IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 14440/2016

In the matter between:

WILLEM HENDRIK HEATH	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUITIONAL DEVELOPMENT	Second Respondent

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JUDGMENT DELIVERED ON WEDNESDAY 6 DECEMBER 2017

GAMBLE, J:

INTRODUCTION

[1] Mr. Willem Hendrik Heath was appointed a judge of the erstwhile Transvaal Provincial Division of the Supreme Court of South Africa on 1 March 1988. Very soon thereafter, Mr. Heath was seconded to the erstwhile Ciskei Supreme Court

which sat at Bisho in the former Bantustan of Ciskei. It was in that court that he served his time as a sitting judge. On 29 May 2001 Mr. Heath tendered his resignation as a judge of the High Court to the erstwhile President of the Republic of South Africa, Mr. Thabo Mbeki, and thereafter pursued a career in the private sector through a consultancy known as "*Heath Executive Consulting CC".*

[2] On 16 August 2016 Mr. Heath launched the present application to effectively undo his resignation as a judge more than 15 years before. He seeks to do so on the basis of judicial review at common law and he intentionally eschews the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). The obvious question that springs to mind is *"Why now, after all these years?"* To answer that question, to which I shall return later, it is necessary to have regard to the factual background to this application.

APPOINTMENT TO THE SPECIAL INVESTIGATING UNIT

[3] In June 1995 the erstwhile Premier of the Eastern Cape, Mr. Mhlaba, appointed Mr. Heath to head up a special commission of enquiry into fraud, corruption and maladministration in that province. It became known colloquially as *"the Heath Commission"* and Mr. Heath acquired a high profile in the media as a person dedicated to the elimination of all forms of State corruption and maladministration.

[4] In 1996 Parliament passed the Special Investigation Units and Tribunals Act, 74 of 1996 (*"the SIU Act").*This legislation envisaged a specialized court ("*a Tribunal* ") presided over by sitting judges of the High Court whose function it was to request the President, from time to time and as the need arose, to issue

proclamations authorizing investigations to be conducted under the SIU Act by the Special Investigations Unit ("*the SIU"*). Given his track record with the Heath Commission in the Eastern Cape, Mr. Heath was a natural choice for the position of head of the SIU when appointed to that office by former President Mandela in 1997. Between 1997 and 2000, Mr. Heath successfully conducted various investigations under the auspices of the SIU.

[5] In 2000 Mr. Heath was approached by Ms. Patricia de Lille (then a sitting Member of Parliament and today the Mayor of the City of Cape Town) as a whistle-blower with information regarding allegations of corruption in relation to the acquisition by the Government of the day of large quantities of weaponry for the South African National Defence Force[1]. Mr. Heath approached President Mbeki and requested a proclamation to enable the SIU to investigate Ms. de Lille's complaint. The President refused and both parties were unhappy with the situation: the Head of the SIU believed an investigation of such magnitude was pre-eminently a task for his Unit, while the President said that he was more than happy with the multitude of other investigations that were already in place into the Arms Deal.

THE SAAPIL JUDGMENT

[6] In March 1999 the SIU was mandated to investigate the affairs of certain personal injury lawyers who were accused of fleecing the public purse in making extravagant claims against the Road Accident Fund. A group of these lawyers did not take kindly to any investigation into their sources of income and formed a

[1] The matter subsequently gained notoriety as "the Arms Deal".

voluntary association known as the *"South African Association of Personal Injury Lawyers" ("SAAPIL").* SAAPIL then went on the offensive and approached first the High Court in Pretoria, and ultimately the Constitutional Court, for relief which attacked the very heart of the SIU. It was claimed that the position of a sitting judge as the head of the SIU was inconsistent with the Constitution, in particular because it undermined the independence of the judiciary and trenched upon the separation of powers principle.

[7] The erstwhile President of the Constitutional Court, Justice Chaskalson, delivered the unanimous judgment of the Court on 28 November 2000 and upheld SAAPIL'S argument.[2] The court held, *inter alia,* that the functions that the Head of the SIU was required to perform were executive functions ordinarily performed by the police and prosecuting authorities. Accordingly, it found, those functions were *"far removed" from the 'central mission of the Judiciary' " and* created the potential for a sitting judge to have to take instructions from the Presidency and the Executive. It is axiomatic that such a situation would undermine the separation of powers principle and the complete independence of the Judiciary.

[8] Mr. Heath says in this application that the *SAAPIL* judgment was a cause of great personal crisis in his life. The Constitutional Court had held that the SIU could not be headed by a judge and gave the Legislature a year to amend the SIU Act, but until that time, Mr. Heath could continue in his position as head of the SIU. Thereafter, he could no longer serve as head of the SIU and remain a sitting judge. Mr. Heath could, of course, retain his judicial office and return to the High Court

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[2] SA Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC)

Bench but for reasons which I will deal with later, he decided that that was not an avenue which he wished to follow. In the result, Mr. Heath says he decided to explore relinquishing his judicial office in order that he could continue holding his position as Head of the SIU.

JUDGES' REMUNERATION AND CONDITIONS OF EMPLOYMENT ACT

[9] Judges are not employed like ordinary civil servants or private sector workers. They hold office under a statute known as the Judges' Remuneration and Conditions of Employment Act, 47 of 2001 (*"the Judges' Act"*)[3], and their removal from office is strictly controlled by that statute: this is one of the cornerstones of the independence of the Judiciary and intended to preclude the dismissal of judges from office for reasons, for example, of political expediency.

[10] In the circumstances, when judges (other than Constitutional Court judges) reach what would generally be regarded as the age of retirement[4], they are entitled to be *"discharged"* from active service without more in terms of s3(2) of the current Judges' Act, while the discharge of Constitutional Court judges is governed by s3(1) thereof. Under the 1989 Act no distinction was drawn between the discharge of Constitutional Court judges and other judges, all of whom qualified for discharge from active service under s3(1) of that act.

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[3] The current Judges' Act came into operation on 22 November 2001 and was preceded by an act of similar title, Act 88 of 1989, which was in force at the time the events relevant to this matter occurred.

[4] The age in question varies depending, in the main, on a judge's length of service. It is not less than 65 years of age, is generally 70, but can be as old as 75..

[11] S3(1) of the old Judges' Act (like s3(2) of the current act) contemplated discharge from judicial office with the sanction of the President in 2 discrete scenarios. Firstly, under s3(1)(c) provision was made for the discharge by the President of a judge who had become

> *"afflicted with a permanent infirmity of mind or body which [rendered] him incapable of performing his official duties."*

Secondly, in terms of s3(1)(d) a judge could

> *"at any time on his request and with the approval of the President be discharged from active service if there [was] any reason which the President [deemed] sufficient."*

[12] Mr. Heath evidently requested President Mbeki to grant his discharge from active service in terms of s3(1)(d). Inexplicably, the request to the former President (said to have been contained in a letter dated 3 April 2001) is not included in the papers before this court. Nevertheless, the basis therefor appears in broad outline from a letter written by President Mbeki on 17 May 2001 to Mr. Heath's former attorney.

> *"Dear Mr. de Klerk*
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> > *I have had the opportunity to consider Judge Heath's request to be discharged from active service as a judge in terms of the provisions of section 3(1)(d) of the Judges' Remuneration and Conditions of Employment Act, 88 of 1998 (sic).*

The reason advanced by Judge Heath for this request is that his role as a judge has been compromised by his appointment as the Head of the Special Investigating Unit (SIU).

I do not believe that Judge Heath's sojourn at the SIU has compromised his standing as a judge. The decision of the Constitutional Court you referred to, does not suggest that Judge Heath should not resume his duties on the bench.

I have taken the liberty of consulting the President of the Constitutional Court and the Acting Chief Justice on this matter.

Accordingly, I do not grant Judge Heath a discharge from active service as a judge.

Yours sincerely,

TM MBEKI"

THE MOTIVATION FOR REQUESTING A DISCHARGE FROM OFFICE

[13] In the founding affidavit Mr. Heath gives some background to his request for discharge made to President Mbeki. Central to the request, he says, was the judgment of the Constitutional Court in *SAAPIL.*

"14. The order of the Constitutional Court declaring that my position as head of the SIU was inconsistent with the central mission of the Judiciary called for

some deep reflection on my part. In essence, all the parties involved had to take steps in order to ensure that judicial independence was not undermined. Parliament was given an opportunity to pass appropriate legislation and the executive had to ensure that the position of Head of the SIU was not headed by a member of the judiciary. I was deeply concerned about the findings of the Constitutional Court that I had been appointed to a position that was inconsistent with my primary duties as a judge. What these findings meant was that the work I had done for three years as Head of the SIU had fundamentally been inconsistent with my duties as a judge - which is primarily to uphold judicial independence. I held and still hold the principle of judicial independence to be sacrosanct to any functioning system and rule of law. It is key to the legitimacy of the (sic) judicial office. Following deep reflections on the findings of the Constitutional Court I came to the unhappy conclusion that it was no longer desirable for me to remain in active judicial service. President Mandela's appointment of me to head the SIU had eroded my standing as an independent and impartial judge. I believe that the judgment and order were binding on me and where it had been found that I had acted in a manner that compromised the independence of the judiciary I (sic) was required that I take steps that would not place me in active service….

16. The findings of the Court required that I take time to consider what was necessary and important in order to protect judicial independence. The implications of the judgment on me as a Judge were far-reaching and as I consulted widely, it became clear that a discharge from active service was the

only way I could act in order to protect judicial independence. A discharge meant that I was allowed to leave the (sic) judicial office with my benefits [5].

17. After an agonising reflection of (sic) my position, I addressed a letter to the then President Mbeki, in which I set out my request for discharge from active service. I attach a copy of my letter to the President as "WH 2".[6] Before I explain this letter, let me state that, following the judgment of the Constitutional Court, I had approached the President and the then Minister of Justice and Constitutional Development for a solution (sic) the predicament created by the invalidation of my appointment to the SIU. I suggested that I could remain the Head of the SIU and resign my position as a judge. I considered that this would be a fitting solution to achieving the objectives of the SIU. Both the President and the Minister of Justice and Constitutional Development did not accept my proposal. It appeared that they wanted me to return to my judicial office irrespective of the order and the findings of the Constitutional Court on my appointment. What made things worse for me were comments made by the President about my work as Head of the SIU that called into question my integrity. The adverse and extremely damaging remarks made by the President about me and the work of the SIU left me with no chance of pursuing my judicial career with the dignity and credibility that I had done so (sic) prior to my appointment to head the SIU.

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[5] Effectively a salary for life (with annual increments where granted) and, after 15 years' service, a tax free gratuity equal to twice annual remuneration.

[6] The annexure referred to is Mr Heath's annotated draft of a copy of his subsequent letter of resignation date 29 May 2011.

18. My assessment of the facts was that I could not return to the bench in light of the judgment. I considered my benefits as a judge and decided that the only option for me was to address a request to the President for my discharge from active judicial service, in terms of the provisions of section 3(1)(d)…

19. Given the adversarial treatment that I was facing under President Mbeki, I decided to request my attorneys to address a letter requesting my discharge from active judicial service. I expressed the view that the findings of the Court required that I am (sic) discharged from active judicial service. I was also of the view that the President would consider my request with due regards to the requirements of judicial independence, my appointment to head the SIU and my benefits as a judge. In circumstances where the executive had compromised me as a judge, I was convinced that President Mbeki would consider my request for discharge favourably. I believed that a decision to discharge me from active judicial service would be consistent with the requirements of judicial independence and that the President was enjoined to take a decision consonant with that principle. I was shocked when President Mbeki disagreed with the judgment of the Constitutional Court that my appointment to the SIU had compromised me as a judge. His refusal to discharge me from active judicial service forced me to resign. I do not believe that his decision was done in defence of judicial independence. I attach a copy of the President's letter refusing to approve my application for a discharge as "WH 3".

20. The President disagreed with my reasons for seeking discharge from active judicial service. With respect to the President, his reasons for rejecting my application failed to have regard to the principle of judicial independence. Had he considered the reasons for my request, he would have discharged me from service with the consequence that I would have received my benefits.

21. In any event, the decision of the President to reject my request for discharge was not only unlawful in that it was fundamentally inconsistent with the duty of the executive to protect judicial independence in terms of section 165 (5) of the Constitution, it was also irrational in that it failed to consider all the facts relevant to my appointment to the SIU."

[14] The thrust of the case in the founding affidavit then is that Mr. Heath's independence and integrity as a judge were compromised by the judgment in ***SAAPIL*** and that this precluded him from returning to the Bench. While there is also mention of the fact that President Mbeki had publicly criticized Mr. Heath's interest in the Arms Deal while at the SIU during an address on national television in Jan 2001, this does not seem to play a major role in his complaint. In the answering affidavit the respondents suggest that Mr Heath has taken the matter unnecessarily personally and that there is nothing which precluded his return to the Bench in 2001. It is therefore necessary to consider precisely what the Constitutional Court held.

[15] In delivering the judgment in ***SAAPIL,*** Justice Chaskalson was cautious not to cast any aspersions on Mr. Heath which suggested that his conduct as Head of the SIU was anything but *bona fide* and exemplary. The Learned Justice emphasized the need for legislative interference in the structure of the SIU Act to enable the unit to

take its place in a constitutional dispensation which guaranteed the independence of the Judiciary.

> *"[24]…. The present case is concerned not with the intrusion of the Executive into the judicial domain, but with the assignment to a member of the Judiciary by the Executive, with the concurrence of the Legislature, of functions close to the 'heartland' of executive power…*
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> *[26] The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness….*
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> *[35] The fact that it may be permissible for Judges to perform certain functions other than their judicial functions does not mean that any*

function can be vested in them by the Legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function that to permit Judges to perform them would blur the separation that must be maintained between the Judiciary and other branches of government. For instance, under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not 'appropriate to the central mission of the judiciary' [7]. They are functions central to the mission of the Legislature and Executive and must be performed by members of those branches of government.

[36] The first respondent has not intruded into the affairs of the Executive at his own instance. The Legislature made provision for the appointment in the Act and the Executive, through the President, requested the first respondent to accept the appointment. I have no doubt that in accepting the appointment the first respondent acted in what he perceived to be the national interest. The fact, however, that all involved acted in good faith and in what they perceived to be the interests of the country does not make lawful legislation or conduct that is inconsistent with separation of powers required by the Constitution….

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[7] The phrase is taken from the judgment of Blackmun J in *Mistretta v United States* 488 US 361 (1989) at 388.

> *"Congress may delegate to the judicial branch non-adjudicatory functions that do not trench upon the prerogative of another branch and that are appropriate to the central mission of the Judiciary."*

[38] I accept that it is important that the head of the SIU should be a person of integrity. But Judges are not the only persons with that attribute. The functions that the head of the SIU has to perform are executive functions that under our system of government are ordinarily performed by the police, members of the staff of the National Prosecuting Authority or the State Attorney. They are inconsistent with judicial functions as ordinarily understood in South Africa…

[45] The functions that the head of the SIU is required to perform are far removed from 'the central mission of the Judiciary'. They are determined by the President, who formulates and can amend the allegations to be investigated. If regard is had to all the circumstances, including the intrusive quality of the investigations that are carried out by the SIU, the inextricable link between the SIU as investigator and the SIU as litigator on behalf of the State, and the indefinite nature of the appointment which precludes the head of the unit from performing his judicial functions, the first respondent's position as head of the SIU is, in my view, incompatible with his judicial office and contrary to the separation of powers required by Constitution.

[46] Under our Constitution, the Judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the Bill of Rights. It is important that the Judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a Judge into the executive domain is permissible, the way would be open

for Judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions which are not appropriate to the 'central mission of the Judiciary'. Were this to happen the public may well come to see the Judiciary as being functionally associated with the Executive and consequently unable to control the Executive's power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the Judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case and states a principle that is of fundamental importance to our constitutional order."

[16] I agree with the respondents that the judgment is in no way critical of Mr. Heath personally. Rather, it seeks to stress the incompatibility of the position of the Head of the SIU with judicial independence – the very cornerstone of judicial office - and highlights the structural problem arising from the purposive interpretation of a piece of legislation viewed in its constitutional context. In the result I do not believe that it can be said that Mr. Heath's standing as a judge was in any way compromised by the work he performed as head of the SIU.

[17] Furthermore, one sees in the letter from President Mbeki refusing the request for discharge an indication that he had consulted Justice Chaskalson and the erstwhile Acting Chief Justice, Judge Hefer, in relation to the request. While Mr. Heath takes President Mbeki to task for consulting the very judge who had authored the

SAAPIL judgment, I do not think that there was anything improper in this contact. On the contrary, the fact that the President said that he had taken the heads of the two apex courts in the Republic into his confidence prior to making his decision to refuse Mr. Heath's discharge makes eminent sense. For, if there was any perception from the side of the Judiciary that Mr. Heath had somehow been tainted by virtue of the office that he had held at the SIU and was not a fit and proper person to serve on the Bench again, it is fair to assume that either (or both) of those erstwhile leaders in the Judiciary would have expressed their disquiet to the President and indicated that such a move was undesirable.

THE BASIS FOR CHALLENGING THE PRESIDENT'S DECISION

[18] Adv. Masuku (who appeared with Adv. Long) for Mr. Heath argued that the decision of President Mbeki to refuse to grant their client a discharge from judicial office in terms of s3(1)(d) of the Judges' Act of 1989 failed to meet the constitutional principle of legality. They relied, in the main, on the well-known line of decisions from the Constitutional Court in this regard commencing with *Fedsure* and *SARFU.*[8] Counsel further submitted that, since the power exercised by President Mbeki flowed directly from s176(2) the Constitution[9], his failure to grant the discharge as requested was executive in nature rather than administrative.[10]

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[8] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC).

[9] *"s176(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament."*

[10] Masethla v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)

[19] The case for Mr. Heath was argued on the basis that the President exercised his discretion in an unreasonable and irrational manner and that it falls to be reviewed on that ground alone. The argument goes further to suggest that, although Mr. Heath's appointment as a judge was terminated by his own act of resignation, he was left with little choice to do so after the President had refused to grant him a discharge. In suggesting that the President had "*effectively forced the Applicant off the bench by refusing to give him an early discharge from active judicial service with all the associated benefits"* his resignation was said to be "*similar to a constructive dismissal"* in the employment law context. I am not certain that this comparison is tenable outside of the provisions of the Labour Relations Act, 66 of 1995 (*"LRA")*[11] in the light of the offer by the President that Mr. Heath resume his duties as a judge and his subsequent informed decision to resign, but the issue does not call for determination in this application.

[20] It is trite that a legality challenge falls outside of the ambit of PAJA. In *Masethla,* a matter which related to the President's power to terminate the employment of the Director General of the National Intelligence Agency, Moseneke DCJ (writing for the majority) held that the power so exercised was executive in nature and did not constitute administrative action. It was nevertheless subject to judicial review on the limited basis of legality and rationality.

> *"[76] Section 85(2)(e) of the Constitution, in particular, stipulates that the President exercises executive authority by performing 'any other executive*

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[11] In terms of s186(1)(e) the definition of *"dismissal"* includes the situation where *"an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee" .*

function provided for in the Constitution or in national legislation'. Furthermore, it is important to understand that s1 of PAJA expressly excludes, from the purview of 'administrative action', executive powers or functions of the President referred to in s85(2)(e). In other words presidential decisions which constitute the exercise of executive powers and functions under s85(2)(e) are clearly not susceptible to administrative review under the tenets of PAJA even if they otherwise constitute administrative action….

[78] This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority considered must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement. The authority in s85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfill executive functions and should not be constrained any more than through the principle of legality and rationality."

[21] I did not understand Adv. Dukada SC (who appeared with Adv. Rakgwale for the respondents) to take issue with the submission that the present application is to be determined as a legality challenge. Accordingly, it must be instituted in terms of Rule 53 of the Uniform Rules of Court and the common law principles relevant thereto.

THE UNREASONABLE DELAY RULE

[22] As a review which falls outside of the ambit of PAJA, the common-law delay rule applies in the instant case.[12] Accordingly, once the defence of undue delay is put up (as the respondents have done here) it is incumbent upon an applicant for review to persuade the court that the application has been brought within a reasonable time of the impugned decision having been made. The court is then obliged to adopt a two phase approach: if it finds that the delay is reasonable, that is the end of the enquiry and the review proceeds. But if it finds that the delay is not reasonable, it will be required to determine whether the delay should be condoned. In *Ntame* Plaskett J referred to the classic test formulated in this regard in *Wolgrooiers*[13].

> *[16]…..(F)irst, a court must decide whether the proceedings were brought within a reasonable time and, secondly, if not, it must decide whether the unreasonable delay ought to be condoned, in which event it must exercise a discretion taking into account all relevant factors (including, but not limited to, prejudice to the respondent).”*

[23] In *Merafong* Cameron J explained the rationale for the delay rule and the applicable test.

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[12] Ntame v MEC for Social Development, Eastern Cape 2005 (6) SA 248 (E) at [14] – [17]; Khumalo and Another v MEC for Education, KwaZulu-Natal 2014 (5) SA 579 (CC) at [94]; Merafong City v Anglogold Ashanti Ltd 2017 (2) SA 211 (CC) at [73] – [74]

[13] Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (a) SA 13 (A) at 39C-D. See also Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others 2001 (4) SA 958 (C) at 629H – 631D.

"[73]…Whether under PAJA, or legality review, [the applicant municipality] was obliged to institute proceedings to review the decision without unreasonable delay. The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself. Had Merafong instituted a review application, as it ought, the court hearing it would have had to consider whether the delay precluded its challenge.

[74] In Khumalo this court…… held that an assessment of a plea of undue delay involves examining (i) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of all the relevant circumstances); and if so (ii) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application."[14]

[24] Bearing in mind the importance of the question of prejudice to the opposing party, as alluded to by the court in *Merafong* , in *Tasima* [15] the Constitutional Court urged courts to exercise caution when considering delay, and the reasonableness thereof.

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[14] Citing with approval Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA) at [24] and [31]

[15] Department of Transport v Tasima (Pty) Ltd 2017(2) SA 622 (CC) at [160]

"[160] While a court 'should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of the exercise of public power', it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of the court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise."

]25] As to what constitutes a reasonable time generally for the institution of review proceedings, one might look to the 180 day period prescribed in PAJA as providing some notional starting point since that is what the Legislature has deemed reasonable in the context of that act. But a court should not necessarily constrain its discretion to that extent given that it is enjoined to a look at a variety of other factors to assess the reasonableness of going beyond that period to accommodate an applicant's tardiness. As the court pointed out in Ntame [16] these factors might include

- Ascertaining the terms and effect of the decision;
- Asking for reasons for the decision;
- The time required to take advice from a lawyer;
- Making representations and attempting to negotiate a compromise so as to avoid litigation;

[16] At [17]

- Procuring copies of relevant documents;
- Consulting with witnesses and obtaining affidavits;
- Placing one's attorney in funds;
- Preparing the papers and lodging and serving same.

[26] In the heads of argument filed on behalf of Mr. Heath, counsel dealt extensively with the relevant principles in relation to the delay rule but the heads are rather opaque as to whether the intention was to argue that a delay of some 15 years was reasonable. However, in argument before us Mr. Masuku quite candidly accepted (as of course he was obliged to) that the delay was unreasonable. To that I would only add, grossly unreasonable, if regard be had to all the relevant circumstances. After all, this was no ordinary litigant oblivious to the niceties of the law: Mr. Heath would have appreciated immediately upon receipt of President Mbeki's letter of 17 May 2001 that he had to take the matter on review, and then within a reasonable time, if he wished to challenge the refusal to grant him a discharge from office. In *Associated Institutions*[17] the court stressed that applicants for review must avoid an attitude of indifference and are duty bound to take the necessary steps to prosecute a review as soon as they become aware of the decision.

[27] No doubt realizing that he was heading into stormy waters, counsel changed tack and moved a late application for condonation of the late filing of the review papers. Such an application changes the scenario to the extent that Mr. Heath

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[17] Associated Institutions Pension Fund and Others v Van Ztl and Others 2005 (2) SA 302 (SCA) at [51]

must then offer a full and complete explanation for the delay[18]. Importantly, what the application for condonation in this matter unequivocally establishes is a concession by Mr. Heath that the application for review is unquestionably late. It is therefore not necessary for the court to make the first value judgment contemplated in the Wolgroeiers test. The enquiry is limited to the second leg.

[28] Since the application for condonation was not accompanied by a separate affidavit but sought to rely on the papers before us, we are bound to have regard to the founding affidavit and establish what the objectively ascertainable facts reveal. Recently in *Gijima* [19] the Constitutional Court stressed the importance of a court considering the reasonableness of delay to exercise its discretion on a firm factual footing.

> *"[49] From this, we can see that no discretion can be exercised in the air. If we are to exercise 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 the facts placed before us by the parties or objectively available factors."*

Accordingly, it is to the founding papers that I turn to consider Mr. Heath's explanation for the unreasonable delay in instituting this application.

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[18] Associated Institutions Pension Fund and Others v Van Zyl and Others *supra* at [48].

[19] State Information Technology Agency SOC Ltd v Gijima holdings (Pty) Ltd [2017] ZACC 40 (14 November 2017) at [49]

EXPLANATION FOR THE DELAY.

[29] Having dealt extensively with a host of facts said to be relevant to the merits of the review, the question of delay is dealt with by Mr. Heath towards the end of the founding affidavit, and then almost in passing.

> *"[87] A pertinent question which may arise is why I have delayed until now to make this application. The reasons for this delay are linked to my view that a judge ought not to engage in matters that bring the judiciary into political controversy. Following my resignation, I had to decide whether to bring an application against the President. This application would have meant highlighting issues that I had acquired in the course of my work confidentially. I could not, having served for 14 years (more than 13 years as a judge) bring myself to bringing an application that had the potential to embarrass the President and draw into a political controversy, the then President of the Constitutional Court and Acting Chief Justice on the basis that President Mbeki had allegedly consulted him (sic) prior to denying me the discharge that I required.*
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> *[88] I was alive to the requirement that I act in a manner fitting a judge by not launching proceedings that had the potential to bring the administration of justice into disrepute. The fact that the President had acted unlawfully is self-evidence (sic) at two levels. Firstly, the alleged consultation with the President of the Constitutional Court, who had authored the judgment which had found against my appointment to head the SIU, was in itself an irregularity. There is no statutory basis for the President to have consultant the author of judgment*

for purposes of determining whether to discharge me or not. Secondly, the President was clearly acting in contravention of section 85 (2) of the Constitution which requires that the President 'exercise the executive authority, together with the other members of the Cabinet.' "

[30] The affidavit goes on to deal with the grounds of complaint against the improper exercise by President of his executive powers and then picks up again with the following explanation in relation to the delay point.

"90. Any litigation on (sic) this matter would have meant that the President of the Constitutional Court and the President are called as a witness, with the possibility of cross examination on the contents of the alleged meeting which transpired between him and President Mbeki. I considered this to be undesirable for the judiciary in South Africa.

91. As a judge myself I would never have wanted to embarrass the country's Chief Justice in this way and certainly would never have wanted to be part of something which could potentially have been damaging to the image and integrity of the judiciary.

92. When President Mbeki refused my application to him for the early retirement special discharge (sic), I was forced to resign for reasons which will be detailed hereinafter. As a result of my resignation from the bench, I had lost all my benefits to which a retired judge is entitled in terms of the Act. I therefore did not have the financial means to bring an application to Court. I do not wish to detail the financial difficulties that I have endured as a consequence of the

decision of the former President Mbeki, but these have had a debilitating effect on my livelihood and that of my family.

93. I have since then and on a number of occasions attempted to make representations and submissions to the President and the former Minister, but I have no idea whether such submissions were received by them or whether my submissions were considered.

94. Subsequent to my removal from the SIU and forced resignation from the bench, I was appointed as Special Adviser to the then Minister of Justice and Constitutional Development, Mr. Radebe. I raised this issue with the then Minister but did not wish to abuse the position of trust that I held with him. I maintain that my resignation from the bench had been forced upon me and that there was a need to resolve the matter."

Those 5 paragraphs are the sum total of the explanation put up in the founding affidavit in relation to the question of delay which Mr. Heath thought "*may arise".* In the replying affidavit there is an attempt to shore up the delay argument but it is trite that in motion proceedings such as these, and particularly where there is a delay of such a substantial time, the case is to be fully advanced in the founding papers. I shall accordingly summarise the reasons put up and comment on the cogency thereof.

[31] Firstly, it must be observed that, while obviously aware of the right to review from the outset, there was a conscious decision by Mr. Heath not to resort to litigation. The primary explanation for that decision is said to be that Mr. Heath did not wish to cause embarrassment to President Mbeki, Justice Chaskalson or Judge Hefer

by suggesting that they had acted improperly by discussing the application for discharge with each other. The explanation can therefore be categorized as a political decision. With respect, that can hardly constitute a reason in light of the fact that when ultimately lodged, the application for review would perforce have the potential to cause just such embarrassment. One might ask rhetorically, is it being suggested that the application does not have the potential to cause embarrassment today to President Mbeki and Judge Hefer, both of whom are still alive but no longer active in their respective offices?[20]

[32] Secondly, the suggestion by Mr. Heath that litigation would necessarily have led to the calling of President Mbeki and Justice Chaskalson as witnesses, with the prospect of cross examination of each of them in relation to what was discussed at their alleged meeting in relation to his application for discharge, evidences a fundamental misunderstanding of the process of judicial review conducted in terms of Rule 53, which is by way of application and where oral evidence is a rarity.[21] But, even where oral evidence is sought by one of the parties, it will only be granted in circumstances where there is a dispute of fact which was not anticipated at the outset.[22] In the context of the facts at hand, furthermore, it cannot be said with any

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[20] According to Wikipedia Online Encyclopaedia, Justice Chaskalson retired as Chief Justice on 31 May 2005 and died on 1 December 2012, while President Mbeki resigned from office on 24 September 2008. Volume 2002(6) of the South African Law Reports records that Judge Hefer retired on 31 December 2002. He is very much alive and was recently interviewed on national television in relation to a matter pending before the Supreme Court of Appeal.

[21] Cora Hoexter Administrative Review in South Africa, 2nd ed at 525; Ackermans Ltd v Commissioner, South African Revenue Service 2015 (6) SA 364 (GP) at 374B

[22] Hoexter *op cit* at 526; Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1161-2

degree of certainty that Justice Chaskalson would have made an affidavit in a review brought within a reasonable time, or that such affidavit would necessarily have drawn a dispute of fact warranting a referral to oral evidence.

[33] Thirdly, Mr. Heath says that as a consequence of his resignation he lost all benefits attaching to judicial office and did not have the financial means to bring a review application. He expressly chose, however, not to take the court into his confidence and provide any details regarding his alleged financial difficulties. Importantly, Mr. Heath does not provide any details of his remuneration while with Heath Consulting or as Special Advisor to Minister Radebe. In the circumstances, it must be said that there is insufficient evidence to demonstrate why a delay of 15 years is justified on financial grounds alone.

[34] Finally, Mr. Heath refers to the fact that on a number of occasions he made *"representations and submissions to the President and former Minister"* [23] and did not receive any replies thereto. It is not immediately clear how this fact impacts on the unreasonable delay in lodging this review application but the complaint is in any event problematic in light of a memorandum written to Minister Radebe on 1 December 2009 by the Chief State Law Adviser, Mr. Enver Daniels.

[35] In that memorandum, which is annexed to Mr. Heath's replying affidavit, Mr. Daniels refers to a letter written to President Zuma by Mr. Heath dated 4 November 2009 in which he had submitted a document entitled "*Reapplication: Special Discharge as a Judge".* Mr. Daniels explains in some detail to Mr. Radebe

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[23] Although he doesn't identify them by name it would appear as if Mr.Heath is referring to President Mbeki's successor, President Zuma, and Minister Radebe.

why the "*reapplication"* was unsuccessful in light of, *inter alia,* the provisions of the Judges' Act of 2001. Yet in the replying affidavit, while attaching Mr. Daniels' memorandum, Mr. Heath implies that he has no knowledge of who authored the request and says further that the contents of the memorandum only came to his attention while preparing the replying affidavit. Given that the memorandum purports to respond directly to a request from Mr. Heath himself and is directed to the Minister to whom Mr. Heath provided special advisory services, his claim in the founding affidavit that he did not know what became of his *"representations and submissions"* is hard to follow.

[36] In the result, I am unable to find any proper explanation for the failure to lodge the review application within a reasonable time after May 2001, nor is there any feasible explanation advanced by Mr. Heath as to why he delayed for such an extended period of time thereafter. Finally, Mr. Heath provides no evidence regarding any further developments or changed circumstances that occurred in 2016 which persuaded him that the time was then ripe to lodge the application. In other words, what it was that persuaded him to abandon his earlier political reservations.

[37] Further, if one has regard to the objective facts that emerge from the papers, it is evident that there is no basis for this court to consider condoning the filing of the application more than 15 years after the event. For instance, attached to the founding affidavit is a letter of recommendation written in support of Mr. Heath by President Nelson Mandela in 2002. That letter reflects the President's understanding that

> *"(i)n June 2001…[Mr. Heath] resigned as head of the [Special Investigations] Unit and as a judge, so as to go into the private sector. During the course of a meeting on 4 March 2002, he informed me concerning his consultancy. One of the major activities of Heath Specialist Consultants is to persuade international investors to invest money into South Africa. Part and parcel of this operation is an investigation… into the integrity of local businesses in order to verify their bona fides and to reassure the international business community and potential investors…"*

This letter confirms the respondents' assertion that Mr. Heath willingly relinquished a position in public life in favour of the private sector and gave up his entitlement to judicial benefits in so doing.

[38] The answering affidavit filed on behalf of the respondents was deposed to by Dr Cassius Lubisi who is described as "*the Director-General and Secretary of Cabinet of the Republic of South Africa."* The first point raised by Dr Lubisi in opposition to the review is in relation to the alleged prescription of the debt which Mr. Heath claims in this application.[24] It is said that the claim for arrear remuneration has prescribed and, further, that Mr. Heath has not given the requisite notice under the

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[24] In prayer 5 of the Notice of Motion, an order was sought directing the Minister of Justice and Constitutional Development to "*pay the Applicant in accordance with the provisions of section 5 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 from the date of his active discharge which is 29 May 2001 and to implement all the rights pertaining to a Judge and to which a Judge is entitled to (sic) in terms of the provisions of the said legislation*. "

Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002. The relief sought in prayer 5 is therefore said to be time barred.

[39] It is further pointed out by the respondents that Mr. Heath has been remunerated during the past 15 years from various sources, allegedly handsomely[25]. While Mr. Heath disputes the extent thereof in the replying affidavit, it is not in issue that he has had the benefit of other remuneration in the interim. This is problematic because judges are precluded from receiving any remuneration other than in terms of the Judges' Act of 2001 without the consent of the Minister of Justice and Constitutional Development[26]. It is correctly pointed out by the respondents that, whatever the strength of the prescription argument may be, the provisions of s2(6) of the Judges' Act of 2001 will be contravened if the relief sought in prayer 5 is granted. Effectively Mr. Heath will have received remuneration to which he is not entitled as a judge, if the primary relief is granted. Or to put it differently through the use of the vernacular, he will receive *"double pay",* with the judicial remuneration coming at the expense of the taxpayer.

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[25] Aside from an allegation that he received a retainer from Heath Consulting of at least R230 000 per month, it is suggested by the respondents that Mr Heath's firm received *"a payment of approximately R18 500 000-00 over a period of three years for his investigations relating to the late mining mogul, Brett Kebble".*

[26] S2(6) of Act 47 of 2001 provides that "*No Constitutional Court judge or judge may, without the consent of the Minister, accept, hold or perform any other office of profit or receive in respect of any service any fees, emoluments or other remuneration apart from his or her salary and any amount which may be payable to him or her in his or her capacity as such a Constitutional Court judge or judge."*

[40] In *Gijima*[27] the Constitutional Court, with reliance on the *dictum* of Cameron J in *Merafong* referred to in [23] above, repeated that "*(t)he reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality: time is of utmost importance."* The importance of that principle is more than adequately demonstrated in the present matter. It was incumbent on Mr. Heath to have approached this court without undue delay to procure his benefits as a judge discharged from active service before he embarked on a new career in the private sector. Having not done so, it will be well-nigh impossible to unscramble the omlette at this stage and separate Mr. Heath's legal remuneration from that which is proscribed.

[41] In concluding his address Mr. Masuku resorted to a plea *ad miseracordium* urging the court *"on bended knee and with tears in [his] eyes"* (as he put it) to come to the assistance of his client. That impassioned request by counsel really summed up the case for Mr. Heath in a nutshell – an application lacking in first principles in which a delay of 15 years has not been reasonably explained by the applicant – and precious little else to warrant its success.

[42] In the circumstances, I am of the view that there is no factual basis before us upon which this court can exercise its discretion to condone a very, very lengthy delay in the initiation of proceedings. On the contrary, the granting of the relief sought in this matter will be prejudicial to the respondents, the public purse and the image of the judiciary as a whole. Persons who willingly tender their resignation from the Bench, for whatever reason, must be held to their solemn undertaking to vacate

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[27] At [44]

office lest the public perceive that different standards apply to those that hold that high public office.

CONCLUSION

[43] In the circumstances I would dismiss the application for condonation and the application for the relief sought in prayers 1 to 5 of the notice of motion and direct the applicant to pay the costs of both applications, including the costs of 2 counsel.

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GAMBLE, J

DLODLO, J:

THE FOLLOWING ORDER IS MADE:

1. The application for condonation is dismissed.

2. The relief sought in prayers 1 to 5 of the notice of motion herein is refused.

3. The applicant is to bear the costs of the first and second respondents in both applications, such costs to include the costs of 2 counsel where so employed.

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DLODLO, J

BAARTMAN, J;

I agree

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BAARTMAN, J