not ask for the file, remember Sec 85 is suspended due to non existence of claim costs' (emphasis supplied). Ms Ntshabele's response to the Public Protector followed more than a month later, only after a reminder from the Public Protector, on 7 September 2015, that '[p]rogress and feedback on this matter is still outstanding'.

[83] The respondents did not explain this correspondence in their answering affidavit. In the absence of an explanation, it falls to be inferred that the respondents' administrative system was in a state of disarray sufficient to raise the concern of the auditor-general, become the subject matter of a forensic audit and render s 85 of COIDA incapable of operation –

hence its so-called 'suspension', for which, unsurprisingly, there is no provision in the Act. The respondents also failed to explain why their response to the Public Protector did not disclose the 'non existence of claim costs'.

[84] On 23 October 2015, the Public Protector's office informed the appellant's agent of the response it had obtained from the compensation commissioner. The essence of its advice was that owing to the forensic audit that was being undertaken and the review 'of all section 85 cases previously lodged with the Fund', the respondents were unable, at that time, to

provide the information sought by the appellant and could not commit to timelines by when they would be able to do so. The Public Protector's investigators advised the appellant that they were accordingly unable to take the matter further and that they had 'closed [their] file and [would] review the process as recommended by the Auditor-General'. Thus, at the respondents' behest, the appellant was asked to be patient, indefinitely.

[85] I do not think that the criticism in the majority judgment of the appellant's failure thereafter to do anything to process the matter further until it directed a further request for information to the compensation commissioner in July 2017 is justified. If the appellant had moved sooner, it would have been told that it was being unfairly precipitate in the face of the advice it had received from the office of the Public Protector. In the circumstances, and in the light of their further conduct described below, the respondents' reliance on delay on the part of the appellant in taking its inaction on judicial review strikes me

as nothing short of cynical opportunism.

[86] The further request that the appellant addressed through its agent in July 2017 was followed up by a formal request for information in terms of the Promotion of Access to Information Act (PAIA) in October 2017. Consistently with the behaviour of the director-general and his subordinates from the outset, the appellant's renewed request for the information it sought to make its case for consideration in terms of s 85 of COIDA was ignored. The appellant thereafter, in November 2017, pointed out that the failure to provide it with a decision on its PAIA application came down, in terms of s 27 of PAIA, to a deemed refusal of its application. It lodged an internal appeal against the refusal. The appeal was also futile.

[87] Contemporaneously with the attempt to extract information under PAIA, the appellant's agent also wrote again to the Public Protector. In a letter, dated 13 October 2017, the agent noted that she had acted 'on behalf of numerous clients' in requesting the compensation commissioner the section 'to provide the required information and also to review the section 85 discounts and loadings'. She stated '[t]he Compensation Commissioner has ignored these applications'. She pointed out that three years had passed since the Public Protector had been informed by the respondents that matters were being addressed although some time would be required to complete the process, yet the respondents continued to shirk the responsibility on them to act in terms of s 85 of COIDA. She advised that she had held a meeting with the Director: Income Management of the compensation fund on 12 September 2017 and was informed that the fund remained unable to draw information from its computer systems to determine the claims costs for individual employers. She was assured that this would be rectified 'soon', but could not obtain a commitment to a date by which this would become possible. She pointed out that she had submitted applications for 'claims cost experiences' for about 27 employers and for 'section 85 reviews' for 'five or six employers with Section 85(2) loadings' and that '[n]one of these matters has ... been attended to'.

She urged the Public Protector to 'revisit' the matter.

[88] It would appear from a letter that the agent wrote to the appellant, a year later, on 4 September 2018, that the Public Protector had advised shortly before that date that 'the Fund's actuary is investigating the matter and feedback will be supplied around 30 September [2018]'. In the context of the history of her dealings with the department on the appellant's

behalf since 2014, the agent expressed scepticism about the wisdom of the appellant deferring to the outcome of the reported actuarial

investigation. She recommended to the appellant that it should 'seriously consider legal action against the Compensation

Commissioner (Director General) and to obtain the relevant orders of court instructing the Compensation Commissioner to report to you on your costs of claims, and, subsequently, to apply his discretion to determining your correct assessments in terms of sections 85(2) and (or alternatively) to refund you any excessive assessments you have paid in terms of section 85(3)'.

[89] The judicial review application was instituted some 20 months later, on 25 May 2020. Two months of that interval was taken up by the hard lockdown that attended the Covid19 pandemic. Two months after the institution of proceedings in the current matter, the third respondent published a notice in the Government Gazette[39] in terms of which, purporting to exercise his powers under s 85(2) of COIDA, he announced the cancellation of 'the loadings

applied to employer (sic) with effect from 1 March 2019 and prospectively'. Save for its beneficial effect on the appellant's pleaded claim sounding in money, the director-general's blanket cancellation of loadings is of no relevance to the appellant's claim for judicial review. As the appellant's counsel pointed out, however, it does point to a misapprehension by the third respondent as to the import of his responsibilities under s 85.

- [90] The provision does not lend itself to a blanket treatment of employers by the director-general under any of its three subsections. On the contrary, s 85 requires of the director-general to differentiate between safety-efficient and safety-inefficient employers and to treat them differently. He can only relieve employers that he has penalised under s 85(2) of their loading if they improve their employee health and safety records relative to other employers in comparable businesses. His conduct in publishing the notice therefore serves as just further evidence of the disarray in the respondents' administration, or non-administration, of s 85.
- [91] The facts show that were the appellant's application for judicial review entertained by the court a quo, its prospects of success would be better than just good. This takes us to the questions that the majority judgment holds nonetheless stand in the way of the court's ability to entertain the application.
- [92] I accept that the application instituted by the appellant was brought well outside the 180-day outer limit fixed by s 7(1)(a) of PAJA, and that accordingly, the court a quo could entertain it only if it granted condonation for the delay in terms of s 9 of PAJA. It is unnecessary to determine precisely when the 180 days elapsed, but, on its own case, the appellant was aware, or should have been aware, by 2015 at the latest of the director-general's failure to exercise his discretion and it failed to avail of the remedy available to it in the circumstances in terms of s 5 of PAJA. As I have related, it tried instead to get its complaint resolved through the office of the Public Protector and abided by the advice it was given through official channels that it should allow a generous period of time for the third respondent to get his house in order.
- [93] Sections 7(1)(a) and 9 of PAJA, read broadly, are a codification of the delay rule that applied in judicial reviews of administrative action under the common law. The common law delay rule, which is a manifestation of judicial policy, still applies in respect of legality reviews that are not subject to PAJA, and also, it would appear, in applications for review in terms of s 6 of PAJA brought within 180 days but nevertheless unduly delayed in the peculiar circumstances of the given case.[40] The position concerning the rule that obtained before the enactment of PAJA was succinctly stated by Miller JA in the landmark

judgment

of *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 38H-39D:

‘Die onderhawige hersieningsverrigtinge sorteer onder die tweede van die groepe deur INNES, H.R., beskryf in Johannesburg Consolidates Investment Co. Ltd. v Johannesburg Town Council, 1903 T.S. 111 op bl. 115 en 121. (Sien ook Harnaker v Minister of the Interior, 1965 (1) SA 372 (K) op bl. 376 - 7, 380.) Die aansoekdoener in so 'n geval beroep hom op die inherente jurisdiksie wat die Hof uitoefen om, bv., die handeling van administratiewe liggame in hersiening te neem op grond van inter alia, magsoorskryding of onreëlmatighede

of nie-nakoming van opgelegde geldigheidsvereistes. In gevalle waar 'n bepaalde tydperk vir instelling van sodanige verrigtinge deur wetgewing of regulasies voorgeskryf is en die aansoekdoener nie aan die voorskrif voldoen nie, is die Hof by magte om te weier om die saak in hersiening te neem - of kan hy die versuim kondoneer. In sulke gevalle oefen die Hof 'n regterlike diskresie uit, met inagneming van alle tersaaklike omstandighede. In die afwesigheid van enige spesifieke tydsbepaling het ons Howe gedurende die afgelope sowat 70 jaar herhaaldelik daarop gewys dat die verrigtinge binne redelike tyd ingestel moet word. (Sien Van Winsen en Thomas, *The Civil Practice of the Superior Courts of S.A.*, 2de uitg., bl. 683 - 4, en die gewysdes daar genoem). 'n Soortgelyke reël geld in Engeland met betrekking tot certiorari verrigtinge. (Smith, *Judicial Review of Administrative Action*, 3de uitg., bl. 374, 379.) Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis (a) of die verrigtinge wel na verloop van 'n redelike tydperk eers ingestel is en (b), indien wel, of die onredelike

vertraging oor die hoof gesien behoort te word. Weereens, soos dit my voorkom, met betrekking tot (b), oefen die Hof 'n regterlike

diskresie uit, met inagneming van al die relevante omstandighede. (Sien *Shepherd v Mossel Bay Liquor Licensing Board*, 1954 (3) SA 852 (K) op bl. 857.)[41]

[94] The effect of PAJA is that, in respect of the first leg of the potentially two-stage enquiry described in *Wolgroei*, any application for judicial review of administrative action instituted after the elapse of more than 180 days after the applicant

has or could reasonably have had knowledge of the action and the administrator's reasons for it is ipso facto regarded as unreasonably delayed. A court is permitted to entertain it only if, upon application by the applicant in terms of s 9 of PAJA, the court condones the delay, which it is empowered to do 'where the interests of justice so require'.

The considerations that would be weighed in the second leg of the delay test expounded in cases like *Wolgroei* and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie*, en 'n Ander[42] are essentially the same as those which now fall to be weighed in determining what 'the interests of justice require'

within the meaning of s 9 of PAJA.

[95] The majority judgment holds that there was no application by the appellant for the condonation of the delay that it required for the court a quo to be able to entertain the review proceedings. If that were indeed the case, that would be the end of the matter; cf. Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited.[43] I do not agree that there was no application.

[96] Paragraph 7 of the appellant's notice of motion sought relief in the following terms: 'An order condoning the delay in bringing the application this application to review and set aside the abovementioned decisions insofar as it may be necessary'.

As I understand it, the majority judgment adopts the position that relief sought in those terms is fatally non-compliant with s 9

of PAJA, which, according to its tenor, contemplates the granting of condonation by way of an order extending the time limit for the institution of proceedings for a fixed period.[44] The terms of the appellant's application for condonation were not framed in accordance with the wording of s 9.

[97] I cannot subscribe to the majority judgment's views on the inadequacy or ineffectiveness of the manner in which the appellant framed its prayer for condonation in terms of s 9. The wording that it used in its notice of motion clearly conveyed an intention to apply for condonation to the extent that it was required.

[98] The fact that the prayer did not expressly mention s 9 and did not faithfully follow the relevant phraseology of the provision was of no moment. It was for the court a quo, if it were persuaded to grant the condonation that was sought, to frame its order consistently with the terms of the provision. It would do that by extending the period of 180 days up till the date of the institution of the review application. In my judicial experience, which has extended over the entire period that PAJA has been in operation, applications in terms of s 9 are almost never framed in a form that closely follows the relevant wording of s 9(1)(a).

[99] That is not surprising in my view, for the wording, strictly construed, suggests that the application for condonation should precede the institution of the contemplated review proceedings and that a court granting the application should fix an extended period within which the review must thereafter be instituted. That has, however, never been the practice. Not surprisingly, because following the wording strictly would only conduce to the exacerbation of the unwholesome consequences of undue delay by unnecessarily extending it.

[100] Section 9, like some other provisions of PAJA,[45] is in more respects than one not altogether clearly formulated. Thus, for example, in *City of Cape Town v South African National Roads Agency Ltd and Others*,[46] this Court (per Binns-Ward and Boqwana JJ) remarked on the unlikelihood that the reference in the provision to the ability of the parties by agreement to extend the periods referred to in s 9(1) excluded the power of the court, in appropriate circumstances, to decline to accept any such agreement, stating 'The, on the

face of it, unqualified right given to the parties to a review application to extend the period for the institution of proceedings by agreement appears potentially to negate the concept of protecting of the position of members of the general public who may have acted on the decision that is part of the rationale for the common law rule. The current case does not require us to decide the question, but it seems to us that it would be within the power of the court, in appropriate circumstances, especially when the position of persons other than the litigants might be prejudicially affected, to decline to recognise an agreement between the parties to extend the time limits provided in terms of s 7(1) of PAJA’.

[101] With all of its imperfections, I do not think it appropriate to construe and apply s 9 with indiscriminating adherence to its literal tenor. Any approach to the practical application of the provision should be informed by the object of PAJA, which is to give effect to the basic right of everyone to administrative justice;[47] not to unduly constrain or put stumbling blocks in the realisation of that right. The long title of and preamble to the Act record that it is directed at giving ‘effect to the right to administrative action that is lawful, reasonable and procedurally

fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution’ and ‘promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action’. The object of s 9 of PAJA is to allow for condonation of unreasonable delay where the interests of justice militate in favour of that; put otherwise it is to avoid unreasonable delay in the institution of judicial review proceedings being, by itself, a basis to turn away such applications where the applicants can demonstrate that the interests of justice require that they should be heard. Unsurprisingly, having regard to its object, s 9 is not prescriptive as to the form of the application that may be brought under it or as to the stage of the review proceedings at which such application may be made.[48]

[102] The ‘interests of justice’ is a concept that is impossible to define in the abstract with any precision, rather like that of ‘good cause’. What might be in the interests of justice is entirely dependent on the peculiar circumstances of the given case. The pertinent jurisprudence has identified a non-exclusive list of factors that are ordinarily taken into account in weighing whether it would be in the interest of justice to condone an unreasonable delay in the institution of a judicial review application: the extent and cause of the delay, the effect of the delay on public administration and other persons who may have ordered their affairs on the assumption of the validity of the impugned administrative action, the reasonableness of the explanation for the delay, the importance of the issue involved and the prospects of success of the contemplated review. Each case must be treated on its peculiar facts, and the weight to be given to the pertinent factors will vary case by case. Thus, an inadequacy in the explanation for the delay would generally not, of itself, and without a weighing of that shortcoming against the other factors that should be taken into account, justify a determination that the interests of justice did not require that

the delay should be condoned.[49]

[103] Determining an application under s 9 involves a judicial weighing and balancing of a variety of considerations, some of which can be in tension with the others. It is not a box-ticking exercise. The cases illustrate that.

[104] So, for example, whereas it has often been held that an explanation for the delay requires (i) a full explanation for the delay, (ii) covering the entire period of delay and (iii) the explanation given being reasonable, it is evident that a shortcoming on any of these counts should not be an absolute bar to the grant of condonation. In *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others*[50], a delay of more than 40 years in the institution of judicial review proceedings was condoned and the impugned administrative decision was set aside without any consideration of the applicant's explanation for the delay. In that matter, the applicant (the relevant local authority) had been aware of the impugned decision from the time it was made. It is apparent that the court nonetheless entertained the review because of the public importance of the issues concerned and its perception of the adverse

consequences of allowing the decision to stand notwithstanding that innocent parties had made significant investment decisions on the basis of its assumed longstanding validity. Similarly, the Constitutional Court's majority judgment in *Khumalo and Another v MEC for Education, KwaZulu-Natal*[51] demonstrates that the absence of an acceptable explanation by the applicant for the unreasonable delay, while it is a material consideration to be weighed in the exercise of the court's discretion, is not necessarily determinative, by itself, of whether condonation should be granted; a broader consideration is still necessary. Neither of those review cases was subject to PAJA but, as explained earlier, the approach to determining what was in the interest of justice reflected in them is nevertheless germane to the application of s 9(2) of PAJA.

[105] The majority judgment appears to have attached great, if not conclusively determinative, weight to the length of the delay and the shortcomings in the appellant's explanation for it. In my respectful view, it did not give sufficient attention to some of the other material considerations that fell to be taken into account.

[106] The delay might have been a long one but it was not of the character of that of a typically indifferent, indolent or unconcerned complainant. On the contrary, the appellant persistently endeavoured during the period of the delay to have its complaint addressed, whether by the respondents directly or through the intervention of the Public Protector. The Public Protector was fobbed off twice with claims by the respondents that the issue was enjoying attention. Both the Public Protector and the

appellant were told that addressing the issue would be a time-consuming process and would require of the appellant to be patient. Many of the appellant's subsequent communications with the respondents were simply ignored.

[107] This is not a case where the respondents can claim to be prejudiced by the delay. Involving, as it does, a situation in which the evidence suggests a persistent failure by the director-general to comply with an obligation to exercise a discretionary power, it is therefore not a matter that engages the public interest in the certainty or finality of administrative decisions. It is instead a case in which decisions that should have been made were not made, and still require to be made. What I see as the mechanical approach to the issue of delay manifest in the majority judgment fails, in my view, to acknowledge or attach the deserved weight to these special features of the instant case, and also the merits of the review (which it acknowledges) and the wider importance of the issue that is involved (which it discounts).

[108] The majority judgment's emphasis on the delay and the relative inadequacy of the explanation for it casts the merits of the review somewhat into the shade. It is clear that there has been a persistent failure by the director-general to exercise the discretion conferred in terms of s 85 of COIDA. That is a matter of consequence, not only for the appellant but also

for all other employers whose assessments have been subject to loading since about 2010. It bears on the overall administration of the employers' contributions assessment system under the Act and suggests that it may have been materially mismanaged in recent years. If, as would appear probable, the compensation fund has been financed during that period to some extent by inappropriate loading, it would necessarily imply that the budgeting of the fund is skewed – probably the reason for the

Auditor-General's recommendation referred to in the respondents' response to the Public Protector quoted above.

It would also suggest that whereas the levies of some employers have been inappropriately loaded on an ongoing basis, other employers

whose record since 2010 might have justified the imposition of loading have escaped the penalisation contemplated by s 85(2).

The operation of the equitable scheme that the legislature crafted in s 85 has been subverted by the failure of the director-general

to discharge his statutory functions in terms of the provision. The failure has not only an inequitable financial effect. It also conduces to negate the incentive that the proper operation of s 85 was plainly intended to offer to employers to improve

safety standards in the workplace and provide healthier work environments. These considerations make this an important matter for the consequences of a favourable determination of the review would probably redound more widely than the advantage that the appellant individually would stand to obtain thereby.

[109] The majority judgment, in my view, wrongly, ignores the wider importance of the administrative failures exposed by the evidence in the appellant's review application. At para 47, the majority judgment appears to accept the cogency of a statement in the appellant's counsel's heads of argument that the matter essentially concerns a private dispute with no industry-wide consequences. With respect, I consider that the majority judgment mischaracterises the submission. In my view, counsel's written submission was directed at the appellant's claim sounding in money. As remarked earlier in this judgment, the appellant's notice of motion was ineptly framed. The draftsman clearly failed to appreciate that the appellant did not enjoy a legal claim sounding in money but only a hope of consequential financial recompense if it succeeded in its application

for judicial review under PAJA. Irrespective of counsel's opinion, however, the wider significance of the administrative

failure by the director-general to discharge his functions under s 85 is axiomatic and the court should not be misled by counsel's

submissions from recognising as much. That the failure was not restricted to the appellant's assessed levies is borne out by the internal departmental correspondence and the Department's correspondence with the Public Protector that was canvassed in the evidence.

[110] The indications that that the administration of COIDA is in material respects in disarray is matter of general concern. It adversely affects not only the right of the affected persons to administrative justice but also the basic values and principles of public administration enshrined in s 195 of the Constitution. I consider that the courts should be wary of too readily declining to entertain review applications of such broad importance on account of procedural shortcomings.

[111] To sum up, the context and peculiar character of the delay in this case, the absence of prejudicial consequences to the respondents or third parties, the importance of the case and the apparent merit of the review, weighed holistically, demonstrated that the interests of justice required that condonation be granted in terms of s 9 of PAJA and that the court a quo erred by not granting it.

[112] Turning to the suggestion that the appellant failed to exhaust its internal remedy. The majority judgment has assumed that the provisions of s 91 of COIDA were applicable in the circumstances. I do not agree.

[113] Section 91 of COIDA currently[52] provides:

'Objections and appeal against decisions of director-general

- (1) Any person affected by a decision of the director-general or a trade union or employer's organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.

(2)(a) An objection lodged in terms of this section shall be considered and decided by the presiding officer assisted by two assessors designated by him, of whom one shall be an assessor representing employees and one an assessor representing employers.

- (b) If the presiding officer considers it expedient, he may, notwithstanding paragraph (a), call in the assistance of a medical assessor.
- (c) The provisions of sections 6, 7, 45 and 46 shall apply mutatis mutandis in respect of the consideration of an objection.

(3)(a) After considering an objection the presiding officer shall, provided that at least one of the assessors, excluding any medical assessor, agrees with him, confirm the decision in respect of which the objection was lodged or give such other decision as he may deem equitable.

- (b) If neither of the assessors agrees with the view of the presiding officer, the presiding officer shall submit the dispute in terms of section 92 to the Supreme Court for decision.

The presiding officer may in connection with proceedings in terms of this section make such order as to costs and the payment thereof as he may deem equitable.

- (5) (a) Any person affected by a decision referred to in subsection (3) (a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding-

- (i) the interpretation of this Act or any other law;
- (ii) the question whether an accident or occupational disease causing the disablement or death of an employee was attributable to his or her serious and wilful misconduct;
- (iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;
- (iv) the right to increased compensation in terms of section 56.

- (b) Subject to the provisions of this subsection, such an appeal shall be noted and prosecuted as if it were an appeal against a judgment of a magistrate's court in a civil case, and all rules applicable to such an appeal shall mutatis mutandis apply to an appeal in terms of this subsection.

- (6) Except where the presiding officer orders otherwise, no obligation to pay any assessment, compensation or any other payment to the director-general or to the compensation fund, or to pay any periodical payments to or on behalf of an employee under a decision of the presiding officer, shall be suspended or deferred by reason of the fact that an objection has been lodged against such decision in terms of subsection (1), or that an appeal has been noted in terms of subsection (5).

- (7) (a) If during the hearing of an objection the presiding officer dies or becomes unable to act as presiding officer-

(i) the hearing may, with the consent of the person, trade union or employers' organization contemplated in subsection (1), proceed before another presiding officer and the assessors concerned; or

(ii) the hearing shall start de novo if the consent contemplated in subparagraph (i) is not given.

(b) If during the hearing of an objection an assessor dies or becomes unable to act as assessor-

(i) the hearing may, with the consent of the person, trade union or employers' organization contemplated in subsection (1), proceed before the presiding officer concerned and the remaining assessor or assessors; or

(ii) the hearing shall start de novo if the consent contemplated in subparagraph (i) is not given.'

[114] The provision affords a right of objection or appeal against decisions of the director-general. However, the essence of the appellant's complaint is that the director-general has failed

to exercise the discretion invested in him in terms of s 85 of COIDA and has failed to make the decisions that an exercise of the discretion would entail. The appellant therefore contended that s 91 was

not applicable in the circumstances. I think there is substance in the argument. What would the panel provided for in the section be expected to do in such a case? There is no decision by the director-general for it to consider.

[115] Whereas the special definitions of 'administrative action' and 'decision' in PAJA include in the concept of 'decision' the failure to make a decision, that is inconsistent with the ordinary meaning of the word. The special definitions in PAJA are not applicable in the interpretation of COIDA. The word 'decision' is not specially defined in COIDA and therefore bears its ordinary meaning within the context that it is employed there.

[116] 'Decision', in the pertinent senses of the word, is defined in The Shorter Oxford English Dictionary as '1. The action of deciding (a contest, question etc.); settlement, determination; a conclusion, judgement: esp. one formally

pronounced in a court of law. 2. The making up of one's mind; a resolution'. The director-general's failure to make the decisions entailed in the exercise of his powers and obligations under s 85 did not, in my judgment, amount to a decision for the purposes of s 91 of the Act. The question of a failure by the appellant to avail of s 91 accordingly did not properly arise.

[117] I can in any event find nothing in s 91 that gives an appellate tribunal constituted in terms of the provision a power on appeal to exercise the discretion vested in the director-general in terms of s 85(2) and/or (3), and to make any decision required of him in terms of that provision on his behalf. At most it might alter or correct a decision that he had made in the exercise of his discretion. The consequential relief that the appellant sought by way of a rebate on the assessed levies it has already paid cannot arise for consideration until after

the director-general's failure to make a decision in terms of s 85(3) has been reviewed and set aside and the question has been remitted to him to make a decision in terms of his discretionary power.

[118] In my judgment, the court a quo should have condoned the delay and granted the appellant substantive relief in the form set out in the following paragraph. Costs should have followed the result. Having regard to the third respondent's contribution to the delay, I would not have excluded the costs of the condonation application from the costs awarded in the appellant's

favour.

[119] I would therefore have made the following

orders.

The appeal is upheld.

The first respondent is ordered to pay the appellant's costs in the appeal, including the fees of two counsel where such were engaged.

The order of the court a quo is set aside and replaced with orders in the following terms:

3.1 The applicant's failure to institute judicial review proceedings within the period fixed in s 7(1) (a) of the Promotion of Administrative Justice Act 3 of 2000 is condoned in terms of s 9 of the said Act and the applicant is afforded an extension of time up to and including the date of the institution of this application to commence the proceedings.

3.2 The failure by the third respondent to exercise the discretion vested in him in terms of s 85 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 during the period 2010 to date is declared to constitute unlawful administrative action and is reviewed and set aside.

3.3 The third respondent is directed to review the assessment of all employers in terms s 83 of COIDA since 2010 for the purpose of ameliorating, as far as feasibly possible at this stage, the adverse financial effect on those employers whose assessments should not have been assessed at a higher tariff of assessment than the tariff of assessment for employers in like businesses and to grant the concomitant rebates in terms of s 85(3) of COIDA.

3.4 The third respondent is directed to comply with the provisions of paragraph 3.3 above within 12 months of the date of this order or such longer period as a judge in chambers may, on good cause shown, allow.

3.5 The third respondent is directed within one month of compliance with the provisions of paragraph 3.3 above to file a report with the Registrar of this Court describing the nature of the review that has been undertaken and the remedial measures that have been implemented, alternatively explaining any inability to implement such measures. The third respondent is directed to furnish a copy of the report to the applicant prior to lodging it with the Registrar.

3.6 The applicant's claims sounding in money are refused.

3.7 The Registrar is directed to forward a copy of this judgment to the Office of the Public Protector and to the Public Service Commission.

3.8 The first respondent is ordered to pay the applicant's costs of suit.

BINNS-WARD J

- [1] Section 86 also provides that subject to the approval of the Commissioner, the assessment may be paid in instalments.
- [2] V1, pg11, para 21
- [3] Paragraph 33 of the respondents' heads of argument.
- [4] Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited (Case No: 1044/2020) [2022] ZASCS 56 (22 April 2022) at paras [18] and [23]. On application to the Constitutional Court, leave to appeal was granted but the application was dismissed. [Sasol Chevron Holdings Limited v Commissioner for the South African Revenue Services 2023 JDR 3799 (CC)]; See also Mostert NO v Registrar of Pension Funds and Others 2018
- (2) SA 53 at para 35.
- [5] Paragraph 33 of the respondent's heads of argument
- [6] Paragraph [22]
- [7] V1, pg 17, annexure FVN2.1
- [8] V1, pg 18 annexure FVN2.2
- [9] V1, pg 19 annexure FVN2.3
- [10] V1, pg 20 annexure FVN2.4
- [11] V1, pg 21 annexure FVN2.5
- [12] V1, pg 22 annexure FVN2.6
- [13] V1, pg 23 annexure FVN2.7
- [14] V1, pg 24 annexure FVN2.8
- [15] V1, pg 25 annexure FVN2.9
- [16] V1, pg 26 annexure FVN2.10
- [17] V1, pg 27 annexure FVN2.11
- [18] V1, pg 40, para 9 to pg 41, para 10
- [19] Paragraphs 30.3.1 and 30.3.2 of the Appellant's heads of argument.

- [20] In her replying affidavit, Celia Coetzer asks for condonation for the late production of certain documents but is silent on the late application.
- [21] Director Of Hospital Services V Mistry 1979
- (1) SA 626 (A) at 635H
- [22] [2010] 2 All SA 519 (SCA)
- [23] 2017
- (6) SA 90 (SCA) at para [34]
- [24] Gqwetha v Transkei Development Corporation Ltd and Others 2006
- (2) SA 603 (SCA) at paras [22] and [23]
- [25] Paragraph 42.1 of the appellant's heads of argument.
- [26] Koyabe v Minister for Home Affairs (Lawyers for Human Rights at Amicus Curiae) 2010
- (4) SA 327 (CC) at para [38]
- [27] Refugee Appeal Board and Others v Mukungubila 2019
- (3) SA 141 at para [30]; Gavric v Refugee Status Determination Officer and Others 2019
- (1) SA 21 CC at para [58]
- [28] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd and Others 2014 (5) SA 138 (CC) at para [68]
- [29] Ibid at para [116]
- [30] Ibid, para [39]
- [31] V1, pg 9, para 16
- [32] V 2, pg 159, para 16 and pg 160, para 24.
- [33] Paragraphs
- [21] and [22] of the judgement, page 175 - 176
- [34] Paragraph 23 of the judgement, page 176. It is evident from the grounds of appeal that the appellant does not dispute or take issue with this finding.
- [35] A functionary provided for in s 2 of COIDA, who is appointed to assist the director-general in the performance of his or her functions under the Act.
- [36] Cf. Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another
- [2015] ZACC 22 (26 June 2015); 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

- [37] L. Baxter, *Administrative Law in South Africa* at 411-412.
- [38] I assume this was what referred to in the letter quoted above as ‘an accident experience schedule’.
- [39] GN 780 published in GG 43528 on 17 July 2020.
- [40] See *Lind and Another v Trustees for the of the time being of The Indigo Trust (T3685/96) and Another*
- [2021] ZAWCHC 97 (18 May 2021), para 6.
- [41] The current review proceedings resort under the second of the categories described by Innes CJ in *Johannesburg Consolidates Investment Co. Ltd. v Johannesburg Town Council*, 1903 T.S. 111 at. 115 and 121 (see also *Harnaker v Minister of the Interior*, 1965 (1) SA 372 (C) at 376 - 7, 380.) The applicant in such a case invokes the inherent jurisdiction of the Court to review the actions of administrative bodies on grounds of, for instance, exceeding their powers, or irregularities or non-compliance with prescribed requirements. In cases in which a fixed time limit is provided by statute or regulation for the institution of such proceedings and the applicant fails to comply therewith the Court is empowered to refuse to hear the matter on review – or it can condone the failure. In those cases the Court exercises a judicial discretion, taking into account all the relevant circumstances. Where there is an absence of any specific time limit the Courts have over the last 70 years repeatedly indicated that the proceedings
- must be instituted within a reasonable time. (See Van Winsen en Thomas, *The Civil Practice of the Superior Courts of S.A.*, 2ed., pp. 683 - 4, and the authorities there referred to). A similar rule applies in England in regard to certiorari proceedings. (Smith, *Judicial Review of Administrative Action*, 3rd ed., pp. 374, 379.) If it is alleged that the applicant has failed to institute proceedings within a reasonable time, the Court must determine (a) whether the proceedings were indeed instituted after a reasonable time had elapsed and (b) if so, whether the unreasonable delay should be condoned. With reference to (b), it appears to me that in such a case too the Court exercises a discretion with regard to all the relevant circumstances. (See *Shepherd v Mossel Bay Liquor Licensing Board*, 1954 (3) SA 852 (C) at 857.) (My translation.)
- [42] 1986
- (2) SA 57 (A) at 86-7.
- [43] [2022] ZASCA 56 (22 April 2022); 85 SATC 216, confirmed on appeal to the Constitutional Court in *Sasol Chevron Holdings Limited v Commissioner for the South African Revenue*
- [2023] ZACC 30 (3 October 2023); 2023 (12) BCLR 1525 (CC).

[44] Section 9 of PAJA provides: ‘Variation of time (1) The period of- (a) 90 days referred to in section 5 may be reduced; or (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned. (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.’

[44] Section 9 of PAJA provides:

‘Variation of time

(1) The period of-

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.’

[45] Most notably, for example, the Act’s definition of ‘administrative action’.

[46] [2015] ZAWCHC 135 (30 September 2015); 2016 (1) BCLR 49 (WCC); [2016] 1 All SA 99 (WCC); 2015 (6) SA 535 (WCC), para 15, fn 16.

[47] PAJA manifests the constitutional legislation mandated in s 33(3) of the Bill of Rights.

[48] In *Loghdey v City of Cape Town and Others*, *Advance Parking Solutions CC and Another v City of Cape Town and Others*

[2010] ZAWCHC 25 (20 January 2010); 2010 (6) BCLR 591 (WCC) at para 65, I declined to follow *Directory Solutions CC v TDS Directory Operations (Pty) Ltd and Others*

[2008] ZAECHC 22 (4 April 2008) which held that an application in terms of s 9 had to be brought in the applicant’s founding papers in the review application.

[49] The Constitutional Court’s judgment in *Van Wyk v Unitas Hospital and Another*

[2007] ZACC 24 (6 December [2007] ZACC 24; 2007); 2008 (2) SA 472 (CC); 2008

(4) BCLR 442 (CC), para 22 is often cited as authority for the proposition that an explanation for delay must be ‘full’, ‘cover the entire period of delay’ and be ‘reasonable’. The Court found the explanation offered for the delay in that case to be ‘superficial and unconvincing’. That finding did not, however, make the Court consider it unnecessary to consider various other factors pertinent to condonation before it was able to conclude that in all the relevant circumstances a case for condonation had not been made out.

[50] [2009] ZASCA 85 (3 September 2009); 2010 (1) SA 333 (SCA).

[51] 2014

(5) SA 579 (CC).

[52] The section has been substantially amended in terms of s 58 of an amendment Act, Act 10 of 1922, which has yet to be brought into operation.

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