IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

LAC Case No: J500/2020

In the matter between:

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

and

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	**First Respondent**

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

Heard: **09 December 2020**

Delivered: **15 December 2020**

Coram: Phatshoane ADJP, Davis JA and Coppin JA

JUDGMENT

THE COURT

Introduction

[1] In his seminal contribution to the understanding of the scope of adjudication, Professor Lon Fuller[1], in describing disputes which cannot be resolved adequately by adjudication, introduced the concept of polycentricity. Fuller defined polycentric problems as 'situations of interacting points of inference' which, when applied to adjudication 'involved many affected parties and a somewhat fluid state of affairs.'[2] In short, Fuller emphasised that where a multitude of parties is affected by a decision, this may result in complex repercussions as a result of interventions which cannot be adequately predicted by the adjudicator. The criticism of this theory[3] notwithstanding, the problem of a polycentric decision looms large in the context of the present dispute.

[2] In essence, the dispute concerns a collective agreement entered into between the Government through the offices of the first respondent and the

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[1] L R Fuller '*The Forms and Limits of Adjudication*' (1978) 92 *Harvard Law Review* 353.
[2] Fuller at 395-397
[3] See for example J W F Allison '*Fuller's Analysis of Polycentric Disputes and Limits of Adjudication*' 1994 (53) *Cambridge Law Journal* 367.

admitted union members to the Public Service Coordinated Bargaining Council ('PSCBC') which was concluded in 2018. The agreement was entitled 'Resolution 1: Agreement on the Salary Adjustments and Improvements on Conditions of Service in the Public Service for the Period 2018/2019; 2019/2020 and 2020/2021 ('the collective agreement').

[3] The agreement concerned adjustments to the salary structure of public service employees for the three financial years referred to above. The collective agreement was implemented for both the 2018/2019 and the 2019/2020 financial years. The present dispute concerns the enforceability of part of the collective agreement that provides for salary increases for these employees for the financial year 2020/2021.

[4] This Court is now faced with an application in which the applicants seek the enforcement of a clause in the collective agreement which the first and seventh respondents contend would cost the fiscus in the amount of R 37.8 billion. The sixth respondent, which opposes the enforcement of the clause in its entirety, has launched a counter-application seeking declaratory relief that the relevant clause is unlawful, invalid and unenforceable.

[5] At the hearing, this court treated the application and the counter-application as inextricably linked so that a finding of invalidity and unenforceability of the collective agreement, insofar as it is relevant to the present dispute, would be determinative thereof. For the sake of clarity, I shall refer to the ninth to fourteenth respondents who oppose the counter-application as the respondent unions.

The factual matrix

[6] Wage negotiations between the Government as the employer and the trade union parties which were represented at the PSCBC commenced in November 2017. After lengthy negotiations, Resolution 1, which constituted

the collective agreement, was concluded in May and June 2018. The parties who signed it were the Government as employer and the ninth, tenth, eleventh, fourteenth respondents together with the second applicant. According to an affidavit deposed to by Mr Mchunu, on behalf of the first respondent, the signatory unions, whilst not the only ones in the PSCBC constituted the majority for the purposes of clause 17.9 of the PSCBC's constitution. The resolution was thus signed by the Government through the first respondent and the unions which represented the majority of the union votes at the PSCBC. The resolution thus became binding on all parties at the PSCBC.

[7] Clause 3 of Resolution 1 provided for the necessary salary adjustments. Clauses 3.1 and 3.2 provided for salary adjustments in the 2018/2019 and 2019/2020 years. As indicated, these clauses were implemented. Clause 3.3, which is the relevant one for the purposes of the present dispute, provides for salary adjustments for employees in the public service in the 2020/2021 year in the following terms:

> '3.3 The salary adjustment for the period 1 April 2020 to 31 March 2021, effective from 1 April 2020, for employees on salary levels 1-12 will be as follows;
>
> 3.3.1 Level 1 to 7 : Projected CPI + 1.0%
>
> 3.3.2 Level 8 to 10 : Projected CPI + 0.5% and
>
> 3.3.3 Level 11 to 12: Projected CPI'

[8] Clause 3.4 of the collective agreement then provides that:

> '3.4 The projected CPI for the 2019/2020 and the 2020/2021 FY will be as determined by the National Treasury for these respective periods.'

[9] Between 25 February and 25 March 2020, the Government sought the agreement of the union parties to revise clause 3.3 on the basis that its costs

were unaffordable. The union parties refused to revise the agreement and insisted on its implementation. It is common that clause 3.3 was not implemented on 1 April 2020.

[10] Aggrieved by the Government's attempt to alter, if not repudiate, the collective agreement, the ninth, eleventh and fourteenth respondents, inter alia, referred the dispute to the PSCBC on 2 April 2020. The dispute was conciliated on 20 May 2020 but proved to be unsuccessful and thus the dispute remained unresolved when the relevant unions requested arbitration which was opposed by the Government parties. The dispute about whether the matter should be resolved by arbitration was superseded by events, in that, on 8 June 2020, the present application was launched seeking an order to compel the first, sixth and seventh respondents to comply with its obligations in terms of clause 3.3 of the collective agreement. The arbitration was postponed until this application was finalised. At the same time, the counter-application was launched by the sixth respondent seeking declaratory relief concerning the legality of the collective agreement and its enforcement.

[11] When the dispute came before this Court, sitting as a court of first instance, a range of legal issues was raised by the various parties. Suffice to say that the key question for determination of both the application and the counter-application was whether Clause 3.3 is invalid in that the collective agreement, in the view of the sixth respondent, was concluded in contravention of Regulations 78 and 79 of the Public Service Regulations which were promulgated under the Public Service Act 1994. It is to that question to which we must now turn in order to resolve the present dispute.

The applicable regulations

[12] Regulation 78 mandates collective bargaining and empowers the Executive to engage in negotiations and subsequently to conclude a collective agreement. To the extent that it is relevant, the regulation reads thus:

(1) Collective bargaining shall be regulated by the Labour Relations Act.

(2) An executive authority may enter into a collective agreement on a matter of mutual interest only if that authority

(a) is responsible for managing collective bargaining on behalf of the State as employer in that forum;

(b) has authority to deal with the matter concerned; and

(c) meets the fiscal requirements contained in regulation 79.

(3) In the Public Service Co-ordinating Bargaining Council, which deals only with matters transverse to the public service, the Minister is responsible for negotiations on behalf of the State as employer. (emphasis added)

[13] Regulation 79 headed "Matters with Fiscal Implications, provides inter alia" as follows:

'An executive authority shall enter into a collective agreement in the appropriate bargaining council on any matter that has financial implications only if

(a) he or she has a realistic calculation of the costs involved in both the current and the subsequent fiscal year;

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

(c) he or she can cover the costs

(i) from his or her departmental budget;

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

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

[14] When the two regulations are read together, it is clear that they impose a requirement for the conclusion of a collective agreement by the State to this extent: the cost of the collective agreement must be covered from the budget of the relevant department of State or on the basis of a written commitment from the Treasury to provide additional funds or, alternatively, from the budget of other departments or agencies with their written consent together with approval from National Treasury.

[15] From the papers, it appears that the cost of the collective agreement could not be covered solely from the budget of the seventh respondent. No written commitment was provided by National Treasury to provide additional funding and, further, no written agreement by any other department or agency and National Treasury's approval has been procured to fund the deficit from other budgets. The applicants' and the respondent unions contended that National Treasury and the Minister of Finance were bound by the approval by Cabinet of a draft agreement which had been entered into on 26 January 2018.

[16] Counsel for the applicants as well as counsel for the ninth, eleventh and fourteenth respondents, together with counsel for the tenth respondent, all contended that the seventh respondent had been authorised to act on behalf of the Government at the PSCBC. The offer had been made by the Government and had been approved by the Cabinet. Further, the seventh respondent had then made the offer to the relevant unions in the PSCBC which had been accepted. It was this outcome which represented the collective agreement.

[17] Applicants contend that, in terms of s 91 of the Constitution of the Republic of South Africa, 1996, once Cabinet approves the offer to be made to the unions, that is the January 2018 offer, all Ministers of State were bound by it, including the first and sixth respondent. In particular, the presentation to the Committee of Ministers ('COM') set out the full range of public service negotiations for the relevant period of 2018/2019 to 2020/2021. Applicants'

counsel submitted that from this document it was clear that the first and seventh respondents intended to implement other measures in order to obtain the additional funding necessary to meet the costs of the collective agreement, including Clause 3.3. In that presentation, it was stated that the additional expenditure per year would be as follows:

2018/2019 - R6.2 billion

2019/2020 - R10.7 billion

2020/2021 - R13.2 billion

[18] This represented a total outlay over the period of R 30.2 billion. These figures were part of the presentation made to the COM. COM approved the draft agreement and hence the final collective agreement. The sixth respondent, was both a member of the Cabinet and of COM and therefore the collective agreement fell within the ambit of s 91 of the Constitution.

[19] In support of this conclusion, the respondent unions contended that, as the sixth respondent was the political head of National Treasury, and had been part of Cabinet and thus had participated in the relevant Cabinet decision, there had been Treasury approval for the proposal which, in turn, gainsaid the reliance of the sixth respondent on Regulation 79. The applicants, together with the respondent unions, therefore, submitted that it could be inferred that the Cabinet had considered ways in which it would raise funds to meet the shortfall of R 30.2 billion, being the additional funding required in the event that the collective agreement was implemented. In their view, this was the only reasonable inference to draw from the facts because this Court could not assume that the Executive arm of Government had chosen deliberately to use its powers in breach of the rule of law by concluding an agreement in flagrant violation of Regulations 78 and 79. Hence it followed that the only reasonable inference which this Court could draw from the evidence presented was that Cabinet considered and then complied with Regulation

79, when it made its decision to present the offer of January 2018 to the applicants and respondent unions, and hence agreed to enter into the collective agreement on that basis.

[20] In answer to this argument, counsel for the sixth respondent referred extensively to a letter written by the then Minister of Finance, Mr Malusi Gigaba, to the then Minister for Public Service Administration, Ms AF Muthambi, on 14 February 2018 which contains the following of relevance to the present dispute:

> 'The National Treasury has carefully examined the request against funds available within the fiscal framework. However, no additional funding can be made available to fund the wage negotiations outcome which exceeds the provided funding envelope over the 2018 MTEF. The compensation budgets of departments remain hard ceilings.
>
> In order to maintain government's compensation ceiling, and provide a credible alternative approach to the negotiations, the National Treasury proposes:
>
> - Voluntary early retirement and exit of 19, 000 public servants, in order to free up R12 billion in additional resources. These funds can be used to fund above – CPI costs-of-living adjustments and other proposals set out below.
>
> - Cost-of-living adjustment not exceeding the following effective rates for each financial year per salary range:

Levels	2018/19	2019/20	2020/21
Salary levels 1-7	CPI + 0.15%	CPI + 0.25%	CPI + 0.50%
Salary levels 8-10	CPI + 0.00%	CPI + 0.20%	CPI + 0.30%

Salary levels 11-12	CPI + 0.00%	CPI + 0.00%	CPI + 0.20%

- Equalisation of pay progression at 1.5 per cent across the public service starting in 2019/20; and

- Extension of housing allowance to spouses who are public servants in 2020/21.

Other measures must also be considered:

- The State spends R8 billion per year on overtime, spent largely in the health sector. Possible savings may be found in this area, particularly as it relates to commuted overtime doctors.

- The State spends R 2 billion per year on performance bonuses. If performance bonuses are curtailed, the State could save over R 1 billion per year. This amounts to spending only 0.2 per cent of the wage bill on performance bonuses. The policy allows for spending of up to 1.5 per cent of the wage bill on performance bonuses. Consideration should be given to reducing this threshold to 0.75 per cent of the wage bill.

- It is also crucial that teachers be required to submit performance evaluations in line with the policy and practice for the rest of the public service.

I kindly advise that DPSA consider the measures described above as part of the employer offer to labour parties at the PSCBC. In effect, the DPSA needs to urgently put in place a programme that will facilitate voluntary exits to remain within the current compensation ceilings.

In light of the serious fiscal constraints that the country faces, acceptance of this proposal may require level of political intervention. I strongly advise that we urgently meet the principals of labour parties, preferably before the resumption of negotiations. To this end, we may also have to consider

requesting postponement of the sitting of the PSCBC scheduled for Friday 16 February 2018 to allow for this engagement.'

[21] Counsel for both the sixth and first and seventh respondent submitted that it was clear from this letter that the conditions imposed by National Treasury through the Minister of Finance had not been met. It followed therefore that there had been no written commitment of any kind given by National Treasury to provide additional funding. In their view, it was also clear that there had been no written agreement which could be shown to have been concluded by any other department or agency to supply the necessary shortfall nor any Treasury approval to fund the deficit from any other budget.

Evaluation

[22] Mr Mogajane, the Director General of National Treasury, in his affidavit, drew the Courts' attention to the clear qualifications by Treasury as set out in the Minister of Finance's letter of 14 February 2018. All that Mr Galorale, representing the ninth, eleventh and fourteenth respondents stated in answer was 'if the collective agreement was indeed unlawful, invalid and unenforceable the government would not have complied with Clauses 3.1 and 3.2 and would have sought an order declaring the collective agreement to say unlawful and invalid. Such an order is not sought in the notice of counter application.'

[23] The contents of the letter of 14 February 2018 evinces the absence of any commitment by National Treasury of the kind required expressly by Regulation 79. The sixth respondent's case is buttressed by the lack of evidence of any written agreement by any other Department of State. This is not denied by applicants or the respondent union in their affidavits.

[24] It is arguably, for this reason, that counsel for the ninth, eleventh and fourteenth respondents astutely concentrated much of his argument on two fundamental issues. Firstly, he submitted that as the collective agreement,

including Clause 3.3, was concluded in June 2018, the challenge to the validity of the collective agreement had been brought more than two years later, in July 2020, approximately 24 months after the collective agreement was concluded and the rights therein had already vested.

[25] Counsel contended further, on the basis of the decision by the Constitutional Court in *Member of the Executive Council for Health Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (5) BCLR 547 (CC) that, even where a decision could be found to be invalid, a Government department should generally not be exempted from the forms and processes of review. Further, the Court held that the reviewing court had a discretion as to what relief should be granted pursuant to a successful review application in such a case. We turn to deal with these two fundamental questions.

Delay

[26] It was submitted by the respondent unions that a delay of 24 months was clearly unreasonable. Even in a collateral challenge, on the assumption that the counter-application represented a collateral challenge (which was not conceded by counsel for the respondent unions), Government is required to explain any delay in challenging the impugned action proactively. See *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) BCLR 182 (CC). In counsel's view, an argument that an application for the review of the clause, prior to 1 April 2020, would have been premature was both hollow and untenable response. It was contended that Regulations 78 and 79 were relevant at the time of the conclusion of the collective agreement and not thereafter. Therefore, the sixth respondent's delay in challenging the legality of the collective agreement was clearly unreasonable. See *Altech Radio Holdings (Pty) Ltd and others v City of Tshwane Metropolitan Municipalities* [2020] ZASCA 122.

[27] If, by contrast, the sixth respondent's argument on the merits of the validity of the collective agreement is correct, namely that Cabinet had no power to grant the approvals required by Regulation 79 and that the necessary requirements set out in Regulations 79 had not been met, then the principle of legality must dictate that the agreement was invalid. It is a fundamental principle in terms of the common law, that an actor must be legally empowered to perform any act in question and that public power may only be exercised by the lawfully constituted authority. The act must be performed in accordance with the substantive and procedural requisites prescribed by the empowering provision. See C Hoexter *Administrative Law in South Africa* (2nd ed) Juta (2012) at 255 ff.

[28] It was argued both by counsel for the first and seventh respondents and counsel for the sixth respondent that, in the first two years of the collective agreement, it was possible to meet the demands imposed upon them by the agreement. However, in the view of the sixth respondent's counsel, this did not detract from the argument that the collective agreement was invalidly concluded and was thus an illegal agreement. The fact that the implementation of Clause 3.3 would impose an additional burden of R 37.2 billion, undoubtedly prompted the sixth respondent to raise the issue of invalidity and legal unenforceability. [4]

[29] The question of delay was carefully considered by the Constitutional Court in *Khumalo and another v MEC for Education, KwaZulu Natal* (2014) (5) SA 579 (*Khumalo*) at para 44:

> 'It is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of the inherent jurisdiction to regulate their proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This

[4] There was some dispute about this figure but no evidence was put up by the applicants or the union respondents to contest the averment of the Government respondents that the cost of the increase as contained in Clause 3.3 of the collective agreement was at present figures in the amount of R 37. 2 billion

discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.'

[30] The Court in *Khumalo, supra* went on to say that, given the importance of the rule of law as a founding value; 'a court would be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power'. (para 45) The Court emphasised that delay undermines the ability of a court to evaluate fully an allegation of illegality, although that is clearly inapplicable in this case. While there is prejudice to the applicants and union respondents, there is also massive prejudice to the public interest at large, given that an additional R37.2 will have to be found to finance the costs of increases pursuant to Clause 3.3 of the collective agreement. This imposes a significant burden on the fiscus.

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

[32] The only argument against the submission of the sixth respondent that Treasury provided no written agreement to make good the shortfall from the budget of the first respondent to fund Clause 3.3, pursuant to the requirements of Regulation 79, was that the COM and later the Cabinet appeared to have agreed to enter into the collective agreement. That, however, does not represent compliance with the express wording of Regulation 79, read together with s 216 (2) of the Constitution which provides

that 'the National Treasury must enforce compliance with the measures established in terms of sub section (1) and may stop the transfer of funds to an organ of State if that organ of State commits a serious or persistent material breach of the measures prescribed'.

[33] National Treasury is given a particular status under the Constitution. The constitutional provision set out in s 216 of the Constitution ensures that National Treasury is one of the guardrails to ensure that the appropriate standard of constitutional governance is adhered to by the Executive. The inclusion of the role of National Treasury in Regulation 79 fits together with the purpose of s 216 of the Constitution. Absent compliance with Regulation 79, it matters not whether Cabinet might have approved the agreement, in that, whatever the Minister of Finance may or may not have said in Cabinet cannot be read to equate to compliance with s 216 of the Constitution read together with Regulation 79. The argument that the collective agreement breached the applicable regulations, namely Regulation 78 and 79, must thus be upheld. This leads to the second issue raised by counsel for the respondent unions, namely consideration of the consequences of a decision to declare Clause 3.3 of the collective agreement to be invalid.

The consequences of invalidity

[34] On the assumption that clause 3.3 was declared to be invalid, counsel for the applicants referred to the decision in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) in support of an argument that, notwithstanding a declaration of invalidity of clause 3.3, the Government should not benefit from such a finding.

[35] In *Gijima v State Information Technology Agency (SITA),* Gijima and SITA had concluded an agreement in terms of which the former was required to provide IT services to the South African Police Service on behalf of SITA. The agreement was concluded in 2006 and extended several times. On 25 January 2012, SITA terminated the agreement with effect from 31 January

2012. A settlement agreement was entered into between the parties subsequent to an urgent application which Gijima instituted against SITA. SITA assured Gijima that it had the authority to enter into this settlement agreement in which Gijima was appointed as a service provider for the KwaZulu Natal Health Department and for the Department of Defence. This agreement was extended on numerous occasions until 30 May 2013 when SITA informed Gijima that it did not intend to further renew this agreement.

[36] A payment dispute then arose. SITA resisted Gijima's claim on the basis that the agreement as well as the three extended addenda that followed it were invalid as there was non-compliance with the provisions of s 217 of the Constitution when the parties concluded the agreement.

[37] Both the High Court and the Supreme Court of Appeal held that the review which SITA had launched against the validity of the agreement had been brought way out of the 180 day period stipulated in s 7 of Promotion of Administrative Justice Act 30 of 2000.[5] The Constitutional Court found that there was no basis for the exercise of a discretion to overlook the inordinate delay in the application brought by SITA and held at para 49 that:

> 'From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here.'

[38] The Court found that SITA had acted contrary to the 'dictates of the Constitution'. Having so concluded, the Court then referred to s 172 (1) *(a)* of the Constitution which enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.

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[5] The question of whether the Court was dealing with administrative action and hence the applicability of PAJA was not debated in that it was clearly common cause that the question of delay was relevant to these proceedings.

[39] In the view of the Court, the award fell to be declared to be invalid. However, in terms of s 172 (1) *(b)* of the Constitution, a Court deciding a constitutional matter has a wide remedial power. The question, therefore, was what relief should be granted in circumstances where the agreement had been held to be invalid. It was to this aspect of the judgment that counsel for the applicants referred this Court in support of the submission that the Government could not benefit from its breach of the provisions of Regulation 79.

[40] The court in *Gijima* held:

> 'It seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract while Sita sat idly by and only raised the question of the invalidity of contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it to be declared invalid with the rider that the declaration of invalidity must not have the effect to divest in Gijima of rights to which- but for the declaration of invalidity- it might have been entitled.' (at para 54)

[41] Counsel for the applicants therefore submitted that in similar fashion, the first, sixth and seventh respondents should not be permitted to benefit from a declaration of invalidity in circumstances where two-thirds of the collective agreement had been implemented already and where fiscal pressure now impelled these respondents to seek refuge in the invalidity of the entire agreement.

[42] In similar fashion, counsel for the union respondents submitted that an appropriate just and equitable remedy would be that the Government should meet its obligations in a 'phased in' manner. In his view, this relief would be appropriate and just and equitable in that the employees' constitutional right to bargain would be vindicated, the relevant employees were not aware that

there was any non-compliance with the relevant legislation and Regulations 78 and 79 at the time of the conclusion of the collective agreement and they had fashioned their lives on the basis that the collective agreement was valid and enforceable.

[43] The present dispute is significantly different from that which confronted the Constitutional Court in *Gijima, supra*. In that case, the concern related to one contract entered into between Gijima and SITA. It was understandable in the circumstances that the Court found it just and equitable, under the circumstances of an inordinate delay to justify an order which would not penalise the innocent party, being Gijima.

[44] In the present case, the dispute is far more complex; hence the problem of the polycentric dispute which is set out in the introduction to this judgment. The submission on behalf of certain of the respondent unions is illuminating in that it reflects that certain of these parties have understood the parlous financial position in which the fiscus finds itself and thus the country in the wake of the Covid 19 pandemic. They were prepared to accept a staggered approach to the compliance with clause 3.3.

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

[46] In the exercise of a discretion of the kind set out in *Gijima, supra*, considerations of the effect on the public purpose in general and the impact on millions of South Africans who barely survive on a day to day basis and

need all the help the State may be able to provide are paramount considerations. As Mr Mojanane stated in his affidavit, Government has very limited capacity to borrow additional funds and the national interest burden is now a critical expenditure item in the National Budget. In our view, the normative vision of the Constitution which aims that everyone living in the country should live a dignified life and hence those most in peril should be assisted first dictates the outcome of the discretion in this context.

[47] To return to the submission about a compromise remedy, there were no details provided by any of the union respondents as to how their proposed staggered approach could be structured. Resolution 1 of 2018 only operates for a three-year cycle which ends on 31 March 2021. There was also evidence of new negotiations for the new cycle already being underway.

[48] That further negotiations may well take place with regard to a settlement of the salary cycle ending on 31 March 2021, is, of course, an issue beyond the competence of the court. That is for the parties to negotiate. We have already found that a decision to find that it is just and equitable that the government pay the entire sum which flows from Clause 3.3 for the period ending on 31 March 2021 cannot in and of itself be regarded as a just and equitable remedy within the economic and social context within which this dispute is located. Absent some clear guidance as to how a compromise remedy could be crafted, the Court would be left on its own to exercise such a discretion in circumstances in which clear polycentric consequences stand to be considered. There was simply no evidence nor guidance provided to the Court. In these circumstances, it would be inappropriate for the Court to attempt such a difficult fiscal balancing measure. And it is not the role of a court to so do.

Conclusion

[49] The Court is faced with an application and a counter-application. The application brought by the first and seventh respondents was to the effect that

this Court declare the enforcement of Clause 3.3 of Resolution 1 of 2018 to be in contravention of ss 213 and 215 of the Constitution read together with Regulation 78 and 79 of the Public Service Regulations 2016. There were, in addition, in the notice of the counter-application a series of alternative declarations which were sought. The sixth respondent lodged a conditional counter-application contemporaneously with the filing of his answering affidavit on 17 July 2020 in which the application was opposed.

[50] The counter-applications are, as indicated earlier, inextricably linked to the application. Once it is found that clause 3.3 of Resolution 1 of 2018 infringed the mandatory legal requirements governing the conclusion of the collective agreement by Government, it follows that there is no need to deal with the application. It stands to be dismissed, in that there is no valid agreement upon which to base applicants' claim. Given the nature of this dispute and the legal questions raised, it would be inappropriate to make an order as to costs.

Order

[51] The following orders are made.

1. It is declared that the enforcement of clause 3.3 of Resolution 1 of 2018 (the Resolution) is unlawful for contravention of ss 213 and 215 of the Constitution of the Republic of South Africa, 1996 and Regulations 78 and 79 of the Public Service Regulations, 2016.

2. The application is dismissed.

THE COURT

Phatshoane ADJP, Davis JA and Coppin JA

APPEARANCES:

For THE APPLICANTS:	C Orr SC and G K Phajane Instructed by Bowman Gilfillan Inc.-
FOR THE FIRST AND SEVENTH RESPONDENTS:	T.J. Bruinders SC, Adv J Thobela-Mkhulisi, Adv E Richards Instructed by The State Attorney
FOR THE SIXTH RESPONDENT:	J.J. Gauntlett SC and QC, F. B. Pelser Instructed by the State Attorneys
FOR THE NINETH, ELEVENTH & FOURTEENTH RESPONDENTS:	N.H. Maenetja SC and Adv M.Y. Salukazama Instructed by Cheadle Thompson & Haysom-
FOR THE.TENTH RESPONDENT:	W.R. Mokhare SC and Adv E Masombuka Instructed by Mdhluli Pearce & Mdzikwa Inc
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